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140 Cal.App.2d 268

CALCOT ASSOCIATION, Ltd., a corporation, Plaintiff and Respondent,

v.

COAST COTTON MILLS, a corporation, Defendant,

J. M. Adamo and E. T. Combs, Defendants and Appellants.

Civ. 5310.

District Court of Appeal, Fourth District, California.

March 26, 1956.

Hearing Denied May 23, 1956.

Action by a cooperative cotton marketing association for balance due on price of cotton sold by it to defendant corporation and on corporation's two stockholders' guaranties to pay specified portions of a line of credit granted corporation by plaintiff. From a judgment of the Superior Court of Kern County, R. B. Lambert, J., for plaintiff defendant guarantors appealed. The District Court of Appeal, Conley, J., pro tem., held that there was no failure of consideration for guaranties because of plaintiff's general manager's letter notifying guarantors that no further cotton would be sent by plaintiff to corporation's cotton mills on credit after exhaustion of total amount of guaranties, that such letter was not conclusive and binding proof that guaranties were not relied on by plaintiff when earliest shipments of cotton were made, and that guaranties applied to last consignment of cotton ordered before, but not actually shipped until after, sending of letter.

Judgment affirmed.

1. Corporations 🔑218

There was no failure of consideration for corporation's stockholders' guaranties to pay specified portions of line of credit granted corporation by co-operative cotton marketing association because of association's refusal, communicated through its general manager's letter to guarantors, to continue to ship cotton or extend further credit to corporation after its indebtedness reached monetary limit of guaranties, where there was no accompanying agreement to give corporation credit for any specified time and guarantors expressed hope in their letters of guaranty that association would extend additional favorable credit terms to corporation. West's Ann. Agric.Code, § 1 et seq.

2. Corporations 🔑269(3)

A co-operative cotton marketing association's general manager's letter, notifying textile corporation's stockholders, who guaranteed payment of specified portions of line of credit granted corporation by association for cotton sold thereby to corporation, that no further cotton would be sent to corporation's mills on credit after exhaustion of total amount of guaranties, was not conclusive and binding proof, in association's action on guaranties, that they were not relied on by association when earliest shipments of cotton were sent to corporation's mills, in view of testimony of association's employee in immediate charge of shipments that cotton was delivered to mills only because of such guaranties. West's Ann.Agric.Code, § 1 et seq.

3. Guaranty 🔑7(1)

A creditor's right to enforce contract to guarantee payment of debt must be based on knowledge of existence of guaranty and extension of credit to debtor in reliance thereon.

4. Corporations 🔑218

A corporation's stockholders' guaranties of payment of specified portions of line of credit granted corporation by cooperative cotton marketing association for cotton sold thereby to corporation applied to association's last consignment of cotton ordered by corporation before, but not actually shipped until after, sending of association's general manager's letter notifying guarantors that no further cotton would be sent to corporation's mills on credit after exhaustion of total amount of guaranties and that future sales must be on cash basis, where letter did not purport to cancel guaranties and neither guarantor attempted to cancel them before last shipment of cotton, which was accepted and used by corporation inferentially with guarantors' knowledge and approval. West's Ann.Agric. Code, § 1 et seq.

V. P. DiGiorgio and Thomas R. Davis, Bakersfield, for appellants.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondent.

CONLEY, Justice pro tem.

Calcot Association, Ltd., a cooperative association for marketing cotton, organized pursuant to the Agricultural Code, sued the defendant Southern California Textile Industries, a corporation, by the fictitious name under which it did business, Coast Cotton Mills, for $11,670.47 as the principal balance due on the sale of cotton, and defendants and appellants James A. Adamo and E. T. Combs on their written guaranties to pay, respectively, two-thirds and one-third of a line of credit granted to the mills up to and including $12,000. Judgment by default was entered against the mills and, after trial, against the appellant guarantors for their respective portions of the total.

The guarantors Adamo and Combs, sole stockholders of the corporation, owned, respectively, two-thirds and one-third of the capital stock. Both were actively engaged in the business of the mills and Adamo had other business interests as a carpet manufacturer involving the use of the cotton yarn spun by them. For several years the mills had bought cotton from plaintiff, sometimes on a cash basis, sometimes on a 60-day credit basis, but in August, 1953, the plaintiff, through its assistant manager George T. Akers, Jr., notified E. T. Combs of the mills that no further credit would be extended and no further shipments made unless Adamo and Combs would execute written guaranties. This they agreed to do and the guaranties are as follows:

> "August 26th–1953
>
> "Calcot, Ltd.
> "Box 3217
> "Bakersfield, California
> *"Attention Mr. Kennedy*
>
> "Dear Mr. Kennedy:
>
> "Confirming conversation with your Mr. Akers over the telephone regarding extension of credit to the Coast Cotton Mills, it is deemed advisable that Mr. Adamo and I guarantee the extension of credit to the corporation on the basis of ownership of stock, namely one third and two thirds. Therefore, I am glad to guarantee the sum of $4,000.00, one third of the agreed $12,000.00 extension of credit.
>
> "I am glad to maintain this personal guarantee of one third of the extended credit of twelve thousand dollars until such time that you see fit to ship us open account based upon our past credit performance.
>
> "Yours very truly,
> "E. T. Combs"

> "August 27, 1953
>
> "Calcot Ltd.
> "Box 3217
> "Bakersfield, California
> *"Att: Mr. Kennedy*
>
> "Dear Mr. Kennedy:
>
> "In consideration of Mr. Combs personally guaranteeing one-third of any extension of credit on your part to Coast Cotton Mills up to twelve thousand dollars, I hereby guarantee the balance of two-thirds up to this maximum amount.
>
> "It is hoped that with these two basic personal guarantees you would not necessarily need to limit the credit to

Coast Cotton Mills to this amount, but would find it conservatively proper to resume the prvious credit limits on a 60 day basis from date of bill of lading.

"Yours very truly,
"Adamo Co.
"J. M. Adamo"

Cotton of the total value of $11,670.47 was thereafter shipped by plaintiff to the mills and accepted and used by the consignee. The mills did not pay anything on the account and the company is now bankrupt.

The appellant guarantors raise three points: (1) That there was a failure of consideration for the guaranty in that J. R. Kennedy, general manager of the plaintiff, notified them by letter dated September 15th to the effect that no further cotton would be sent to the mills on credit after the $12,000 total of the guaranties was exhausted; (2) That the same Kennedy letter shows that plaintiff did not rely upon the guaranties when the earliest shipments of cotton were sent to the mills; (3) That the last shipment was made by the plaintiff after the mailing of the Kennedy letter and that consequently, although the cotton was accepted and retained by the defendant mills, the guaranties did not apply. It seems to the court that in view of the record all of these points are devoid not only of merit but even of plausibility.

The Kennedy letter referred to in connection with each of appellants' contentions reads as follows:

"California Cotton Cooperative Association, Ltd.

"September 15, 1953

"Mr. J. M. Adamo
"Adamo Company
"1140 East Eleventh Street
"Los Angeles 21, California

"Dear Mr. Adamo:

"Sometime ago, our Mr. Akers asked me to review our credit policy with the Coast Cotton Mills, Orange, California. At that time I told Mr. Akers to inform the Coast Cotton Mills, that we would extend credit up to $12,000.00 if you gave us your personal written guarantee.

"In answer to this request we received a letter from Mr. Combs dated August 26th and a letter from yourself, dated August 27th, personally guaranteeing the credit of Coast Cotton Mills, one-third and two-thirds respectively, up to the amount of $12,000.00.

"We have recently reviewed the various sales made to you from July 28th to September 1st. All the sales confirmations on these three sales, covering 100 bales, read 'Reimbursement to be Cash Against Documents?', and I was not aware that you considered the agreement on the extension of the $12,000.00 line of credit to be in effect at this time.

"As you probably know, the cotton business is operated on a traditional small margin and has always been strictly cash. Since we have never advanced credit to our regular customers, and after due consideration of all factors involved, we have decided not to deviate from this practice. In line with this policy, all further sales of cotton to Coast Cotton Mills must be Cash Against Shipping Documents.

"We would like very much to continue furnishing cotton to the Coast Cotton Mills, as we certainly realize its importance and significance in the economy of California. We do believe, however, that for the best interest of all, we should stick to the customs and practices of the cotton trade in our dealings. I hope you accept this letter in the spirit in which it is written, as we have a great deal of interest in the continued success of the Coast Cotton Mills.

"Very truly yours,
"Calcot, Ltd.
"/s/ J. R. Kennedy
"General Manager

"CC: Mr. E. T. Combs
"Orange, California."

[1] The contention that there was a failure of consideration is based on plaintiff's refusal, communicated through the Kennedy letter, to continue to ship additional cotton or extend further credit to the

mills after the indebtedness should reach the $12,000 limit of the guaranties. The trial court had substantial evidence before it in the testimony of Mr. Akers and the form of the letters of guaranty sued on to warrant its conclusion that there was no accompanying agreement to give a 60-day credit to the mills or a credit for any other length of time. The guaranties of appellants not only contain no condition as to the length of time, as distinguished from the amount, for which credit would be extended, but they show on their face that no such agreement existed. In each of their letters of guaranty, Adamo and Combs express the hope that the plaintiff will be lenient enough to extend additional favorable credit terms. These expressions demonstrate that the parties knew at the time the guaranties first became effective that no such additional terms existed. It is wholly unreasonable, in view of the record, to contend that the plaintiff owed any obligation to ship a single pound of cotton in excess of the $12,000 limit.

[2, 3] Appellants' second claim, namely, that the Kennedy letter of September 15, 1953, is conclusive and binding proof that the guaranties were not relied upon by the plaintiff when the earliest shipments of cotton were made is equally fallacious. It is, of course, elementary that a creditor's right to enforce a contract of guaranty must be based upon knowledge of the existence of the guaranty and that the credit must be extended in reliance thereof, 24 Am.Jur., pp. 884–885, but appellants fail to give due weight to the evidence of the witness Akers, who was the employee of the plaintiff in immediate charge of shipments, that the cotton was delivered to the mills only because the guaranties had been made. Thus, entirely apart from the meaning and effect of the Kennedy letter, the trial court had ample and substantial evidence upon which to base the findings and judgment.

[4] Finally, it is claimed that the last consignment of cotton, ordered before the Kennedy letter but not actually shipped until afterward, does not come within the guaranties by reason of that letter. However, it is clear that the Kennedy letter did not purport to cancel the guaranties but merely notified Mr. Adamo that future sales must be on a cash basis. Neither of the guarantors even attempted to cancel their guaranties before the last shipment. On the contrary, the cotton was accepted and used by the mills, inferentially with the knowledge and approval of appellants, and the present claim that the guaranties did not apply to it is without any semblance of virtue.

The judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 133

The PEOPLE of the State of California, Plaintiff,

v.

Donald Bryce LAWRENCE, Defendant and Appellant,

Fireman's Fund Indemnity Company, Respondent.

Cr. 3144.

District Court of Appeal, First District, Division 1, California.

March 22, 1956.

Rehearing Denied April 6, 1956.

Hearing Denied April 18, 1956.

Defendant was convicted of second degree burglary on count of indictment for taking watches from a jewelry store and acquitted on count for taking money from an inn. An indemnity company, as subrogee of a restaurant at the inn, filed a claim for return of money allegedly stolen by defendant from the restaurant and delivered into court's custody by peace officers taking possession thereof on defendant's arrest. From a judgment of the Superior Court, County of Monterey, Anthony Brazil, J., for claimant, defendant appealed. The District Court of Appeal, Bray, J., held that Penal Code sections requiring delivery of stolen property in magistrate's custody to owner thereof and authorizing court before which trial is had for stealing property to order its restoration to owner were void as applicable to facts of case, so that indemnity company's proceeding and judgment were also void.

Judgment reversed.

1. Convicts ⚿6

A person sentenced to prison for term of years is still liable to be sued and hence has right to defend action against him, notwithstanding statutory provision that sentence of imprisonment in state prison for term less than life suspends all civil rights of person sentenced. West's Ann.Pen.Code, § 2600.

2. Convicts ⚿1, 3

The trend of law is to lessen severity and harshness of common-law penalties respecting convicts, their property and rights, in accord with modern notion that imprisonment of felon is a means for protecting society rather than punishment imposed on individual.

3. Convicts ⚿6

One serving sentence in state prison on conviction of second degree burglary was entitled to defend indemnity company's proceeding, as subrogee, for return of money allegedly stolen by him from burglarized premises and delivered into court's custody by peace officers taking possession thereof on defendant's arrest, and to appeal from judgment for such company, but was not entitled to be personally present in court during proceeding.

4. Constitutional Law ⚿309(1)

One in possession of property under claim of right cannot be deprived thereof without due process of law, which requires notice to him of time and place of hearing and opportunity for him to be heard in proceeding to recover possession of property from him.

5. Constitutional Law ⚿309(1)

In absence of statutory requirement of notice to person in possession of property of proceeding for recovery thereof, any notice given him is without legal force and authority, so that proceeding is ineffective, whether such notice is acted on or disregarded, and fact that he may by chance have notice or have a hearing as matter of favor is insufficient, as law must require notice to him and give him right to hearing and opportunity to be heard.

6. Constitutional Law ⚿38

The constitutionality of law must be tested, not by what has been done or ordinarily would be done thereunder, but by what may be done by its authority.

7. Criminal Law ⚿1221

Money taken from one charged with burglary by peace officers arresting him presumptively belongs to him.

8. Constitutional Law ⚿306
Criminal Law ⚿1206(1), 1221

The Penal Code sections, requiring that stolen property in magistrate's custody be delivered to owner and authorizing court before which trial is had for stealing such property to order its restoration to owner, were void as applied to facts in case of one convicted of second degree burglary on count of indictment for taking watches from jewelry store, but acquitted on count for taking money from inn, so that proceeding by indemnity company as subrogee, for return of money allegedly stolen by defendant from restaurant at inn and judgment for such company after hearing at which defendant, serving sentence in state prison on conviction, was neither represented nor appeared, were also void. West's Ann.Pen. Code, §§ 1409, 1410, 2600, 2604.

◆

Donald Bryce Lawrence, Vacaville, in pro. per.

Saul M. Weingarten, Seaside, for respondent.

BRAY, Justice.

Appellant was charged with two counts of second degree burglary: (1) taking watches from a certain jewelry store, and (2) taking approximately $200 from the Mission Inn. A jury convicted him on the first count but acquitted him on the second count. At the time of his arrest defendant had on his person the sum of $114.21 which was used as evidence at the trial. After the trial defendant made written request to the county clerk for the return to him of this sum. Thereafter Fireman's Fund Indemnity Company, as subrogee of La Cantina Restaurant at the Mission Inn, filed in the criminal proceeding a "Claim for Return of Stolen Property," alleging that $198.40 was stolen from and was the property of said restaurant, that said sum came into the possession of peace officers on defendant's arrest and was then delivered into the custody of the court. Its return was then requested. The trial court set a date for the hearing of this claim, causing notice thereof to be sent to appellant at San Quentin where he is incarcerated because of his conviction on the first count. At the hearing, Fireman's Fund was represented but appellant was not, nor did he appear. He did, however, send a letter to the court clerk contesting the hearing as being illegal, claiming the money as his, and pointing out his inability to be present.

The transcript of the testimony at the criminal trial was admitted in evidence and the court rendered judgment in favor of Fireman's Fund for the delivery to it of "$198.40" now in the custody of the court.[1] Appellant appeals from that judgment.

Questions Presented.

1. Has appellant because of loss of his civil rights any standing in this proceeding?

2. Is this proceeding proper?

1. Civil Rights.

[1–3] "A sentence of imprisonment in a State prison for any term less than life suspends all the civil rights of the person so sentenced * * *." Penal Code § 2600.

The weight of authority in this country is that notwithstanding provisions similar to the above a person sentenced to prison for a term of years is still liable to be sued and that this liability necessarily carries with it the right to defend. See 18 C.J.S., Convicts, § 7b, p. 106. California follows this rule. See Castera v. Superior Court, 29 Cal.App. 694, 695, 159 P. 735; Coffee v. Haynes, 124 Cal. 561, 57 P. 482; Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205, 48 A.L.R. 580. "In re Gainfort, D.C., 14 F. Supp. 788, states that the status of convicts in regard to civil rights in California is rather uncertain and that the trend of the law is to lessen the severity and harshness of the common-law penalties in relation to convicts, their property and rights; and that this is in accord with the modern notion that imprisonment of a felon is rather a means for protecting society than a punishment imposed upon an individual." Hall v. Hall, 98 Cal.App.2d 209, 213, 219 P.2d 808, 811. Defendant, therefore, is entitled to defend in this proceeding and to appeal from the judgment. However, he is not entitled to be personally present at any part of the proceedings. See In re Bagwell, 26 Cal.App.2d 418, 420, 79 P.2d 395.

2. Is This Proceeding Proper?

Fireman's Fund contends that the right to bring this proceeding is provided by sections 1409 and 1410, Penal Code. Section 1409 provides: *"If property stolen or embezzled* comes into custody of the magistrate, it must be delivered to the owner on satisfactory proof of his title, and on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate." (Emphasis added.) Section 1410 provides: "If the property stolen or embezzled has not been delivered to the owner, the Court before which a trial is had for stealing or embezzling it may, on proof of his title, order it to be restored to the owner."

[4] In Modern Loan Co. v. Police Court, 12 Cal.App. 582, 108 P. 56,[2] it was held that section 1408 (dealing with return to the owner of such property by the magistrate before whom the complaint that property is stolen or embezzled is laid), and section 1409, are void insofar as they are applicable to search warrant proceedings. "One who is in possession of property under a claim of right cannot be deprived of its possession without due process of law; and, in order to constitute due

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[1] This discrepancy between the $198.40 ordered delivered and the $114.21 taken from appellant is not explained.

[2] Quoted with approval in Angelopulos v. Bottorff, 76 Cal.App. 621, 245 P. 447.

process of law, there must be notice of the time and place of hearing, and an opportunity to be heard. Murray v. Hoboken Land & Improvement Co., 18 How. [272] 280, 15 L.Ed. 372; 22 Cyc., pp. 72, 73; People v. Granice, 50 Cal. 447. The statute should give the parties interested in the property an opportunity of presenting, in a deliberate, regular, and orderly method, issues of fact and of law to the court or to a court and jury unless a jury is waived. Under these two sections, irrespective of the value of the property, and without any right of appeal, and without the slightest notice—indeed immediately upon the return of the warrant—the magistrate may proceed to the 'proof of the ownership or of title' to the property and make an award. A proceeding permitting this contravenes the provisions of the state and federal Constitutions that a person cannot be deprived of his property without due process of law. It is no answer to the objection urged that the magistrate quite probably will see to it in each case that notice and an opportunity to be heard are given, for the right of a person to his day in court must rest on something more substantial than favor or discretion. It is essential to the validity of a statute that it furnish the means whereby one may enforce his constitutional right." 12 Cal.App. at pages 585–586, 108 P. at page 58.

"The property" referred to in section 1408 is the property mentioned in section 1407 "When property, *alleged* to have been stolen or embezzled * * *." (Emphasis added.) Section 1409 refers to "property *stolen or embezzled.*" (Emphasis added.) Section 1410 refers to the same property stated in section 1409 "If the property *stolen or embezzled* * * *." (Emphasis added.) Thus the Modern Loan case constitutes a holding, so far as search warrant proceedings are concerned, that whether the property is *merely alleged* to be stolen or *is* stolen, the failure of the code to provide a procedure for hearing claims to its ownership, with notice to the person from whose possession the property was taken into custody of the law, makes any purported proceeding under any of these sections void.

[5, 6] We see no reason why the language and the reasoning of that case should not apply to the situation in our case. As said in that case, 12 Cal.App. at page 587, 108 P. at page 58: "* * * actual possession is a most valued right, and is an essential part of property, and no one, consistent with constitutional safeguards, can be deprived of the possession or title to property, or of any other substantial right, without reasonable notice and an opportunity to be heard. As said by the supreme court in Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281, 68 L.R.A. 600: 'The guaranty of the Constitution that he shall not be deprived of his property without due process of law gives him the right to be heard in its defense against any claim that may be made against him for its possession.'" "As said by the Supreme Court of this state in Re Lambert, 134 Cal. 626, 634, 66 P. 851, 854 (55 L.R.A. 856, 86 Am. St.Rep. 296): 'In the absence from the statute of any requirement of notice to the person, any notice that might be given would be without legal force and authority, and consequently, whether acted upon by him or disregarded, the proceeding would be equally ineffective. "It is not enough that he may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice to him, and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but what may by its authority be done." Stuart v. Palmer, 74 N.Y. [183] 188 (30 Am.Rep. 289). It is not what has been done, or ordinarily would be done, under a statute, but what might be done under it, that determines whether it infringes upon the constitutional right of the citizen. The Constitution guards against the chances of infringement.' Bennett v. Davis, 90 Me. [102] 105, (37 A. [864] 865)." 12 Cal.App. at page 586, 108 P. at page 58.

In the Modern Loan case, 12 Cal.App. at page 594, 108 P. 56, the court pointed out that the ordinary action of claim and delivery was provided by the law as the means to determine the right of possession of property.

[7, 8] Presumptively the money taken from defendant belonged to him. Conviction of a crime does not work a forfeiture of the person's property. Penal Code § 2604. While it very well may be, as the court here found, that this was stolen property, such fact must be determined by due process of law. The sections upon which the court based its judgment being void as applicable to the facts of this case, the procedure and judgment are also void. It therefore becomes unnecessary for us to determine the sufficiency of the evidence to support the court's findings.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Respondent,

v.

KINGS COUNTY WATER DISTRICT and Elbert Montgomery, Louis Giacomazzi, Louis E. Hansen, Frank J. Martin, and Earle A. Howe, as the Board of Directors of Kings County Water District, and Ralph S. Morgan, Secretary of Kings County Water District, Appellants.*

Civ. 4992.

District Court of Appeal, Fourth District, California.

March 26, 1956.

Hearing Granted May 23, 1956.

Railroad brought mandate action against board of directors of the Kings County Water District to require board to exclude certain land from district. The trial court, W. G. Machetanz, J., entered judgment in favor of railroad, and board and others appealed. The District Court of Appeal, Conley, J. pro tem., held that benefits that might accrue to railroad through increased traffic due to prosperity in farming community as result of conservation of water could not "substantially" and "directly" benefit the railroad, and would not justify denial of petition of railroad for the exclusion of 30-foot center strip of land, on which roadbed of railroad's main line was located, from county water district, and that board did not abuse its discretion in holding that two adjoining 35-foot strips of land, which railroad had leased in part to farmers for purpose of raising crops, should not be excluded.

Judgment affirmed in part and reversed in part.

1. Mandamus ⚷172

In mandamus proceeding by railroad to require board of directors of county water district to exclude realty of railroad, court's inquiry was limited to determination whether there was any prejudicial abuse of discretion by the board in that its findings, if any, and orders were not supported by substantial evidence. Water Code, §§ 30000 et seq., 31020–31033, 32200, 32220–32227; West's Ann.Code Civ.Proc. § 1094.5.

2. Waters and Water Courses ⚷183½

On petition for the exclusion of land from a county water district, it is advisable as a matter of administration that board of directors of district make findings of facts, even though it is not mandatory under statute for the board to do so. Water Code, §§ 32220–32227.

3. Waters and Water Courses ⚷183½

Decision of board of directors of county water district denying petition to exclude land from district carried with it the implied finding that the board did not believe that the prerequisites to exclusion had been proved. Water Code, §§ 30000 et seq., 31020–31033, 32200, 32220–32227.

4. Waters and Water Courses ⚷183½

In proceeding before board of directors of county water district to exclude land from district, finding that land will be benefited by its retention within district boundaries is binding on reviewing court, when testimony on question is conflicting and evidence supporting retention is substantial.

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* Opinion vacated 302 P.2d 1.

Water Code, §§ 30000 et seq., 31020–31033, 32200, 32220–32227.

5. Waters and Water Courses ⚷183½

The word "substantially" as used in section of the Water Code providing that board of directors of county water district, when passing on a petition to exclude land from district, shall order exclusion when the board determines that the land will not be "substantially" and directly benefited by its continued exclusion in the district, or the board determines the exclusion to be for the best interests of the district, means in a substantial manner, really, solidly, completely, material, true, important, and essential. Water Code, § 32222.

See publication Words and Phrases, for other judicial constructions and definitions of "Substantially".

6. Waters and Water Courses ⚷183½

The word "directly" as used in section of the Water Code providing that board of directors of county water district, when passing on petition to exclude land from district, shall order exclusion when board determines that land will not be substantially and "directly" benefited by its continued inclusion in the district, or board determines the exclusion to be for the best interests of the district, means in a direct way, without anything intervening, not by secondary, but by direct, means. Water Code, § 32222.

See publication Words and Phrases, for other judicial constructions and definitions of "Directly".

7. Waters and Water Courses ⚷183½

The substantial and direct benefit which must be present to justify retention in county water district of land sought to be excluded from district means direct and substantial benefit to land in question. Water Code, § 32222.

8. Waters and Water Courses ⚷183½

Benefits that might accrue to railroad through increased traffic due to prosperity in farming community as result of conservation of water could not "substantially" and "directly" benefit the railroad, and would not justify denial of petition of railroad for the exclusion of 30-foot center strip of land, on which roadbed of railroad's main line was located, from county water district. Water Code, §§ 30000 et seq., 31020–31033, 32200, 32220–32227.

9. Waters and Water Courses ⚷183½

On petition by railroad to have land excluded from county water district, board of directors of district did not abuse its discretion in refusing to exclude two 35-foot strips of land, which railroad had leased in part to farmers for the purpose of raising crops. Water Code, §§ 30000 et seq., 31020–31033, 32200, 32220–32227.

10. Mandamus ⚷174

Findings of fact and conclusions of law are necessary in a mandate action, unless waived. West's Ann.Code Civ.Proc. §§ 634, 1109.

11. Trial ⚷390

A trial court has inherent power to make findings nunc pro tunc.

12. Mandamus ⚷187(9)

Where findings were not prepared, signed, or filed in mandate action until after judgment, and were then filed nunc pro tunc as of the date, on which decree was entered, failure to observe normal sequence prescribed by the Code of Civil Procedure for the proposal, consideration, and adoption of findings of fact and conclusions of law was not reversible error. West's Ann. Code Civ.Proc. §§ 634, 1109.

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Walch & Griswold, Hanford, for appellants.

Robert W. Walker, John J. Balluff, Los Angeles, Sidney J. W. Sharp, Herbert M. Braden, and Lawrence W. Clawson, Hanford, for respondent.

CONLEY, Justice pro tem.

This is an appeal from a judgment in mandate requiring the board of directors of the Kings County Water District to exclude the right of way owned by the respondent railroad company, approximately 16½ miles long and 100 feet in width, consisting upon analysis of a 30-foot center strip upon which the ties, rails and roadbed of the main line of the railroad lie, and a contiguous strip on each side thereof 35 feet in width. The station areas along the railroad are not included in the petition nor is the company property in the city of Hanford which is outside of the water district boundaries.

The appellant county water district was organized February 24, 1954, under the County Water District Law. Water Code sec. 30000 et seq. It comprises approximately 150,000 acres. It was organized and formed to protect the underground water supplies of the area from excessive pumping and to ward against the transportation of underground water by others to areas outside the district. Its purposes and functioning generally have been in accordance with the aims and methods approved by law for such an organization. Coachella Valley County Water Dist. v. Stevens, 206 Cal. 400, 274 P. 538; Water Code secs. 31020 to 31033.

Prior to the institution of the mandate suit, the respondent railroad petitioned the board of directors of the district for the exclusion of the land pursuant to section 32200 of the Water Code. The board held an extended hearing, and thereafter denied the petition. A complete record of the testimony and proceedings at that hearing was received in evidence by the trial court and formed the evidentiary basis for its judgment.

[1] Section 1094.5 of the Code of Civil Procedure prescribes the method and scope of the review which the trial court may make in a mandate action of this character. Discretion as to the determination of facts is vested by law in the board of directors of the water district and the limits of the court's inquiry at the trial must be whether there was any prejudicial abuse of discretion by the board in that its findings, if any, and its order are not supported by substantial evidence.

[2, 3] In passing it should be noted that there were no formal or explicit findings of fact by the board in connection with the order denying exclusion of appellants' land. The applicable code sections, Water Code sections 32220–32227, do not specifically require findings of fact when exclusion is denied. Compare the requirement for findings in proceedings for the inclusion of land in a county water district. Sec. 32447, Water Code. The preparation of findings by the board would, however, be helpful and such a record of the specific determination of facts is advisable as a matter of administration even though not mandatory under the statute. However, the board's decision denying the petition to exclude the respondent's land carries with it the implied finding that the board did not believe that the prerequisites to exclusion had been proved.

In Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 315, 144 P.2d 4, 11, the relative powers and duties of the court trying a mandamus case and of the board of directors against whom the action is brought are stated as follows:

> "It is the general rule that the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner. The court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the administrative agency. 16 Cal.Jur. 809, § 28, and cases there cited; 34 Am.Jur. 856, § 68, with supporting authority. In a proceeding of this character, challenging the propriety of decision of an administrative board, the attitude of the courts is well stated in the following language found in the case of Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869, 871: 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.' "

In Odden v. County Foresters, etc., Retirement Board, 108 Cal.App.2d 48, 49, 238 P.2d 23, 24, it is said:

> "On an application for a writ of mandate to review an order of a local quasi judicial body such as the board in the present case the trial court does

not have a right to judge of the intrisic value of evidence nor to weigh it. The power of the court is confined to determining whether there was substantial evidence before the board to support its findings." See, also, Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 457, 171 P.2d 500.

[4] In exclusion proceedings before irrigation district boards it has been repeatedly held that the findings of the board that the lands of petitioners for exclusion would be benefited by their retention within the district boundaries is binding upon the reviewing court when the testimony on the question is conflicting and the evidence supporting retention is substantial. J. & W. C. Shull, Inc., v. Merced Irr. Dist., 90 Cal.App. 270, 265 P. 965; San Joaquin Agricultural Corp. v. Board of Supervisors, 121 Cal.App. 468, 8 P.2d 1051.

The section of the Water Code which defines the duties of the board of directors when passing upon an exclusion petition is section 32222, which reads as follows:

> "The board after the hearing of any exclusion petition shall order the exclusion of all or any part of the land described in it when as to the land to be excluded either:
>
> "(a) The board determines that the land will not be substantially and directly benefited by its continued inclusion in the district.
>
> "(b) The board determines the exclusion to be for the best interests of the district."

[5] "Substantially" means in a substantial manner, really, solidly, completely. 40 Words & Phrases, p. 504. Webster's International Dictionary defines the word substantial, in part, as follows: "* * * material; * * * not seeming or imaginary; * * * real; true; * * * important; essential; material; having good substance; strong; stout; solid; firm."

[6] "Directly" means in a direct way, without anything intervening, not by secondary, but by direct, means. 12A Words & Phrases, p. 140.

[7, 8] The substantial and direct benefit which must be present to justify retention of land in a county water district means direct and substantial benefit to the land in question. Benefits that might accrue to a railroad through increased traffic due to prosperity in a farming community occasioned by the conservation of water would be indirect benefits and therefore immaterial within the meaning of the legislative enactment.

Considering separately the 30-foot center strip of land upon which the roadbed of the company's main line is located it seems clear that the operations of the water district are not, and could not be, of substantial and direct benefit to it. Reasonable men could scarcely differ from the conclusion that steel rails, ties and rock ballast carefully combined and maintained along a way permanently dedicated to the duties of a common carrier could not possibly be benefited directly and substantially by underground waters. The issuance of the writ of mandate with respect to that portion of the land was therefore proper for the reason that the board of directors had no evidence before it from which it could conclude that that strip of land would be substantially or directly benefited by its continued inclusion in the district.

[9] Turning, however, to a consideration of the two adjoining 35-foot strips of land, we find that the situation is different and there is evidence in the record from which the board of directors could legitimately determine that such land will be substantially and directly benefited by its continued inclusion in the district. In this respect the record shows that the Santa Fe Railroad has in fact leased a number of parcels of this land to farmers for the purpose of raising crops on it. And testimony on behalf of the district at the hearing before the board showed that various crops, including alfalfa, cotton, permanent pasture and grapes were then actually growing on portions of these two 35-foot strips. An engineer for the railroad company admitted that all of this land was on the market for leasing for such purposes, but stated that the motive of the railroad company in encouraging and soliciting such leases

was to avoid the otherwise costly process of destroying weeds which grow annually on the two 35-foot strips in the absence of cultivation and care by tenants. He further testified that the amounts received by the railroad from the leases were nominal, and that all of the land is not readily adaptable to the growing of crops due to differences in elevation caused by the construction of the roadbed. However, these last mentioned factors are not controlling. A farmer could not lay the foundation for the exclusion of his land by letting it lie fallow or by refusing to cultivate it or otherwise prepare it for agricultural uses. The railroad has land which is adaptable to and at least in part actually used for agricultural purposes, and the board had substantial evidence before it from which it legitimately determined that this land as such will be directly and substantially benefited by its continued inclusion within the boundaries of the county water district. The trial court therefore was not justified in holding that the discretion of the board of directors could not be exercised in favor of the inclusion of the land in the district.

[10–12] The appellant contends that findings of fact and conclusions of law were not signed and filed as required by law. Findings of fact and conclusions of law are necessary in a mandate action, unless waived. Beloin v. Blankenhorn, 97 Cal.App.2d 662, 664, 218 P.2d 552; Davis v. State Board of Optometry, 35 Cal.App. 2d 428, 433, 95 P.2d 959. Here, the findings were not prepared, signed or filed until after judgment, being then filed *nunc pro tunc* as of the date upon which the decree was entered. The inherent power of a trial court to make findings *nunc pro tunc* is established in this state. Norton v. City of Pomona, 5 Cal.2d 54 [2], 53 P.2d 952. And in Nielsen v. Witter, 111 Cal.App. 742, 744, 296 P. 121, it was held that prior to appeal findings may be filed *nunc pro tunc* to support a judgment already entered. We consequently feel constrained to hold that no reversible error was committed through this failure to observe the normal sequence prescribed by the Code of Civil Procedure for the proposal, consideration and adoption of findings of fact and conclusions of law. Code Civ.Proc. sections 1109 and 634.

The judgment is affirmed as to the 30-foot center strip of the respondent railroad company's land containing its roadbed, ties, and rails, and is reversed with respect to the two contiguous 35-foot strips, with directions to the trial court to modify its findings, judgment and writ of mandate in conformity herewith. Each party shall pay its own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

140 Cal.App.2d 185

Walter J. STRANGMAN, Petitioner, Judgment-Creditor and Appellant,

v.

George L. DUKE, Defendant, Judgment-Debtor and Respondent.

In the Matter of the Application for the Appointment of Appraisers to Appraise Homesteaded Property.

Civ. 21442.

District Court of Appeal, Second District, Division 2, California.

March 23, 1956.

Hearing Denied May 15, 1956.

Proceeding by a judgment creditor for appointment of appraisers of debtor's homestead property, sale thereof, and payment of judgment debt from proceeds in excess of statutory exemption. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., for sheriff's sale of undivided fourth interest in premises at price exceeding entire amount of exemption, plus tax liens, and distribution of proceeds of sale, petitioner appealed. The District Court of Appeal, Ashburn, J., held that extent of debtor's undivided interest in homestead property should not be defined or exact amount of interest to be sold specified in order of sale, especially where fraudulent transfer of property is claimed, and that order should direct that defendant's undivided interest only, not interest of his wife, to whom half interest in property, acquired by spouses as joint tenants, was conveyed by them as her separate property, be sold for sum exceeding full amount of homestead exemption and judgment lien.

Order modified and affirmed as modified.

Opinion, 293 P.2d 786, vacated.

1. Homestead ⚷84

A husband's declaration that he claimed as a homestead his undivided interest in certain realty, record title to half of which was vested in wife as her separate property and other half in both spouses as joint tenants, was proper. West's Ann.Civ.Code, § 1238.

2. Homestead ⚷84

A husband or wife may declare a homestead on their joint tenancy property without other spouse's consent. West's Ann.Civ.Code, § 1238.

3. Husband and Wife ⚷14(11)

A sale of spouses' joint tenancy property in special proceeding against husband by his judgment creditor for sale of property and payment of judgment debt from proceeds in excess of statutory homestead exemption effects severance of spouses' interests therein, so that only husband's interest passes to purchaser, and wife becomes tenant in common with new owner. West's Ann.Civ.Code, §§ 1240, 1245 et seq.

4. Partition ⚷12(3)

A wife, who is dissatisfied with her status as tenant in common with purchaser of husband's interest in spouses' joint tenancy property at sale in husband's judgment creditor's special proceeding for sale of property and payment of judgment debt from proceeds in excess of statutory homestead exemption, may have partition of property, whereupon, husband's homestead having been terminated, wife may establish new homestead, if requisite facts, such as residence, etc., are present. West's Ann. Civ.Code, §§ 1240, 1245 et seq.

5. Homestead ⚷199

Husband and Wife ⚷14(11)

An execution on judgment against husband reaches, and sale of property owned by spouses jointly in judgment creditor's special proceeding against husband for such sale and payment of judgment debt from proceeds in excess of statutory homestead exemption after husband's declaration of homestead on his undivided interest therein conveys, only husband's half of joint tenancy interest. West's Ann.Civ.Code, §§ 1238, 1240, 1245 et seq.

6. Homestead ⚷200

A husband declaring homestead on his undivided interest in property, title to half of which was vested in wife as her separate property and remaining half held as joint tenancy estate of both spouses, was entitled to entire amount of statutory homestead exemption, as provided by Superior Court's order for sale of undivided one fourth interest in property at price exceeding such amount, plus tax liens, in husband's judgment creditor's special proceeding for sale of property and payment of debt from proceeds in excess of exemption, though husband's interest was only one fourth or half of entire property; there being no statutory provision for apportionment of exemption in any situation. West's Ann.Civ.Code, §§ 1238, 1240, 1245 et seq.

7. Homestead ⚷81

The right to declare homestead does not depend on nature of declarant's title to property involved, so long as he has some interest therein, which is a freehold vesting in him immediate right to possession of property, whether joint or exclusive. West's Ann.Civ.Code, § 1238.

8. Homestead ⚷21, 89

A husband and wife cannot have two homesteads even on different properties, nor on different interests in same property.

9. Homestead ⚷89

A wife could not declare homestead on spouses' jointly owned property after husband's declaration of homestead on his undivided interest therein, in view of statute requiring that wife's declaration of homestead contain statement that her husband has not made such a declaration. West's Ann.Civ.Code, § 1263.

10. Homestead ⚷43

A wife's declaration of homestead on spouses' jointly owned property, without statement required by statute that husband has not made such a declaration thereon, is void. West's Ann.Civ.Code, § 1263.

11. Homestead ⚷21

A husband's declaration of homestead in spouses' joint tenancy property inures also to wife's benefit and protects her interest in property against her own creditors, as homestead exemption extends to entire interest of both spouses in property. West's Ann.Civ.Code, § 1238.

12. Homestead ⚷201

Where husband's judgment creditors first pursue statutory method of enforcing execution by sale of spouses' joint tenancy property, on which homestead has been declared, for payment of judgment debt from proceeds, husband gets benefit of homestead exemption, or if wife's creditors move first, she gets exemption. West's Ann.Civ.Code, §§ 1240, 1245 et seq.

13. Homestead ⚷5

The policy underlying all homestead legislation, whether providing for selection of homestead by person during his lifetime or by court for his family after his death, is to provide place where family and its surviving members may reside and enjoy comforts of home, free from any anxiety that it may be taken from them against their will, either because of their own necessity or improvidence or their creditors' importunity, and to such end liberal construction of law and facts will be adopted by courts.

14. Judgment ⚷739

The res judicata rule does not apply to causes or issues which were not and could not be before court in first proceeding.

15. Judgment ⚷739

A judgment is not adjudication of matters which were not and could not properly be relied on and determined in previous action, but is conclusive of all matters clearly adjudicated thereby, where requisite jurisdiction exists.

16. Fraudulent Conveyances ⚷179(2), 230

A fraudulent conveyance is void, not voidable, as to grantor's creditors, and such a creditor may levy execution on property conveyed as if there had been no conveyance thereof. West's Ann.Civ.Code, § 3439.09(2).

17. Fraudulent Conveyances ⚷317

A judgment creditor, purchasing at his execution sale property fraudulently conveyed by debtor, acquires legal title thereto, not merely right to set aside a voidable transfer, and any other purchaser at such sale, including tort claimant, though his claim has not been reduced to judgment, acquires same legal title. West's Ann.Civ. Code, § 3439.09(2).

18. Fraudulent Conveyances ⚷317

The extent of judgment debtor's undivided interest in property owned by him and his wife jointly should not be defined in order for sale thereof on execution, nor exact amount of undivided interest to be sold specified therein, especially where fraudulent transfer of debtor's property, as by spouses' conveyance of half interest in property to wife as her separate property, is claimed, as such order, though it would not be res judicata in later action by creditor to set aside conveyance as fraudulent, creates practical limitation on bidding. West's Ann.Code Civ.Proc. § 187.

19. Homestead ⚷200

A judgment creditor of husband declaring homestead on his undivided interest in spouses' jointly owned property shortly after their conveyance of half interest therein to wife as her separate property was entitled to order directing execution sale of husband's undivided interest only for amount which must exceed statutory homestead exemption and judgment lien and be applied as provided in statute. West's Ann. Civ.Code, §§ 1245 et seq., 1256.

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Snyder, Fletcher & O'Neil, South Pasadena, for appellant.

George L. Duke and Joseph Doyle, Beverly Hills, for respondent.

ASHBURN, Justice.

Walter J. Strangman, judgment creditor, appeals from an order directing respondent's homestead to be sold. On December 2, 1952, Strangman recovered judgment against George L. Duke for $10,000, plus interest and costs; it was based upon an obligation created in February 1947, at which time the homestead exemption was $6,000. The judgment did not run against the wife, Esther H. Duke. The spouses owned a certain duplex property in undivided interests; one-half was vested in the wife as her separate property and one-half was held as joint tenancy estate of the two spouses. At least, that was the state of the record title.

On September 15, 1952, said George L. Duke declared a homestead on the property, asserting therein "That, it is my intention to use and claim my undivided interest in the said lot of land and premises above described, together with the dwelling houses thereon, and its appurtenances, as a homestead." The wife did not join in the declaration. Strangman, after levy of execution, brought a proceeding pursuant to § 1245 et seq., Civil Code, for appointment of appraisers, sale of the property and payment of his debt out of the proceeds in excess of the statutory exemption. The court, after certain preliminary proceedings, found the value of the property to be $19,500 subject to a tax lien of $169.85; also that the land could not be divided without material injury; ordered a sheriff's sale of an undivided one-fourth interest in the premises at a price which must exceed $6,000[1] plus tax liens; distribution of the proceeds of sale was ordered as follows: (1) Payment of tax lien of $169.85; (2) payment of $6,000 to judgment debtor, George L. Duke; (3) satisfaction of Strangman's execution; and (4) balance, if any, to homestead claimant.

The arguments presented on appeal revolve around the limited nature of George L. Duke's title and the terms of his declaration.

The homesteading of property owned in undivided interests, such as joint tenancy or tenancy in common, has been a perplexing subject in this jurisdiction until recent years. Section 1238, Civil Code, now declares: "If the claimant be married, the homestead may be selected from the community property or the separate property of the husband or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife. * * * Property, within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such a right of possession is not exclusive." The Supreme Court decided in Estate of Kachigian, 20 Cal.2d 787, 790, 128 P.2d 865, 867, that "the former rule prohibiting the selection of a homestead from an undivided interest in property during the lifetime of the owner has been abandoned." In this respect Estate of Davidson, 159 Cal. 98, 115 P. 49, which held that one or both of the spouses could not impress a homestead upon the undivided half interest of a husband owned as tenant in common with his wife, has ceased to represent the prevailing rule.

[1-5] Respondent's assertion in his declaration that he claims as a homestead his undivided interest is in consonance with the rule now prevailing, and cases decided before the change in the law are not controlling. Husband or wife may now declare a homestead on joint tenancy property without the consent of the other spouse. Watson v. Peyton, 10 Cal.2d 156, 159, 73 P.2d 906. When it comes to selling the property in a special proceeding against the husband, pursuant to § 1245 et seq. Civ. Code, that sale effects a severance of the spouses' interests and only the husband's interest can pass to the purchaser; the wife becomes a tenant in common with the new owner. In re Rauer's Collection Co., 87 Cal.App.2d 248, 259, 196 P.2d 803. If dissatisfied therewith she may have a parti-

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[1] The amount of exemption is governed by the law in effect at the time the debt is created. In re Rauer's Collection Co., 87 Cal.App.2d 248, 253-254, 196 P.2d 803.

tion; thereupon the husband's homestead having been terminated, the wife may establish a new one if requisite facts such as residence, etc., be present. 40 C.J.S., Homesteads, § 13, p. 441; Spencer v. Geissman, 37 Cal. 96. In other words, the execution reaches and the sale conveys only the declaring husband's half of the joint tenancy interest, cf. In re Rauer's Collection Co., supra, 87 Cal.App.2d 248, 256, 196 P.2d 803; Estate of Kachigian, supra, 20 Cal.2d 787, 792, 128 P.2d 865.

[6, 7] In the instant case the entire property was appraised at $19,500 and the sale limited to a one-fourth interest conditioned upon receiving a bid of more than $6,000 for said interest. Appellant asserts that respondent was not entitled to the entire exemption because his interest was only one-fourth or a half of the entire property. There is no provision in our statute for apportionment of the exemption in any situation. See In re Miller, D.C.S.Cal., 27 F. Supp. 999, 1001; In re Rauer's Collection Co., supra, 87 Cal.App.2d at page 261, 196 P.2d 803. And its theory is opposed to such treatment. The right to declare a homestead does not depend upon the nature of the declarant's title, so long as he has some interest in the property which is a freehold vesting in him immediate right to possession, whether joint or exclusive. (25 Cal. Jur.2d § 25, p. 321.) And one who is entitled to make such a declaration is declared to be entitled to an exemption from enforcement of debts to a specified extent—in this case $6,000. Since the statute says that one owning an undivided freehold estate may declare a homestead, and that every homesteader is entitled to a specific exemption, Civ.Code, § 1240, the creditor has no complaint. The statute is aimed at a limited protection against his claim. While it is of no interest to the creditor whether allowance of a $6,000 exemption to the husband in the case at bar would be prejudicial to the rights of the wife, it is pertinent to inquire into this matter as a test of the soundness of the conclusion above indicated.

[8–10] Husband and wife cannot have two homesteads, not even upon different properties, Gambette v. Brock, 41 Cal. 78, 84; Bullis v. Staniford, 178 Cal. 40, 44, 171 P. 1064, and of course cannot have two homesteads upon different interests in the same property. The wife could not in the present instance declare a homestead because § 1263, Civil Code, provides: "The declaration of homestead must contain: 1. A statement showing that the person making it is the head of a family, and if the claimant is married, the name of the spouse; or, *when the declaration is made by the wife, showing that her husband has not made such declaration* and that she therefore makes the declaration for their joint benefit". (Emphasis added.) Without the statement that the husband has not made a declaration one attempted by the wife is void. Booth v. Galt, 58 Cal. 254; Cunha v. Hughes, 122 Cal. 111, 54 P. 535; Hansen v. Union Sav. Bank, 148 Cal. 157, 82 P. 768; Schuler-Knox Co. v. Smith, 62 Cal.App.2d 86, 144 P.2d 47; Crenshaw v. Smith, 74 Cal.App.2d 255, 168 P.2d 752; Santa Barbara Lbr. Co. v. Ross, 183 Cal. 657, 659, 192 P. 436.

[11–13] It is doubtless true, as appellant now argues, that the husband's declaration inures also to the wife's benefit and protects her interest in joint tenancy property against her own creditors. Michels v. Burkhard, 47 Cal.App. 162, 165, 190 P. 370; Yager v. Yager, 7 Cal.2d 213, 219, 60 P.2d 422, 106 A.L.R. 664; Johnson v. Brauner, 131 Cal.App.2d 713, 722, 281 P.2d 50; Keyes v. Cyrus, 100 Cal. 322, 34 P. 722. The exemption "extends to the entire interest of both in the property. It has been specifically so held with respect to joint tenancies. This in the cases of Swan v. Walden, 156 Cal. 195, 200 [103 P. 931, 134 Am.St.Rep. 118, 20 Ann.Cas. 194]; Watson v. Peyton, 10 Cal.2d 156, 159–160 [73 P.2d 906]; In re Miller, D.C.S.D.Cal., 27 F.Supp. 999." Johnson v. Brauner, supra, 131 Cal.App.2d 713, 722, 281 P.2d 50, 56. The result of this is that if the husband's creditors first pursue the statutory method of enforcing an execution he gets the benefit of the exemption, or if the wife's creditors move first she gets it; once the property is sold the homestead is gone and the question of apportionment of the exemption has exhausted its practical importance. Until such a sale is had it is for the benefit of both spouses that the one who is the judgment debtor have the full exemption. "The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in Estate of Fath, 132 Cal. 609, 613, 64 P. 995, 997, 'to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors,' and to this end a liberal construction of the law and facts will be adopted by the courts." Estate of Kachigian, supra, 20 Cal.2d 787, 791, 128 P.2d 865, 867.

Appellant complains of the procedure pursued by the trial court, claiming that it was error to find upon the extent of respondent's interest in the premises and to limit the sale to an undivided one-fourth interest. In the present instance the declaration claims only an undivided interest without defining it and appellant argues in effect that that interest is a full half because the deed of a half interest to the wife as her separate property was and is fraudulent.

The gist of appellant's complaint about this procedure, as originally formulated, was that the finding that respondent owned a one-fourth interest in the premises would be res judicata in a later action brought by appellant to set aside as fraudulent the conveyance of the one-half interest to the wife. Respondent's own affidavit says that the judgment was based upon "an alleged fraudulent transaction." It appears that the Dukes acquired the property as joint tenants on February 16, 1949, that a one-half interest was conveyed by the two spouses to the wife as her separate property on September 3, 1952, and that the husband's homestead declaration was filed on September 15, 1952. The opening brief asserts, and it is not denied, that the deed to the wife was made just 15 days before the trial of the action which resulted in judgment in favor of plaintiff; that the deed is subject to attack by appellant as a fraudulent transaction and such an attack would be frustrated by the finding at bar under the familiar doctrine of res judicata.

[14, 15] The rule of res judicata does not apply to causes or issues which were not and could not be before the court in the first proceeding. (15 Cal.Jur. § 198, p. 151.) "A judgment is not an adjudication of those matters which were not and could not properly be relied upon and determined in the previous action; but is conclusive where the requisite jurisdiction exists, of all those matters which it clearly adjudicates." Maxfield v. Burtt, 121 Cal.App.2d 102, 114, 262 P.2d 580, 588. There was no issue of fraud presented to the court in the instant proceeding. No such issue could have been tried herein and the order could not operate as res judicata in that respect.

It appears that all interests in the property are worth $19,500, that a one-fourth interest would be worth no more than $4,875, and as a bid of more than $6,000 must be received at the sale, appellant, the judgment creditor, has no real possibility of realizing anything upon his judgment if the sale is limited to a one-fourth interest, whereas, if the deed be proved to be fraudulent he may be able to reach a one-half interest presumably worth $9,750.

[16, 17] It is true, as appellant now contends, that a fraudulent conveyance is void, not voidable, as to creditors. Section 3439.09, Civil Code, provides that in case of a fraudulent conveyance the creditor may, except as to an innocent purchaser or encumbrancer "(2) Disregard the conveyance and attach or levy execution upon the property conveyed." The Supreme Court in Strong v. Strong, 22 Cal.2d 540, 546, 140 P.2d 386, 389, said: "Such conveyances are void as against creditors, under the express terms of Civil Code, section 3439, et seq., in effect when the Uniform Fraudulent Conveyance Act was adopted in 1939, and of Civil Code, section 3439.09, in effect thereafter. A creditor may levy execution on the property as if there had been no conveyance." As purchaser at his execution

sale the judgment creditor acquires the legal title, not merely a right to set aside a voidable transfer. Bull v. Ford, 66 Cal. 176, 177, 4 P. 1175; Scholle v. Finnell, 166 Cal. 546, 551, 137 P. 241; Gerry v. Northrup, 102 Cal.App.2d 449, 452, 227 P.2d 857; Allen v. McGee, 54 Cal.App.2d 476, 483, 129 P.2d 143; Knapp v. Elliott, 81 Cal.App.2d 667, 675, 184 P.2d 934; Puccetti v. Girola, 63 Cal.App.2d 240, 248, 146 P.2d 714; First Nat. Bank of L. A. v. Maxwell, 123 Cal. 360, 371, 55 P. 980; 23 Cal.Jur.2d § 93, p. 539; 19 Cal.Jur.2d § 188, p. 619; 37 C.J.S., Fraudulent Conveyances, § 308, pp. 1139–1140. Any other purchaser at such sale acquires the same legal title, Bull v. Ford, supra, 66 Cal. 176, 177, 4 P. 1175; First Nat. Bank of L. A. v. Maxwell, supra, 123 Cal. 360, 371, 55 P. 980; otherwise the rule designed to fully protect the creditor would be nullified in practical effect. For such purposes a tort claimant is an existing creditor, though his claim has not been reduced to judgment, Allee v. Shay, 92 Cal. App. 749, 759, 268 P. 962.

[18] While it is true that the code prescribes no specific procedure to be followed upon the sale where an undivided interest is involved, and § 187, Code of Civil Procedure, becomes applicable,[2] we have concluded, upon reconsideration of this case, that it is error in dealing with the sale of an undivided interest, especially where a fraudulent transfer of the debtor's property is claimed, to define the extent of the debtor's undivided interest in the order of sale or to specify the exact amount of undivided interest to be sold. While the order is not res judicata in that respect (authorities supra), it nevertheless creates a practical limitation upon the bidding, and a purchaser who would follow the sale with a quiet title action is thereby confronted with the difficulty of showing that the order defines only the record title of the debtor and establishing the absence of res judicata as well as the fact of fraud in the debtor's conveyance. This hurdle should not be interposed between the judgment creditor and his ultimate realization upon his execution; to do so does not amount to an exercise of a proper discretion.

[19] Paragraph (2) of the findings of fact in the order now on appeal is modified to read: "(2) The said defendant and his wife, Esther H. Duke, are co-owners of said property; defendant owns an undivided interest, the extent of which is not before the court for determination."

Paragraph (2) of the conclusions of law is modified to read as follows: "(2) That the Plaintiff is entitled to an Order of this Court directing the sale of the Defendant's interest only (not the interest of his wife) in said property under the execution issued out of said Judgment, provided that at said sale no bid shall be received for defendant's said undivided interest in said property unless it exceeds the homestead exemption of $6,000 and said lien, and, if said sale is made, the proceeds shall be applied as provided in Section 1256 of the Civil Code of the State of California."

Paragraph III of the order is modified by striking therefrom the words and figures, "one-fourth (¼)".

As thus modified the order is affirmed.

MOORE, P. J., and FOX, J., concur.

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[2] § 187. "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

140 Cal.App.2d 84

Elmer F. REMMER and Helen L. Remmer,
Plaintiffs and Appellants,
v.
GLENS FALLS INDEMNITY COMPANY,
a Corporation, Defendant and
Respondent.
Civ. 16532.

District Court of Appeal, First District,
Division 1, California.
March 21, 1956.

Insureds brought action against insurer to require insurer to indemnify insureds. The Superior Court of Contra Costa County, Hugh H. Donovan, J., entered judgment for insurer, and the insureds appealed. The District Court of Appeal, Peters, P. J., held that where comprehensive personal liability policy providing that it applied only to "occurrences" during policy period, was issued to insureds on October 26, 1945 for three-year period, and in 1947 insureds graded and filled their realty, and policy was cancelled on January 15, 1948, and on January 21, 1952, large quantities of earth and rock slid from fill on insureds' realty onto realty of adjoining landowners, and they brought action against insureds for maintenance and existence of a nuisance and recovered judgment, insurer was not required to indemnify insureds, since "occurrence" within meaning of policy was on January 21, 1952 when policy was not in effect and not in 1947.

Judgment affirmed.

1. Insurance 🔑**177**

Generally, time of "occurrence" of an accident within meaning of an indemnity policy is not the time the wrongful act was committed, but time when complaining party was actually damaged.

See publication Words and Phrases, for other judicial constructions and definitions of "Occurrence".

2. Insurance 🔑**177**

Where comprehensive personal liability policy providing that it applied only to "occurrences" during policy period, was issued to insureds on October 26, 1945 for three-year period, and in 1947 insureds graded and filled their realty, and policy was cancelled on January 15, 1948, and on January 21, 1952 large quantities of earth and rock slid from fill on insureds' realty onto realty of adjoining landowners, and they brought action against insureds for maintenance and existence of a nuisance and recovered judgment, insurer was not required to indemnify insureds, since "occurrence" within meaning of policy was on January 21, 1952 when policy was not in effect and not in 1947.

3. Insurance 🔑**514½**

Under provision of comprehensive personal liability policy requiring insurer to defend insured in any action alleging an injury under the policy, even if the action is groundless, false, or fraudulent, insurer has duty to defend insured when sued in any action where facts alleged in complaint support a recovery for an occurrence covered by the policy, regardless of fact that insurer has knowledge that injury is not in fact covered, but insurer is not required to defend an action against insured when complaint shows on its face that injury complained of is not only not covered by, but is excluded from, the policy.

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Spurgeon Avakian, Oakland, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiffs filed this action against the Glens Falls Indemnity Company claiming that they had incurred a liability for which the company was required to indemnify them under the terms of a policy issued by defendant. The trial court found that the damages involved occurred after the policy was cancelled, and for that reason were not covered by the policy. From a judgment for the defendant, plaintiffs appeal.

Plaintiffs own a lot in Contra Costa County. A Mr. and Mrs. Morris own a lot contiguous to that of plaintiffs on the downhill side of plaintiffs' lot. During the year 1947 the plaintiffs graded and filled portions of their lot. On January 21, 1952, large quantities of earth and rock slid from the fill on plaintiffs' property onto the property of the Morrises. The plaintiffs became obligated to reimburse the Morrises for part of that damage. The question presented is whether that loss was covered by the policy in question.

That policy, a comprehensive personal liability policy, was issued to the plaintiffs on October 26, 1945, and was for a three-year-period. The policy was cancelled on January 15, 1948, and has never been renewed. Thus, the policy was in effect when plaintiffs, in 1947, graded and filled their property, but was not in effect in January of 1952 when the slide occurred that damaged the property of the Morrises. The policy contained the following agreements on the part of defendant:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law * * * for damages because of injury to or destruction of property, including the loss of use thereof."

It also contained the agreement of defendant, insofar as "such insurance as is afforded by the other terms of this policy," to

> "(a) defend in his name and behalf any suit against the insured alleging such injury, * * * or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; * * *
>
> "(b) pay * * * all costs taxed against the insured in any such suit, * * * all interest accruing after entry of judgment * * *"

Another provision of the policy was to the effect that "This policy applies only to occurrences during the policy period." The term "occurrence" is defined in the policy as "an accident, or a continuous or repeated exposure to conditions, which results in injury during the policy period, provided the injury is accidentally caused. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence."

After the slide had occurred in January of 1952, the Morrises, on April 18, 1952, brought suit against plaintiffs. Plaintiffs notified defendant of the filing of this suit, and urged that, under the policy, they were entitled to have defendant undertake plaintiffs' defense of that suit. The defendant refused such defense on the ground that the claims made by the Morrises were not based on any "occurrence" happening while the policy was in effect.

The complaint in Morris v. Remmer alleged that the Remmers:

> "On a date unknown * * * but prior to the 21st day of January, 1952, * * * negligently and carelessly caused the natural contours of Lot 8 to be altered and changed, * * * and negligently and carelessly placed * * * [many hundreds of tons of earth and rock] on the hillside at a point on or near where the above described natural canyon or gully discharged from Lot 8 to Lot 9, without securing the same, and without taking reasonable precautions, or any precautions or steps to prevent its movement or encroachment onto or upon Lots 9 or 60, with the result that said canyon or gully became filled and blocked, and the aforesaid mass of earth and rocks became perilously poised on the hillside above both Lots 9 and 60; ever since the date upon which said changes and alterations were so negligently and carelessly caused by defendants, as aforesaid, the defendants * * * continued to negligently and carelessly maintain the said Lot 8 in the manner and condition alleged.
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> "On or about the 21st day of January, 1952, * * * an unknown number of tons of rock and earth slid from the fill caused by defendants, * * * and then and there followed down * * * the above mentioned natural canyon or gully, through Lot 9, and onto and over Lot 60, * * * thereby damaging and injuring plaintiffs' * * * [property]; on the date hereof said fill has not yet stopped moving, but remains in a continuous process of sliding * * * on to plaintiffs' real property * * *"

In a second count the Morrises averred a cause of action for trespass, while a third cause of action, characterizing the fill as a nuisance, was for an injunction. Both the second and third causes of action incorporated in substance the above quoted allegations.

In the Morris v. Remmer case the trial court found that:

> "During the early months of the year 1947 the defendants [plaintiffs herein], * * * caused the contours of the Remmer property to be altered in the manner and with the result set forth in * * * [the] complaint, excepting, only, that the Court finds that said work and alterations were not executed in a negligent manner;
>
> "Defendants * * * [the Remmers] continued to maintain their real property in the condition above described, from the early months of the year 1947, throughout the balance of the period ending January 21, 1952, culminating in a slide which occurred on or about said late; and that except for the portion of fill which then gave away and slid * * * have continued to maintain the same thereafter; and * * * [that such] is in danger of further movement and in danger of further engulfing * * * [the Morris] property * * *.
>
> "By the alteration of their said property * * *, defendants * * * [the Remmers] created on their said property a condition which, continuously during all the time since then, has constituted and now does constitute a nuisance in that it has threatened and continues to threaten injury to plaintiffs' said property."

In the Morris v. Remmer action the Morrises were not entitled to recover from the Remmers for the physical damages caused to their property by the slide, which amounted to $5,000, because the Morrises had received that sum from the contractor who had done the grading and filling of plaintiffs' property in return for a covenant not to sue the contractor, and were, of course, not entitled to a double recovery. Therefore, since the cost of abating the nuisance exceeded the diminution in the value of the Morrises' property caused by the continuance of the nuisance, the court, in Morris v. Remmer, limited the Morrises to the diminution in value of their property caused by the continuance of the nuisance, the amount being fixed at $2,000. Thereupon, the Remmers brought this present action against the insurance company to recover the $2,000, plus interest, awarded to the Morrises, $1,600 expended by them as attorney's fee, and $173.09 costs, all expended by them in defending the action by the Morrises. They also pray for a reasonable fee for prosecuting the instant action.

In the instant case the court found the facts substantially as summarized above and concluded:

> "The complaint and judgment in said action of Morris v. Remmer were based upon an occurrence which took place at a time not within the period of the said policy of insurance which had been issued to * * * [the Remmers] on the 26th day of October, 1945 and which had been cancelled on the 15th day of January, 1948."

In a memorandum opinion the trial judge, the Hon. Hugh Donovan, spelled out his theory in the following language:

> "The damage complained of was the present threat to, and depreciation of, the Morris land caused by the current maintenance of the balance of the rocks. This damage occurred after the policy was cancelled in 1948."

From the judgment that they were entitled to nothing as against defendant, plaintiffs appeal on the judgment roll.

[1] There is no merit in the appeal. The general rule is that the time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged. Farmers Cooperative Soc. No. 1 v. Maryland Cas. Co., Tex.Civ.App., 135 S.W.2d 1033; Tulare County Power Co. v. Pacific Surety Co., 43 Cal.App. 315, 185 P. 399; Berger Bros. Electric Motors v. New Amsterdam Cas. Co., 293 N.Y. 523, 58 N.E.2d 717; Export S. S. Corporation v.

American Ins. Co., 2 Cir., 106 F.2d 9; Protex-A-Kar Co. v. Hartford Acc., etc., Co., 102 Cal.App.2d 408, 227 P.2d 509; Aetna Life Ins. Co. of Hartford, Conn. v. Maxwell, 4 Cir., 89 F.2d 988. This general rule is adopted by the insurance policy here involved because it defines an "occurrence" insured against as "an accident, or a continuous or repeated exposure to conditions, which results in injury during the policy period."

[2] Appellants' argument is that the action in Morris v. Remmer was for damages caused by a nuisance created in 1947, and, therefore, the "occurrence" was created during the policy period. It is true that the findings of fact in Morris v. Remmer declare that the nuisance was created by the fill of 1947, and was a continuing nuisance, and that it was by reason of this nuisance that the Morrises' property diminished in value. But this is not a complete or proper description of what was involved in the case of Morris v. Remmer. The pleadings in that action, partially quoted above, demonstrate that the damage, injury and cause of action there alleged were for the maintenance and continuance of a nuisance at the time the action was filed, April of 1952. The action of Morris v. Remmer was for the maintenance and existence of that nuisance. That was the nuisance that constituted the "occurrence" for which damages were allowed. This "occurrence" was in 1952, and therefore not within the coverage.

The general rule is not changed by reason of the fact that the case of Morris v. Remmer was for a nuisance rather than damages for injury to the property. Of course, the creation and maintenance of a nuisance is a continuing injury for which a new cause of action continuously arises. Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833; Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625. Here, in Morris v. Remmer, the court found that the nuisance was a continuing one. But to determine the question of the liability of respondent insurance company we must determine when the cause of action in the case of Morris v. Remmer accrued. It is because of the judgment against the Remmers in that case that this present action is brought. We are not interested in ascertaining what theory the Morrises could have sued upon, but on what theory they did sue upon. This is to be determined from the pleadings. Clearly, that complaint, without ambiguity, was for damages for the present nuisance, currently maintained and currently threatening injury, and for its abatement. The cause of action pleaded was necessarily, therefore, not for an "occurrence" happening within the time limits of the policy. The fact that the Morrises were suing for the present maintenance of a present nuisance is demonstrated not only by the allegations of the complaint, but also by the fact that in 1952 the Morrises could not have successfully sued for damages for the original creation of the nuisance in 1947, because such cause of action would have been barred by either the three or four-year statute of limitations. §§ 338, subd. 2, and 343, Code Civ.Proc.

It follows that, although the nuisance was an injury when created in 1947 for which the Remmers were liable, and although this injury occurred during the effective term of the policy, no action was ever brought for that injury. The complaint brought against appellants by the Morrises was for a presently (1952) existing damage which did not occur during the effective date of the policy. As already pointed out, it is not the happening of the wrongful act that is covered by the policy, but the damage flowing therefrom. To be covered by the policy the damage sued for must have occurred during the policy. The damage sued for in Morris v. Remmer did not so occur. Therefore, the policy does not cover the damage.

[3] Appellants also contend that, regardless of whether the policy covered the damage involved, respondent was obligated by the policy to undertake the defense of the appellants in the action brought against them by the Morrises. The defense clause of the policy has already been quoted. It required the respondent to defend the insured in any action alleging an injury under the policy "even if such suit is groundless, false or fraudulent." Under such a clause it is the duty of the insurer to defend the

insured when sued in any action where the facts alleged in the complaint support a recovery for an "occurrence" covered by the policy, regardless of the fact that the insurer has knowledge that the injury is not in fact covered. Lee v. Aetna Casualty & Surety Co., 2 Cir., 178 F.2d 750; Employers Mut. Liability Ins. Co. of Wis. v. Hendrix, 4 Cir., 199 F.2d 53. But it is equally true that the insurer is not required to defend an action against the insured when the complaint in that action shows on its face that the injury complained of is not only not covered by, but is excluded from, the policy. Farmers Cooperative Soc. No. 1 v. Maryland Cas. Co., Tex.Civ. App., 135 S.W.2d 1033. That is the present case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

140 Cal.App.2d 489

Marla Esther GARTEN, Plaintiff and Respondent,

v.

Maurice GARTEN, Defendant and Appellant.

Civ. 21383.

District Court of Appeal, Second District, Division 2, California.

April 4, 1956.

Wife's divorce action. The Superior Court, Los Angeles County, Thurmond Clarke, J., rendered judgment for wife, and husband appealed. The District Court of Appeal, Fox, J., held that where husband owned house and lot as separate property, and an encumbrance was placed thereon after marriage and interest and some principal allegedly was paid with community funds, community had an interest only to extent that community funds found their way into property.

Judgment affirmed in part and reversed in part with directions.

1. Divorce 🔑130

Evidence in wife's divorce action supported grant of divorce to wife on ground of cruelty.

2. Divorce 🔑111

In wife's divorce action, evidence of husband's acts after suit was filed were admissible for corroborative purposes.

3. Husband and Wife 🔑248½

As a general rule, character of property as separate or community is fixed as of time it is acquired, and this character continues until it is changed in some manner recognized by law, as by agreement of parties.

4. Husband and Wife 🔑248½

Realty which husband acquired prior to marriage was separate property, and its character was not changed by reason of marriage, or by its mere use in marital relationship. West's Ann.Civ.Code, § 163.

5. Husband and Wife 🔑248½

Where husband owned lot prior to marriage, and home thereon was substantially completed at date of marriage, house and lot were husband's separate property. West's Ann.Civ.Code, § 163.

6. Husband and Wife 🔑254

There is both a community and a separate interest in property purchased with separate and community funds where each contribution is clearly ascertainable.

7. Husband and Wife 🔑254

Where husband owned house and lot as separate property, and an encumbrance was placed thereon after marriage and interest and some principal allegedly was paid with community funds, community had an interest only to extent that community funds found their way into property.

8. Husband and Wife 🔑248½, 254

Where payments are made with community funds on realty owned by one spouse after marriage, community has a pro tanto community property interest in ratio that payments on purchase price with community funds bear to payments made with separate funds, and this rule applies equally where payments are made on an encumbrance placed on property acquired by one party prior to marriage.

9. Husband and Wife 🔑259

Wife's earnings are a community asset.

10. Husband and Wife 🔑259

A husband's earnings from his personal efforts in managing and operating his own business are community funds.

11. Husband and Wife 🔑259

A spouse's income from the operation of his own business should be first allocated to living expenses of parties in absence of a contrary arrangement, for purpose of determining whether spouse's contributions to business were from community or separate property.

12. Husband and Wife 🔑262(1)

It is presumed that personalty acquired during coverture is community property. West's Ann.Civ.Code, § 164.

13. Husband and Wife 🔑264

Evidence in wife's divorce action supported finding that personalty acquired during coverture was community property.

14. Divorce 🔑188, 223

Question of awards of attorneys' fees and court costs in a divorce action is addressed to sound discretion of trial court.

15. Divorce 🔑189, 223

Trial court in divorce action did not abuse discretion in requiring husband to pay court costs and attorneys' fees.

16. Divorce 🔑253

In divorce action, specific finding that a business was husband's separate property controlled general finding that husband's allegations as to property rights were untrue.

17. Divorce 🔑249(3)

Trial court in a divorce action should not assign separate property of one spouse to the other, but when issue has been made, court may determine whether property is separate or community, and quiet title to rightful owner.

18. Divorce 🔑254

Where pleadings in divorce action put in issue the status of a business as community property or husband's separate property, and trial court found that it was husband's separate property, husband was entitled to have judgment quieting title to business.

19. Divorce 🔑150

In divorce action, general finding that all allegations of the party's pleading were untrue was a sufficient finding.

20. Divorce 🔑109

In divorce action, defendant-husband who alleged cruelty on part of wife had burden of proving allegations of cross-complaint.

21. Divorce 🔑130

Evidence in divorce action supported finding that defendant-husband's allegations of cruelty were untrue.

22. Appeal and Error 🔑1011(1)

Trial court's resolution of sharply conflicting evidence was controlling on appeal.

23. Divorce 🔑109

Defendant-husband who failed, in divorce action, to establish allegations of his cross-complaint was not entitled to divorce.

Oral R. Finch, Los Angeles, for appellant.

Samuel J. Silverman and Leon I. Gubin, Los Angeles, for respondent.

FOX, Justice.

In this divorce action defendant-husband appeals from the judgment. His principal contentions are that the evidence is insufficient (1) to justify granting the plaintiff a divorce, (2) to support the finding that the family home is community property, and (3) to support certain other findings.

The parties were married in December, 1947, and separated in September, 1953. At this latter date, plaintiff was 28 years of age and defendant was in his late 50's. There are no children. Plaintiff's complaint is based on general allegations of cruelty. Defendant denied these and by amended cross-complaint made specific charges of cruelty against plaintiff. The trial court found plaintiff's allegation to be true and defendant's untrue.

The testimony shows that defendant frequently swore at plaintiff and called her a vile and vulgar name upon several occasions; accused her of being "just plain lazy" when she was ill with a high temperature; called her "a damn fool," and said her relations were "all a bunch of fools." He slapped her, and on one occasion knocked her down. She sought refuge at a neighbor's home. He told her he was going "to cut up" her face so that no one would look at her. They had frequent arguments and defendant would not speak to her for three or four days at a time. Additional evidence of defendant's misbehavior need not be recited. A neighbor, Mrs. Nelson, corroborated many of these instances and further testified that plaintiff was nervous and "terribly afraid." Plaintiff's physical condition became very run down and her weight dropped from 120 to 95 pounds. Such evidence amply supports the finding that defendant was guilty of extreme cruelty and that plaintiff was entitled to a divorce on that ground.

[1] Defendant seeks to discount the value of Mrs. Nelson's corroborating testimony on the theory that there was collusion between her and plaintiff. This is simply an argument on the credibility of the witness and the weight that should be given to her testimony. These were matters for the trial court's consideration.

[2] Defendant complained of the admission in evidence of testimony relating to asserted acts of cruelty that occurred after the suit was filed. His position is not well taken. This evidence was admissible for corroborative purposes. Jackson v. Jackson, Okl., 205 P.2d 297, 300; Williamson v. Williamson, 164 La. 144, 113 So. 796, 798.

Was the Family Home Community Property?

[3] As a general rule, the character of property as separate or community is fixed as of the time it is acquired. The character so fixed continues until it is changed in some manner recognized by law, as by agreement of the parties. (10 Cal.Jur.2d sec. 12, p. 676.)

[4, 5] The lot on which the home was built was acquired by defendant some four years prior to his marriage. It was, of course, his separate property, Civ.Code, § 163, and its character as such was not changed by reason of the marriage, nor by its mere use in the marital relationship. Kenney v. Kenney, 128 Cal.App.2d 128, 135, 274 P.2d 951. Defendant started the construction of the house in May or June, 1947, prior to his marriage to plaintiff in the following December. When they married the building was completed "except for some small items" and "most of it" was paid for. The money to pay the balance came from defendant's separate property according to his testimony, and not from the recording business which he had established some two or three months prior to the marriage. Title to the property stood of record in the name of defendant alone. Since the house and lot were acquired prior to the marriage, it was defendant's separate property, Holmes v. Grange, etc., Fire Ins. Ass'n, 102 Cal.App.2d 911, 917, 228 P.2d 889; Palen v. Palen, 28 Cal.App.2d 602, 604, 83 P.2d 36, in the absence of a satisfactory showing that it had been transmuted into community property by some agreement or understanding between the parties, or in some other manner recognized by law. However, there is no suggestion either in the pleadings or in the evidence of any transmutation of this property by agreement.

[6–8] Plaintiff seeks to justify the trial court's finding that the home was community property on the theory that community funds and defendant's separate funds were commingled and that community funds thus found their way into this property. She particularly relies on the fact that an encumbrance was placed on the property and that interest and some small amount on principal had been paid. She either misconceives the rule or its application here. The commingling rule does not apply where, as here, the husband's separate property has not lost its individual identity but can be clearly segregated and identified. Cline v. Cline, 4 Cal.App.2d 626, 629, 41 P.2d 588; Scott v. Remley, 119 Cal.App. 384, 387, 6 P.2d 536; Berry v. Berry, 117 Cal.

App.2d 624, 630, 631, 256 P.2d 646. As said in Faust v. Faust, 91 Cal.App.2d 304, 309, 204 P.2d 906, 909: "There is both a community and a separate interest in property purchased with separate and community funds where each contribution is clearly ascertainable." In the case at bar the lot, with a substantially completed house thereon, belonged to defendant at the time of the marriage, and hence was clearly identifiable as his separate property. It may be, however, that some community funds went into the completion of the house or were paid on the mortgage. It is only to this extent that the community has an interest in such separate property. Where payments are made with community funds on real property owned by one spouse before marriage "the rule developed through the decisions in California gives to the community a *pro tanto* community property interest in such property in the ratio that the payments on the purchase price with community funds bear to the payments made with separate funds." Forbes v. Forbes, 118 Cal.App.2d 324, 325, 257 P.2d 721, 722; Giacomazzi v. Rowe, 109 Cal.App.2d 498, 501, 240 P.2d 1020. The rule would, of course, equally apply where the payments were made on an encumbrance placed on property acquired by one of the parties prior to marriage. Giacomazzi v. Rowe, supra. Under this rule, it follows that any payment of community funds either toward the completion of the house or on the encumbrance would not have the effect of converting the property into community property but rather would give the community a *pro tanto* interest in the property in the ratio that the payments with community funds bear to the value of the property. Since the land was acquired by defendant long prior to marriage and the house was substantially completed before that event, plaintiff cannot sustain the challenged finding on her "commingling" theory. The only source from which any community funds could have been realized was through the operation of Tri-Color Recording Company* that defendant organized a few months prior to the marriage, which the court found to be defendant's separate property and from which decision plaintiff has not appealed.

[9] In February, 1948, plaintiff began taking care of the books of this business and writing the letters. She continued these duties for some time but it is conceded she was not paid any salary. Her earnings were, of course, a community asset.

[10, 11] Although the recording business was defendant's separate property, any earnings of defendant from his personal efforts in managing and operating this business in the nature of salary, wages, or the equivalent thereof, were community property. Cozzi v. Cozzi, 81 Cal.App.2d 229, 232, 183 P.2d 739; Logan v. Forster, 114 Cal.App.2d 587, 601, 250 P.2d 730. Defendant testified he "never earned anything" in the business; that he kept putting money into it from his separate funds, to the extent of $20,000. If there were, however, earnings of a community character from defendant's operation of this business they would first be allocated to the living expenses of the parties in the absence of a contrary arrangement for "the law presumes that money used in the maintenance of the family is drawn from community funds before there is encroachment on separate property." Estate of Tompkins, 123 Cal.App. 670, 675, 11 P.2d 886, 888, Estate of Cudworth, 133 Cal. 462, 468, 65 P. 1041; Logan v. Forster, supra, 114 Cal.App.2d at pages 601, 602, 250 P.2d 730.

On a retrial it will be necessary to ascertain what interest, if any, the community had in the property in question.

[12, 13] Defendant also challenges the sufficiency of the evidence to sustain the finding that the furniture and furnishings of the house were community property. This property was purchased by the parties at an auction after their marriage. Since it was acquired during coverture, the presumption is that it was community property. Civ.Code, § 164; Fountain v. Maxim, 210 Cal. 48, 50–51, 290 P. 576. There was some conflict in the evidence on this point. The trial judge resolved that conflict in

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* This was a fictitious name that was later changed to Aguila Recording Company.

favor of plaintiff. The presumption furnishes adequate support for the finding. McAlvay v. Consumers' Salt Co., 112 Cal. App. 383, 391, 297 P. 135.

[14, 15] There is no merit to defendant's argument that the court erred in allowing plaintiff's attorneys' fees and court costs. It appears that she had no income-producing property or assets and was unemployed. Defendant was a man of considerable means. The question of such awards is addressed to the sound discretion of the trial court. Weil v. Weil, 37 Cal.2d 770, 790, 236 P.2d 159. Under the circumstances here shown, it was clearly not an abuse of discretion to require defendant to pay court costs and attorneys' fees in the amount of $700.00. Sigesmund v. Sigesmund, 115 Cal.App.2d 628, 632–633, 252 P.2d 713.

[16] Defendant asserts there is a conflict in the findings as to the character of the recording business. In paragraph IV of the cross-complaint, defendant alleged all of the property mentioned in plaintiff's complaint except the automobile was his sole and separate property. Plaintiff had alleged the recording company was community property. The court made an omnibus finding that the allegations of paragraphs IV and V of the cross-complaint are not true. The court, however, made a later finding—though misplaced as a conclusion of law, Estate of Cummins, 130 Cal. App.2d 821, 831, 280 P.2d 128, that the business known as Tri-Color Recording Company is the separate property of defendant. This specific finding controls for the "rule is settled that where the court in addition to a general finding makes a specific finding as to a particular fact, the latter controls in the case of an inconsistency." Howard v. Howard, 128 Cal. App.2d 180, 186, 275 P.2d 88, 92; Staub v. Muller, 7 Cal.2d 221, 226, 60 P.2d 283.

[17, 18] Although the pleadings put in issue the question as to whether the recording business was community or separate property, and the court found it was defendant's sole and separate property, no mention is made of it in the judgment. "While the court in a divorce action should not 'assign the separate property of one of the spouses to the other', Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325, 326, yet when the issue has been made the court may determine whether the property is separate or community and quiet title in the rightful owner." Huber v. Huber, 27 Cal.2d 784, 793, 167 P.2d 708, 714. Since the pleadings put in issue the status of the recording business and the court found it was defendant's separate property, he was entitled to have the judgment quiet his title thereto. Huber v. Huber, supra.

[19] Defendant objects that the court made an omnibus finding that all of his allegations in the cross-complaint charging cruelty were untrue. He argues that he was entitled to more specific findings. The rule is, however, that a general finding that all of the allegations of a pleading are untrue is sufficient. Petersen v. Murphy, 59 Cal.App.2d 528, 533, 139 P.2d 49; Stevens v. Stevens, 215 Cal. 702, 705, 12 P.2d 432.

[20–22] Defendant contends that the finding that his allegations of cruelty are untrue is not supported by the evidence. The answer to this contention is that the burden of proof was on him with respect to the allegations of his cross-complaint and that in the view of the trial judge he did not sustain that burden. In arriving at that conclusion the trial judge had the responsibility of evaluating the credibility of the witnesses and determining the weight to which their testimony was entitled. There was a sharp conflict in the evidence which the trial judge was required to resolve and his resolution thereof is controlling on appeal.

[23] Relying on De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598, defendant also argues that he too was entitled to a divorce. But this cannot be so since he failed to establish his allegations of cruelty.

That portion of the judgment which awards the family home, located at 607 De LaFuente, Monterey Park, County of Los Angeles, to plaintiff on the ground that it is community property is reversed, with directions to retry the issue as to the extent of the interest, if any, that the community has therein and to enter judgment accordingly. The trial court is directed to include in the judgment a provision quieting title to the recording business in defendant. In other respects the judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

140 Cal.App.2d 349

Blucher Carl MASON, Plaintiff and Respondent,

v.

Robert Wallace HART and L. E. Shafer, Defendants and Appellants.

Civ. 5315.

District Court of Appeal, Fourth District, California.

March 28, 1956.

Action by driver of overtaken panel truck against owner and operator of overtaking tractor for injuries to person and property sustained in collision between the two vehicles. The Superior Court, Kern County, Norman F. Main, J., entered judgment upon verdict for plaintiff and denied defendants' motion for new trial, and defendants appealed. The District Court of Appeal, Conley, J. pro tem., held that evidence, from which it could be legitimately concluded that driver had negligently stopped his panel truck on highway and was unaware of impending danger from overtaking tractor, and, therefore, unable to escape, that operator saw the dangerous situation when he was 500 to 250 feet from the truck and was traveling not more than 42 miles per hour on flat highway on sunny day, and that, in exercise of ordinary care, such operator knew, or should have known, that driver could not escape from the perilous situation, and that operator had last clear chance to avoid accident by exercising ordinary care and his failure to so act proximately caused the collision, was sufficient to warrant giving of instruction on last clear chance doctrine.

Judgment affirmed.

1. Trial ⇨203(1)

Party is entitled to propose an instruction in conformity with any theory which finds substantial evidentiary support at the trial.

2. Appeal and Error ⇨928(1)

In determining on appeal whether giving of instruction based on doctrine of last clear chance was error, the Court of Appeal would have to accept the evidence most favorable to contention that doctrine was applicable, and party seeking such instruction would be entitled thereto if evidence so viewed could establish elements of the doctrine.

3. Appeal and Error ⇨928(1)

In determining whether record justified giving of last clear chance instruction, the District Court of Appeal did not have to rely wholly on direct evidence but could consider legitimate inferences.

4. Automobiles ⇨246(58)

Evidence, from which it could be legitimately concluded that plaintiff had negligently stopped his panel truck on highway and was unaware of impending danger from defendants' overtaking tractor, and, therefore, unable to escape, that defendant tractor operator saw the dangerous situation when he was 500 and 250 feet from truck and was traveling not more than 42 miles per hour on flat highway on sunny day, and that, in exercise of ordinary care, operator knew, or should have known, that plaintiff could not escape from the perilous situation, and that operator had last clear chance to avoid accident by exercising ordinary care and his failure to so act proximately caused the collision, was sufficient to warrant giving of instruction on last clear chance doctrine.

5. Negligence ⇨83.7, 83.9

To invoke the last clear chance doctrine, there must be knowledge by defendant of plaintiffs' perilous situation, but once such knowledge exists, defendant is under duty to react as a reasonably prudent man in taking the ameliorative measures required by due care.

6. Negligence ⟹83.5, 83.7, 83.8

Doctrine of last clear chance may be invoked where plaintiff, by his own negligence, got himself into position of danger from which it was physically impossible for him to escape through exercise of ordinary care or of which he was totally unaware, and defendant had knowledge that plaintiff was in such situation and must have known, or should have known in exercise of ordinary care, that plaintiff could not escape, was unaware of the impending danger, or was unable to escape through exercise of ordinary care, and defendant had clear opportunity to avoid accident by exercise of ordinary care but failed to do so and, by negligent conduct, proximately caused the accident.

◆

Baker, Palmer, Wall & Raymond and Oran Palmer, Bakersfield, for appellants.

Oscar F. Catalano, Bakersfield, Herbert Chamberlain, San Francisco, for respondent.

CONLEY, Justice pro tem.

The plaintiff, Blucher Carl Mason, sued Robert Wallace Hart and his employer L. E. Shafer for personal injuries and property damage caused by a rear-end collision between plaintiff's car and a GMC tractor driven by the defendant. Judgment on the jury's verdict was entered in favor of plaintiff for $13,157.59. His motion for a new trial having been denied, defendant appealed.

Appellant urges only one contention on the appeal—that the trial court erred in giving an instruction based on the doctrine of last clear chance. This claim of error is two-fold: he argues first, that upon the record no instruction on the doctrine should have been given; and secondly, that in any event the form of the instruction is erroneous.

As not infrequently happens in automobile accident cases, the plaintiff's testimony as to the basic facts differs sharply from the defendant's. Plaintiff testified that he was driving south in the more westerly of the southbound lanes of Highway 99 at approximately 35 M.P.H. when without warning his car was struck violently from the rear by the defendant's tractor. If this version of the collision be accepted the last clear chance theory would, of course, not be applicable as plaintiff would be entirely blameless.

[1] But while respondent naturally relies upon his own account of the collision, he correctly maintains that he was entitled to propose an instruction in conformity with any theory which found substantial evidentiary support at the trial, Gardini v. Arakelian, 18 Cal.App.2d 424, 430; Wheeler v. Buerkle, 14 Cal.App.2d 368, 373, 58 P.2d 230, and that if the defendant produced substantial evidence which would establish the necessary elements of the last clear chance doctrine the instruction was properly given.

[2] In pursuing this inquiry, we shall apply the well recognized rule that on appeal we must accept the evidence most favorable to the contention that the doctrine is applicable in reviewing the record, as "plaintiff is entitled to an instruction thereon if the evidence so viewed could establish the elements of the doctrine." Selinsky v. Olsen, 38 Cal.2d 102, 103, 237 P.2d 645, 646. See, also, Daniels v. City and County of San Francisco, 40 Cal.2d 614, 617, 255 P.2d 785; Bonebrake v. McCormick, 35 Cal.2d 16, 215 P.2d 728; Alberding v. Pritchard, 97 Cal.App.2d 443, 217 P.2d 1012.

The defendant, Hart, testified that he left Modesto going south on Highway 99 between 10 P.M. and 10:30 P.M. on April 27, 1954, driving an unloaded GMC tractor for his employer, the codefendant Shafer. He slept for awhile at the side of the road in Tulare County, and in the early morning proceeded in a southerly direction in the outside lane of the two southbound lanes of Highway 99. When about 500 feet from the point of collision there were no cars ahead of him going in the same direction. The road, as shown by the photograph in evidence, is wide, straight and level, and it was daylight; the jury had the right to infer that visibility would be possible for several times 500 feet. When he first saw plaintiff's panel truck it was stopped on the highway, principally in the outside lane but with its left wheels over the white line and six or seven inches in the inside lane; the defendant testified that when he first saw plaintiff's car it was 250 to 280 feet in front of him. Mr. Hart was far from consistent in his testimony, stating at one time that he did not know that the panel truck was at a standstill until he was only approximately 100 feet away from it; he put on his brakes he says, at 100 feet (50 feet according to his deposition), attempted to turn to the left of the stalled panel truck (or to the right as he said at one time). When 500 feet from the point of collision, Hart estimated his speed at from 40 to 42 miles per hour, but he did not know how fast he was going at 100 feet. It was daylight when the collision occurred; the sun was shining and the highway was a little damp from a mist. There were no other vehicles present on the highway prior to or at the time of the accident. Hart had air brakes on his tractor, which he never applied with full force. The tail-light on the Mason car was lighted, according to Hart.

[3] In pursuing our inquiry as to whether the record justified the giving of the instruction, it is not necessary to rely wholly on direct evidence, as legitimate inferences may properly be considered. For example, the jury was not bound to accept the defendant's statement that he did not see the plaintiff's car until 250 to 280 feet away, Pire v. Gladding McBean & Co., 55 Cal.App.2d 108, 111, 112, 130 P.2d 143, 981; Handley v. Lombardi, 122 Cal.App. 22, 28, 9 P.2d 867, for as was said, of basically similar facts in Selinsky v. Olsen, 38 Cal. 2d 102, 105, 237 P.2d 645, 647, "* * * defendant was looking straight ahead as he approached plaintiff's car and his view was unobstructed. It may be inferred therefrom that he saw plaintiff's motionless car extending into the line of traffic." The inference could legitimately be drawn in this case under the evidence most favorable to the doctrine that defendant saw plaintiff's car at a standstill when he was at least 500 feet away from it and that although he was aware of the perilous situation, he did nothing to avoid the accident until he was within 50 or 100 feet of the point of collision. A long line of authorities in this state expressly approves this "must have seen" or "must have known" rule in determining whether a case properly involves all of the elements of the last clear chance doctrine. Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 637, 255 P.2d 795; Darling v. Pacific Elec. R. Co., 197 Cal. 702, 711, 242 P. 703; Hoy v. Tornich, 199 Cal. 545, 553, 250 P. 565; Alberding v. Pritchard, supra, 97 Cal.App. 2d 443, 446, 217 P.2d 1012; Gillette v. City and County of San Francisco, 58 Cal.App. 2d 434, 442, 136 P.2d 611; Cole v. Ridings, 95 Cal.App.2d 136, 143, 212 P.2d 597; Bailey v. Wilson, 16 Cal.App.2d 645, 649, 61 P.2d 68; Smith v. Los Angeles Ry., 105 Cal.App. 657, 288 P. 690.

[4] In the recent case of Doran v. City and County of San Francisco, 44 Cal.2d 477, 483, 283 P.2d 1, 5, the necessary evidentiary elements which must be present to justify an application of the doctrine of last clear chance are enumerated as follows:

> "The doctrine presupposes: '"(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of

> such failure."' (Daniels v. City and County of San Francisco, supra, 40 Cal.2d 614, 619, 255 P.2d 785, 788.)"

Examining the reporter's transcript in the light of this statement, it is apparent that the proof justified the giving of an instruction in proper form, based on the doctrine. For there was direct and indirect evidence from which it could legitimately be concluded that plaintiff had been negligent in stopping his automobile on the highway and in partially occupying two lanes; he was totally unaware of the impending danger and therefore unable to escape; the defendant, inferentially, saw the dangerous situation when he was 500 feet away, and by his own admission when he was 250 to 280 feet away; his tractor was in good condition and he was not traveling at a speed of more than 40 or 42 miles per hour; the highway was flat, straight and well paved and was only damp rather than very wet or flooded; light conditions were good, the sun was shining and a tail-light was burning on the plaintiff's car; in the exercise of ordinary care the defendant driver knew or he should have known that the plaintiff could not escape from the perilous situation he was in, Alberding v. Pritchard, supra, 97 Cal.App.2d 443, 445, 217 P.2d 1012, and he had the last clear chance to avoid the accident by exercising ordinary care, either through stopping his tractor or by turning it to the left or right of the stalled car; his failure so to act proximately caused the collision.

The question remains whether the instruction as given was correct in form; it reads as follows:

> "There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the plaintiff and defendants were negligent.
>
> "The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:
>
> "First: That plaintiff, by his own negligence, got himself into a position of danger.
>
> "Second: That thereupon, either it was physically impossible for him through the exercise of ordinary care to escape from the danger, or he was totally unaware of impending danger in his position.
>
> "Third: That the defendant had knowledge that the plaintiff was in such a situation, and knew, or in the exercise of ordinary care should have known, that the plaintiff could not escape from such a situation.
>
> "Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that plaintiff either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.
>
> "Fifth: That after the defendant acquired actual knowledge of plaintiff's perilous situation, and knew, or in the exercise of reasonable care should have known, that plaintiff could not escape from such a perilous situation, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.
>
> "Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.
>
> "If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the action, despite the negligence of the plaintiff."

Appellant complains that the requirement numbered "Third" in the instruction is erroneous; otherwise he concedes that the instruction follows California Jury Instructions, Civil, B.A.J.I. form 205 and is correct; the wording of the corresponding paragraph of the B.A.J.I. form is: "Third: That the defendant had actual knowledge of plaintiff's perilous position." The instruction as given omits the adjective "actual" before the word "knowledge", substitutes "that the plaintiff was in such a situation" for the words "of plaintiff's perilous position" and adds a clause "* * * and knew, or in the exercise of ordinary care should have known, that the plaintiff could not escape from such a situation."

"Knowledge" gained wholly by visual observation is necessarily "actual knowledge". "Actual" means real, not nominal; existing in fact, as opposed to constructive, speculative, potential, possible, ostensible, virtual, constructive, conceivable, ideal, theoretical, or hypothetical. 2 Words and Phrases, Actual, p. 311. An automobile driver has knowledge, actual knowledge, of what he sees, and the jury could not possibly have been misled by the omission of the word "actual".

The words "that plaintiff was in such a situation" refer to the situation described in the paragraphs of the instruction numbered "First" and "Second", that is to say the position of danger into which plaintiff had gotten himself and from which it was impossible for him to escape through the exercise of ordinary care, or of which he was totally oblivious. Thus actual knowledge by defendant of plaintiff's perilous situation is correctly required by the instruction.

[5] The third particular in which the instruction differs from the form conceded by appellant to be correct is in fact only a reiteration of the factor contained in the requirement set forth in the paragraph designated "Fourth". The principle is well established in California that in order to invoke the last clear chance doctrine there must be knowledge by defendant of the plaintiff's perilous situation; Doran v. City and County of San Francisco, supra, 44 Cal.2d 477, 483, 283 P.2d 1, but once such knowledge exists, the defendant is under a duty to react as a reasonably prudent man in taking the ameliorative measures required by due care. A classic statement of this principle is made by Mr. Justice Shaw in Basham v. Southern Pac. Co., 176 Cal. 320, 324, 168 P. 359, 360:

> "The doctrine of the last clear chance assumes that both the plaintiff and the defendant have been guilty of negligence, the combination of which produces the danger, and places the injured party in a predicament from which he cannot extricate himself, and that this predicament is known, or should be known, with the knowledge actually possessed, to the other party. It is not until this takes place that the duty of additional care devolves upon the person causing the injury. The person thus causing the injury cannot rely upon dullness to excuse him for not knowing that the other party was not aware of danger. He must be held to know this when the circumstances of which he has knowledge are such as would create in the mind of a reasonable man a belief, or a reasonable fear, that the other party was in such precarious situation."

A similar situation is thus discussed in Sills v. Los Angeles Transit Lines, supra, 40 Cal.2d 630, 637, 255 P.2d 795, 799:

> "It was for the jury to determine whether the circumstances were such as would alert a reasonable man as to the danger of plaintiff's predicament and plaintiff's probable inability to escape therefrom. Peterson v. Burkhalter, 38 Cal.2d 107, 111, 237 P.2d 977. So it was aptly said in Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, at pages 105–106, 267 P. 758, at page 761: 'As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position (Basham v. Southern Pac. Co., 176 Cal. 320, 168 P. 359); and if he sees the dangerous situation he must use reasonable diligence in analyzing the same (Starck v. Pacific Electric Ry. Co., 172 Cal. 277, 156 P. 51, L.R.A.1916E, 58), knowledge of danger being imputed where the cir-

cumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril (Harrington v. Los Angeles Ry. Co., 140 Cal. 514, 74 P. 15, 98 Am.St.Rep. 85, 63 L.R.A. 238).' See, also, Paulos v. Market Street Ry. Co., 136 Cal.App. 163, 170, 28 P.2d 94; Gillette v. City and County of San Francisco, 58 Cal. App.2d 434, 444, 136 P.2d 611."

[6] We conclude that the instruction was correct in form and was properly given. Accordingly, the judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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140 Cal.App.2d 387

PEOPLE of the State of California, Plaintiff and Respondent,

v.

David Jerome MARTIN, Defendant and Appellant.

Cr. 1051.

District Court of Appeal, Fourth District, California.

March 30, 1956.

Rehearing Denied April 12, 1956.

Defendant was convicted of possessing a narcotic. From a judgment of the Superior Court, San Diego County, John A. Hewicker, J., on the jury's verdict, and orders denying defendant's motion for a new trial and committing him to the Youth Authority, he appealed. The District Court of Appeal, Barnard, P. J., held that evidence disclosed reasonable search of parked automobile, in which defendant was sitting, and of his clothes, and seizure of marijuana found therein, as incidents to valid arrest of defendant, so as to render such marijuana admissible in evidence, and that evidence was sufficient to sustain conviction.

Judgment and orders affirmed.

1. Arrest 🔑63(3), 71
Criminal Law 🔑395

In prosecution for possessing a narcotic, evidence that city police officers saw automobile parked across road leading to beach in violation of Vehicle Code, and, after approaching to investigate, found particles of marijuana on shirt of man in driver's seat and a paper sack containing marijuana between heels of defendant, also sitting therein, and that, after arresting him, they found marijuana in his pockets when they searched his clothes at police station, disclosed reasonable search and seizure incident to valid arrest, so as to authorize admission of marijuana in evidence. West's Ann.Health & Safety Code, § 11500; Vehicle Code, §§ 582, 583, 585.

2. Criminal Law 🔑1170½(1)

In prosecution for possessing a narcotic, admission in evidence of state's witness' written statement, without objection by defendant's counsel, after such witness testified as to facts inconsistent with such statement, was not prejudicial to defendant on ground that he was forced to allow admission thereof in order to convince jury that nothing was being hidden from it. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law 🔑1137(5)

Admission of evidence, brought out by defendant's counsel, that prosecution made some charges that a state's witness had been threatened, was not error of which defendant could complain on appeal from conviction.

4. Criminal Law 🔑1166½(12)

Trial court's questions to defendant's witness, who had pleaded guilty of crime charged, as to whether he had been told that he had right to claim privilege and refuse to testify, were not prejudicial to defendant.

5. Criminal Law ⚷1174(6)

In prosecution for possessing a narcotic, trial court's refusal to allow jury to take to jury room packages of marijuana found in parked automobile, wherein defendant was sitting when arrested, and in his pockets when his clothes were searched at police station, was not prejudicial to defendant, where matter of such packages was clearly gone into during trial, no request was made to have them opened in order to show actual narcotic to jury, and purpose of defendant's counsel to have jury see that quantity of marijuana was small was not explained to court. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⚷730(7)

A Deputy District Attorney's remark in argument to jury was not error warranting reversal of conviction, where trial court stated, in reply to defendant's counsel's objection that remark was prejudicial to defendant and not sustained by any evidence, that jury would follow evidence received.

7. Criminal Law ⚷780(1)

In prosecution for possessing a narcotic, a state's witness' testimony that defendant and another occupant of parked automobile, in which witness was also sitting when defendant was arrested, said nothing in witness' presence about a sack of marijuana found in automobile by arresting officers, and that she did not see such sack or know there was any marijuana in automobile, did not show her possession thereof, so that court did not err in failing to instruct jury that she was an accomplice whose testimony should be viewed with distrust. West's Ann.Health & Safety Code, § 11500.

8. Poisons ⚷9

Evidence was sufficient to sustain conviction of possessing a narcotic. West's Ann.Health & Safety Code, § 11500.

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Richard E. Adams; Howard A. Muhleman, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Joan D. Gross, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of possession of a narcotic in violation of Section 11500 of the Health & Safety Code. He was found guilty by a jury and his motion for a new trial and request for probation were denied. Since he was under 21 years of age he was committed to the Youth Authority for the term prescribed by law. He has appealed from the judgment, from the order denying a new trial, and from the order of commitment.

At 1:35 a. m. on June 24, two San Diego police officers in a patrol car were making a routine nightly check of a beach area in La Jolla. They saw an unlighted Chevrolet parked across a short road leading down to the beach, thus blocking access to the beach area. The car was occupied by three persons, one Switzer in the driver's seat, the defendant on the right side of the front seat, and a Miss Gutierrez between them. One of the officers walked up to the car on the driver's side for the purpose of determining why the vehicle was parked in that position. When he turned on his flashlight he saw that the entire front of Switzer's shirt was sprinkled with particles of a green botanical substance which appeared to him to be marijuana. The other officer approached, and also thought it was marijuana. Switzer was placed under arrest and ordered out of the car. Miss Gutierrez also got out of the car on the driver's side. The officer then noticed a brown paper package on the floor of the car between the defendant's bare heels. The officer asked the defendant to hand him the package, which the defendant did. The package contained a considerable quantity of what the officers believed to be marijuana. The defendant said he did not know what it was and did not know it was there, and that he had never used marijuana. He was placed under arrest, and Switzer said this was his stuff. An examination of the car disclosed marijuana debris on both the front and back floor boards, and on the rear floor board there was a burnt marijuana cigarette about 3/8" in length, and brown "roll your own" cigarette papers. There were numerous burnt matches on the ground on both sides of the vehicle below the front windows. The defendant explained this by saying that his cigarette kept going out and he had to relight it numerous times. Both officers testified to these general facts.

At the scene of the arrest the defendant was just "patted down", in a routine search for weapons. At police headquarters, where he was taken, defendant's clothing was examined and marijuana debris was found in pockets of his pants and shirt. The substances found in the paper sack and in the defendant's pockets were examined and found to be marijuana. Miss Gutierrez testified that she was picked up by the boys about 10:30 that night; that the defendant and Switzer referred to narcotics after they arrived at the beach; that she had previously talked with the defendant about narcotics, and he had offered to give her narcotics when she wanted some; and that on this occasion the defendant noticed the police officers first and made the remark that the law was there and there was nothing to be done but just sit and wait. She first stated that when she got in the car the defendant had said he thought he saw "grass on the car" and something about getting "busted". Later, she attributed this statement to Switzer and to another occasion. Her written statement made at the police station on June 24 was admitted in evidence. In this statement, among other things, she said that the defendant and Switzer both talked about getting "high on grass"; that the defendant told Switzer when he got in the car that he saw "grass" on the floor and it was enough to get "busted" on; that when the defendant noticed the police car he said "There's the heat and they're watching us"; that most of the defendant's conversation was about narcotics; that on previous occasions he had tried to get her to smoke marijuana and had shown some to her; and that she had seen him with marijuana on at least two previous occasions.

The defendant testified that he did not know there was any marijuana in the car that night; that he did not see the brown paper sack until the officer asked what it was; and that narcotics were never mentioned at any time when they were in the car. Switzer, who had pleaded guilty and who was brought back for the trial, testified for the defendant, saying that he had purchased this marijuana a day or two before; that he had placed the paper sack under the right-hand front seat of the car; that they did not smoke any marijuana while at the beach; that he did not tell the defendant that the sack of marijuana was in the car and nobody knew it; that the marijuana the officers saw on his shirt had been there since he rolled a marijuana cigarette early that evening; and that the marijuana butt they found on the floor of the car was put there by him the first night he had this marijuana.

[1] Relying on People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905, the appellant contends that illegally acquired evidence was admitted over his objection. It is argued that the exhibits containing the marijuana found in the car and in appellant's pockets, which were received in evidence, were illegally acquired as the result of an unlawful search and seizure; that he was arrested without probable cause; that he and his companions were, so far as known to the officers, violating no law when the officers approached; that they were merely sitting in the car and observing the bay; that the officer did not have probable cause to search either the car or its occupants; and that the testimony of the officers that they saw and recognized particles of marijuana upon the shirt of Switzer is inherently improbable.

The officers saw the car parked across the short road leading to the beach and thus blocking access to the beach area. This was a violation of Sections 582 and 583 of the Vehicle Code, and under Section 585 the officers were justified in looking into the matter. While so doing the officers saw marijuana on the front of Switzer's shirt, and had probable cause to believe that a felony was being then committed. At the same time the officers saw the paper sack between the appellant's bare heels, and the evidence as to the manner in which he was holding his feet around the sack justifies the inference that he was attempting to conceal it. The appellant voluntarily handed the sack to the officer when asked to do so. The marijuana in the appellant's pockets was found when his clothes were searched at the police station, where he was taken. The circumstances disclose a reasonable search and seizure incident to a valid arrest. People v. Martin, 46 Cal.2d 106, 293 P.2d 52; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; People v. Rios, 46 Cal.2d 297, 294 P.2d 39.

[2–6] It is next contended that the conduct of the trial was prejudicial to the appellant in that the basic rules of evidence and justice were ignored, and that "these errors are so obvious that there is no need to support them with authorities." It is argued that the prosecution attempted to impeach its own witness, Miss Gutierrez; that the court then permitted this witness' written statement to be read into evidence; that some charges were made by the prosecution that this witness had been threatened; and that the appellant was convicted only because of this witness' testimony. It is further argued that the court intervened to question the witness Switzer on an irrelevant matter; that the court erred in refusing to allow the jury to take the exhibits containing the marijuana into the jury room; and that the deputy district attorney committed prejudicial error in his argument to the jury by making one statement.

The witness Gutierrez attempted to contradict her own previous testimony, and stated facts inconsistent with her written statement. The court allowed certain questions to be asked on the ground of surprise, and the appellant's counsel then asked that her written statement be read to the jury stating: "I have absolutely no objection to it", and this was done. There is no merit to appellant's present contention that prejudice appears because he was forced to allow the written statement to be admitted in evidence in order to convince the jury that nothing was being hidden from it. A reading of the transcript indicates that this witness' testimony was far from being the controlling element in causing the conviction. The only evidence relating to a charge that this witness had been threatened, which is pointed out by appellant, was brought out by counsel for the appellant. The questions which the judge asked of the witness Switzer related to whether he had been told that he had a right to claim a privilege and refused to testify, and no possible prejudice appears. The matter of the exhibits containing the marijuana was thoroughly gone into during the trial, and no request was made to have the packages opened up in order to show the actual narcotic to the jury. It is now argued that appellant's counsel wanted the jury to see the marijuana itself in order to see that the quantity was small. The purpose was not explained to the court, no request was made at the proper time, and no prejudice appears. No reversible error appears in the remark made by the district attorney in his argument. An objection was made that it was prejudicial and that there was no evidence to sustain it. In reply to the objection the court said "The jury will follow the evidence received."

[7] It is next contended that the court erred in not instructing the jury that the witness Gutierrez was an accomplice, and in failing to instruct the jury that the testimony of an accomplice ought to be viewed with distrust. It is argued that this witness testified that she knew there was marijuana in the car, having received such information from Switzer and the appellant; that having knowledge of the drug and having the right to possess it made her guilty of the same offense as that for which the appellant was being tried; and that she was thus an accomplice. While this witness made conflicting statements about conversations relating to narcotics, and about conversations to the effect that narcotics had been in the car at sometime, she testified that nothing was said in her presence about the sack of marijuana in the car, that she did not see the sack, and that she did not know there was any marijuana in the car. She sat in the middle and there was no evidence of any fact which would tend to connect her with any possession of marijuana on this occasion. Under established rules, the

evidence did not show the necessary possession on her part, People v. Batwin, 120 Cal.App.2d 825, 262 P.2d 88; People v. Walker, 88 Cal.App.2d 265, 198 P.2d 534, and no error appears in the failure to give such instructions.

[8] Finally, it is contended that the evidence is insufficient to sustain the verdict, the only argument made being that mere presence at the scene of a crime is not sufficient to justify a finding of guilty, and that the only evidence against the appellant was the fact that he was in a car in which marijuana was found. There is no merit in this contention.

The judgment and orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Sayde GENIS, Mrs. Mae Swig and Mrs. Doris Weiler, Plaintiffs and Appellants,

v.

Clyde A. KRASNE, Clyde A. Krasne Company, a co-partnership, Harry Maron, David Erenberg, Victor Erenberg, and Clyde A. Krasne Company, a California corporation, Defendants,

Harry Maron and Clyde A. Krasne Company, a co-partnership, Respondents. *

Civ. 21239.

District Court of Appeal, Second District, Division 1, California.

April 3, 1956.

Rehearing Denied April 23, 1956.

Hearing Granted May 29, 1956.

Action by owners of leased premises against assignee of lease to recover under lease covenant attorneys' fees incurred by plaintiffs. The Superior Court of Los Angeles County, Bayard Rhone, J., sustained defendants' demurrer to complaint without leave to amend and entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Nourse, Justice pro tem., held that action by assignee of lease against owners of leased premises to recover damages for conversion of property allegedly removed from leased premises by employees of owners did not arise out of lease within covenant by lessee to pay attorneys' fees incurred by owners in successfully defending any action by lessee for any relief against owners arising out of lease.

Attempted appeals from order denying leave to file amended complaint and order denying motion for reconsideration of such order dismissed, and judgment affirmed.

1. Landlord and Tenant 🔑44(1)

Action by assignee of lease against owners of leased premises to recover damages for conversion of plaintiff's goods allegedly removed from leased premises by employees of owners sounded in tort and did not "arise out of lease" within lease covenant by lessee to pay attorneys' fees incurred by owners in successfully defending any action by lessee for any relief against lessors arising out of lease, regardless of whether entrance to leased premises was gained by means of keys which under lease owners were entitled to retain.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out of Lease".

2. Appeal and Error 🔑103, 110

Order denying motion for leave to file amended complaint after demurrer to complaint had been sustained without leave to amend and order denying motion for reconsideration of order denying leave to amend were not appealable orders and attempted appeals therefrom must be dismissed.

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Dryden, Harrington, Horgan & Swartz, Jacob Swartz, Los Angeles, for appellants.

Fred Horowitz, Amos Friedman, Alvin F. Howard, Los Angeles, for respondents.

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* Opinion vacated 302 P.2d 289.

NOURSE, Justice pro tem.

Plaintiffs appeal from a judgment of dismissal entered following an order of the trial court sustaining defendants' demurrer without leave to amend.

We have come to the conclusion that the judgment must be affirmed.

The facts material to the determination of the appeal, as alleged in the complaint, are: The appellants are the owners of certain real property; this real property they leased to the defendant Krasne and he assigned that lease to respondents, who had by the assignment assumed and agreed to be bound by all the terms and conditions of the lease, on the part of the lessee to be performed.

> The lease contains the following covenant: "In case Lessors shall bring suit to recover any rent due hereunder or for breach of any covenant of this lease, or to recover possession of the premises, and shall recover in the suit, or if Lessee shall bring any action for any relief against Lessors, delaratory or otherwise, *arising out of this lease,* and Lessors shall prevail in such action, Lessee agrees to pay Lessors a reasonable attorney's fee which shall be taxed as part of the costs of such action." [Emphasis added.]

While they were in possession of the premises under the aforementioned lease, respondents commenced an action against appellants. The second amended complaint in that action contains four counts. The first count alleges the execution of the lease and the assignment of the lease to them (respondents here); that the doors to the demised premises were fitted with locks provided by the owners, and that the lease provided that no additional locks should be put on the doors of the demised premises; that the defendants had in their possession keys to the demised premises and permitted certain defendants, sued under fictitious names, to have possession of said keys; that appellants, as owners, had access to the demised premises at all times when the premises were not open for business, and at such times respondents did entrust the premises and their contents to the owners.

> Paragraph XI of the first count reads as follows: "Between August 1, 1946 and October 26, 1947, the exact time or times being unknown to the Krasne Corporation, the defendants Doe I, Doe II and Doe III, who at all times herein mentioned were the agents, servants and employees of the owners, without the knowledge or consent of the Krasne Corporation, and during the time the demised premises and their contents were so entrusted to the owners, wrongfully entered the demised premises, using the keys to the same retained by the owners, and took away, and converted, goods, wares and merchandise of the Krasne Corporation of the reasonable value of $84,727.67, to plaintiffs' damage in said sum."

The second count of the complaint is for all practical purposes identical with the first count except that it refers to wrongful acts occurring at a later date, and seeks the recovery of an additional $79,393.62.

The third count is a common count based on the facts alleged in the first count for money had and received, and the fourth count is a common count for money had and received based upon the second count.

The complaint in the present action then alleges that the appellants successfully defended the action brought by respondents, and in so doing incurred and paid the sum of $24,250 as attorneys' fees. It prays judgment against respondents for that amount.

It is appellants' contention that the relief sought by respondents in their action arose out of the lease. They base this contention upon the fact that in the complaint in that action respondents alleged the fact of the execution of the lease, its assignment to them, and that appellants had the keys to the demised premises and the right to enter them.

[1] This contention cannot be sustained. The allegations referred to above

constituted a mere prelude, showing the relationship of the parties. They added nothing to the cause of action thereafter stated. The gist of the cause of action is contained in the allegations of paragraph XI of the first count, which we have quoted above, and a like charging paragraph in the second count. These paragraphs do not charge any violation of the terms of the lease by the lessors (appellants) but are based upon a wrongful conversion of plaintiffs' property through the theft thereof by appellants' employees. These wrongful acts did not arise out of the lease, and the fact that thieves were able to gain entrance to the premises by reason of the fact that appellants had, under the lease, a right to retain keys to the premises in order to perform their duty to furnish janitor service to the premises, does not convert the act into one arising out of the lease, but leaves it one sounding purely in tort.

The case against the appellants is even stronger than that which the court had before it in De Mirjian v. Ideal Heating Corp., 91 Cal.App.2d 905, 206 P.2d 20, 23. There the defendant was in possession of real property under a lease from the plaintiff which contained a covenant on the part of the lessee to hold the lessor harmless from the use, misuse or neglect of the demised premises, and a further covenant to pay attorney's fees "'[i]n any action at law or equity necessary to enforce Lessors' rights hereunder'". Due to the negligence of an employee of the defendant, a fire occurred which resulted in damage to the leased premises and to another portion of the premises occupied by the plaintiff. In that case the plaintiff sought by his complaint to state a cause of action through the breach of the lease, and caused the property of the defendant to be attached. In reversing an order of the trial court denying defendant's motion to discharge the attachment, the court held that the negligent act sounded in tort and not in contract and that the defendant's duty to exercise reasonable care and to respond in damages for failure to do so were imposed by force of law independent of the contract or its terms.

In the cited case the plaintiff sought to uphold his attachment on the grounds that one of the counts set forth in his complaint sought the recovery of attorney's fees under the covenant for the payment thereof set forth in the lease. In holding that the covenant for attorney's fees was not applicable to actions sounding in tort, the court said:

"It is contended that the cause of action for attorney's fees furnishes ground for an attachment, in the amount of the demand. We entertain a contrary view. It would require a strained construction of the attorney's fee provision to extend its coverage to actions to enforce a liability such as the one pleaded, which exists independently of the lessor-lessee relationship.

"Provisions imposing an obligation to pay for attorney's fees incurred in the enforcement of rights arising out of contracts are commonly found in leases and many other types of contracts. It may not be questioned that it would be permissible to frame such provisions so as to extend the liability to actions for damages arising out of torts directly or indirectly connected with the subject matter of the contract, but we have been unable to discover any reported case in which a court has had occasion to consider a contract in which such broad liability has been so expressed. Nor to our knowledge has any court passed upon the contention that a conventional provision for attorney's fees creates an obligation of the promisor to pay such fees in an action brought to recover damages arising solely out of the promisor's negligence. If such unusual and extensive liability is to be created, it must be by clearly expressed agreement of the parties and not by means of a mere interpretation of vague, general language, such as the parties here employed."

So, here, in the case at bar it was the duty of defendants not to steal or convert the plaintiffs' property, irrespective of any contract between the parties, and it cannot be said that the breach of this duty arises out of the lease or that the conversion was a breach of the terms of the lease.

The conclusion that we have come to makes it unnecessary to consider other questions raised by the parties in their briefs.

[2] The order denying plaintiffs' motion for leave to file amended complaint and the order denying their motion for reconsideration of the last-mentioned order are not appealable orders, and the attempted appeals therefrom are dismissed.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

140 Cal.App.2d 374

B. H. JENNINGS and Louis Saltzmon, doing business as Jennings and Saltzmon, a copartnership, Plaintiffs and Respondents,

v.

L. M. AZHDERIAN and Edward Azhderian, individually and doing business under the name of L. M. Azhderian and Azhderian Bros., a copartnership, Defendants and Appellants.

Civ. 4981.

District Court of Appeal, Fourth District, California.

March 30, 1956.

Action was brought for the reasonable value of work, labor, and materials furnished by plaintiffs in drilling a water well for defendants. The Superior Court of Fresno County, Milo Popovich, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained findings and conclusions of Superior Court that circumstances were such as to justify plaintiffs in their failure to continue with the work and that the work ceased with the consent or acquiesence of defendants.

Judgment affirmed.

1. Appeal and Error 🔑931

Where oral contract for drilling of water wells by plaintiffs for defendants at a fixed price per foot contained no provisions as to how deep drilling should go, or that there should be successful production of water, or what should be done in case it should appear undesirable to continue drilling operations further, those matters were questions of fact for trial court in action for reasonable value of work, labor and materials furnished by plaintiffs in drilling one of the wells.

2. Contracts 🔑322(3)

In action for reasonable value of work, labor, and materials furnished by plaintiffs in drilling a well for defendants, under oral contract which contained no provision concerning what should be done if it should appear undesirable to continue drilling operations further, evidence sustained findings and conclusions of trial court that circumstances were such as to justify plaintiffs in their failure to continue with drilling and that work ceased with the consent or acquiescence of defendants.

◆

Linneman, Burgess, Telles & Van Atta, Dos Palos, for appellants.

Dubsick & Whalen, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for the reasonable value of work, labor and materials furnished by the plaintiffs in drilling a well for the defendants.

The defendants owned a section of virgin land in western Fresno County, which had never been cultivated. In January, 1952, the parties entered into an oral agreement under which the plaintiffs were to drill three water wells on defendants' property and the defendants were to pay $4 a foot. This price included the installation of the casing and the placing of certain gravel, which items were to be furnished by the defendants. The plaintiffs drilled, graveled and cased Well No. 1 for which the defendants paid on its completion, at a depth of 1,800 feet. The plaintiffs then started to drill Well No. 2 at a point about ¾ths of a mile from Well No. 1. This well was drilled to a depth of about 1,400 feet when work was abandoned, and the well was never completed. The defendants refused to pay for the work done and the plaintiffs brought this action. At the trial the defendants took the position that there was an express contract between the parties for the drilling, casing and graveling of the well in issue, and that plaintiffs had failed to substantially perform the contract since they had not cased or graveled the well. It was also contended that the plaintiffs had abandoned the work because the well was so crooked that it was impossible to insert casing therein, and that the defendants had not consented to such abandonment. The court found in favor of the plaintiffs, finding that the reasonable value of the work done was $3,322. Judgment was entered for that amount, and the defendants have appealed.

The appellants contend that the evidence established an express contract for the drilling, casing and graveling of Well No. 2; that there was no substantial performance by respondents since the well was not cased and graveled; that this express contract cannot be converted into an implied contract, so as to permit recovery without full performance, by the mere fact that the hole was claimed to be dry; that there was no evidence justifying the abandonment of the well on the ground that it would not produce sufficient water, since the evidence shows that no real test of the well could be made because it was never straight enough to case or to insert a pump for the purpose of testing it; and that the appellants never consented to the abandonment of the work.

[1, 2] While there was an express contract for the drilling of a well at a fixed price per foot there was no agreement as to how deep drilling should go, and no agreement concerning the successful production of water or what should be done in case it should appear undesirable to further continue the drilling operations. During the trial appellants' counsel told the court "We do not contend that the plaintiffs were bound to produce a well that gave us water", and that their contention was that the plaintiffs could not abandon the work without the consent of the defendants. Since there was no express contract with respect to these matters they presented questions of fact for the trial court. The controlling questions here are as to whether the evidence supports the findings and conclusions to the effect that the circumstances were such as to justify the respondents in their failure to continue with the work, and that the work ceased with the consent or acquiescence of the appellants.

It appears that the appellants were attempting to develop water on a higher portion of their ranch, and that they were unsuccessful although water was developed on the lower portion of the ranch. One of the appellants testified that they had planted crops that year "on the basis of the optimism of what we were told about the probability of water in that area" and what they had seen in two wells on neighboring land. Well No. 1, after pumping ten days, pumped so much sand as to be useless and was abandoned. After the respondents stopped work on Well No. 2 the plaintiffs hired another driller and Wells No. 3 and No. 4 were drilled in the same area. Well No. 3 produced some water for the rest of that season and part of the next, and was then abandoned. Well No. 4 was a dry hole. One of the appellants testified that after April, 1952, they did not attempt to dig other wells in the area where Wells No. 1, 2, 3 and 4 were drilled, that they then went "down below" on their ranch where they found water conditions better, and that "We found out several weeks afterwards that it was better down below."

There was testimony for the respondents that the decision to cease drilling Well No. 2 was based on the unsatisfactory performance of Well No. 1, similarity of drilling samples found in the two wells, and the opinion that no water would be obtained. When conditions appeared unsatisfactory the respondents employed an expert, engaged in that business, to make several tests on Well No. 2. The first was an electric log test, which was to determine the presence of water-bearing strata. There was a little more water-bearing strata in Well No. 2 than in Well No. 1, but the expert testified that the presence of water-bearing strata did not necessarily mean that there was water in it, and that they had frequently found that wells with good water-bearing strata turned out to be dry holes. Two directional tests were also run by the expert which showed that the hole was not straight, but there is a conflict in the evidence as to whether or not it was straight enough to permit the installation of a pump, or as to whether or not it could be successfully straightened. After these tests were made two conversations were held by the parties relative to the well drilling problems. The respondents took the position that the hole could be straightened, but that it was not wise to spend any more money on the well due to the lack of water at that location. There was evidence that the appellants complained about the crooked hole but did not request the respondents to straighten it, or to complete the well. Two days after the second conversation the appellants hired another drilling concern which came in and drilled Wells No. 3 and 4 without much success. After the first of these conversations the appellants started to straighten the hole by widening it, but stopped work after the second conversation which led to the hiring of another driller by the appellants.

The evidence is conflicting as to what was said at these two conversations. The appellants testified that the main talk was about straightening the hole, and that their water engineer advised them that the prospect for water was good. The respondents testified that the main talk was concerning the bad prospects for getting a successful well; that they could straighten the hole but considered this to be useless in view of the water conditions; and that they did not desire to cause further useless expense to the appellants. One of the respondents testified that he told the appellants that if they thought their engineer was right, and if they would pay for the pipe, he would put the casing in; that he could have put the casing in the hole as it then was; and that one of the appellants replied that they did not want the casing put in. This witness was also asked "Now, what did Mr. Azhderian, either one of them, say to you about that well so far as either continuing or not continuing to develop it for water?" He replied, "They did not want to go ahead with that well. They were through with it." One of the appellants was somewhat evasive in his testimony with respect to what was said at these conversations. When asked whether anything had been said at the second of the conversations above mentioned about giving up this well he replied: "There may have been", but that it was really more of a question of whether the respondents could straighten the hole, and that "We certainly weren't willing to take it if he couldn't straighten it out."

While the evidence is conflicting and not too satisfactory in many respects it is sufficient, as a whole, to support the court's findings and judgment. When another well was started it was started some distance from Well No. 2, and the evidence indicates that the appellants as well as the respondents were not satisfied with the water conditions as they appeared at the time work ceased on Well No. 2. From respondents' testimony and from a part of the testimony on behalf of the appellants, the court was justified in concluding that the appellants agreed with respondents' conclusion at that time that it would not pay to put more money into Well No. 2 because of the water conditions as they appeared at the time, and that they acquiesced in, if they did not expressly consent to, the cessation of work on Well No. 2. There was no express contract covering this situation, it was admitted that the appellants were not bound to produce a good well, and there is nothing in the evidence to justify the conclusion that the respondents were bound to continue drilling indefinitely, or to put in casing whenever they stopped, regardless of other conditions, before they were entitled to be paid for their work. Well No. 4 was admittedly put in as a test well at an agreed price of $2.50 a foot, and the court allowed less than that price as the reasonable value of the work done on Well No. 2. In the absence of any specific contract covering the circumstances here involved the respondents were entitled to recover on that basis for the work done.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

S. A. PONCE, Plaintiff and Respondent
v.
Ethel Ruth MARR, Defendant and Appellant.*
Civ. 16726.

District Court of Appeal, First District, Division 2, California.
April 4, 1956.
Hearing Ordered May 29, 1956.

Administrator of estate of deceased grantor brought action against grantee to have deed set aside, on ground that grantee had no intention of performing oral promise, which was consideration for the deed, to care for the grantor. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment for the administrator, and the grantee appealed. The District Court of Appeal, Devine, J. pro tem., held that where grantee testified that deed was given to her in payment for services rendered for grantor, and administrator introduced cancelled checks showing payments of money by grantor to grantee, it was reversible error to refuse to permit grantee to testify in explanation of the checks.

Judgment reversed.

1. Evidence 🔑153(27)

In action by administrator of estate of deceased grantor against grantee to have deed set aside, on ground that grantee had no intention of performing oral promise, which was consideration for the deed, to care for grantor, wherein grantee testified that deed was given to her in payment for services rendered for grantor, and wherein administrator introduced cancelled checks showing payments of money by grantor to grantee, testimony of grantee that one of the checks was a loan and not payment for services rendered by grantee for grantor did not violate the best evidence rule.

2. Appeal and Error 🔑1056(1)
Deeds 🔑202

In action by administrator of estate of deceased grantor against grantee to have deed set aside, on ground that grantee had no intention of performing oral promise, which was consideration for the deed, to care for grantor, wherein grantee testified that deed was given to her in payment for services rendered for grantor, and wherein administrator introduced cancelled checks showing payments of money by grantor to grantee, trial court's refusal to permit grantee to testify in an attempt to explain the checks was reversible error.

3. Trial 🔑45(1)

Where trial court made it plain that testimony offered by defendant to explain certain checks would not be received, offer of proof by defendant was rendered unnecessary.

◆

John J. Fahey, Jr., Daly City, for appellant.

William A. Finger, Burlingame, for respondent.

DEVINE, Justice pro tem.

Plaintiff, as administrator of the estate of his deceased father, brought a suit to cancel a deed which his father had delivered to defendant. It is the contention of plaintiff that the deed was given in consideration of an oral promise by defendant that she would care for and nurse the elderly grantor and that defendant at the time of said promise did not intend to perform. Defendant denied she had made any such agreement, claiming that the deed was for prior services of some four years' duration in collecting rents, doing office work, showing properties, and driving decedent around for which, she testified, she had not been paid. She testified that she had been lent money by decedent to buy an ice cream parlor, but that she had repaid the loan. The court found true all of the substantial allegations of the complaint and rendered judgment canceling the deed.

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* Opinion vacated 301 P.2d 837.

There were several direct conflicts in the testimony of the witnesses, and at the end of the first day of the trial, both sides having concluded the presentation of evidence, the court called on counsel to put their views in writing and the cause was ordered submitted.

Several days later the court set aside the submission for the purpose of considering the subject of evidence discovered by plaintiff's counsel in the interim. At the reopened trial plaintiff offered in evidence several checks, in a total amount exceeding $1,500, which had been drawn by decedent payable to defendant, and endorsed by her. These were offered by way of impeachment of defendant's testimony that she had not received compensation from the decedent. There was no objection by defendant to the admissibility of these checks. Appellant's position is not that the checks were improperly admitted, but that her explanation of them was not received.

That the subject of these checks was extremely important cannot be gainsaid. Up to this point, the court had reserved judgment and had asked counsel's assistance by requesting their respective views to be set forth in writing. At the conclusion of the brief second part of the trial, the court's decision was positive and swift. The court remarked that "She said she didn't get any money and there is fifteen hundred dollars." Within a few moments and after an explanation of the checks was denied by the court, as appears below, judgment for plaintiff was ordered. Thus, the matter of the checks must be regarded as of large import, and the claim that the explanation was curtailed touches the substance of the cause.

Respondent argues that even if the court had admitted the explanation of the checks, and the court believed the explanation, it still would not have been a defense to the action. "Except for the question of * * * credibility," to quote respondent's brief, it made no difference, and later in that brief, it is stated: "if the court didn't believe her testimony that the checks were loans, it could well disbelieve her bare and uncorroborated testimony that she never promised to care for Ponce." That, indeed, is the point. In a case wherein defendant was her own chief witness and wherein her credibility was crucial to her defense, her explanation of evidence that was admitted by way of impeachment was of critical importance.

After the checks were admitted in evidence, counsel for defendant asked his client as witness to go through the checks and give any explanation she wished. It is to be observed that in her original testimony, defendant had not denied receiving any moneys from decedent, for she had testified to one loan and had not been asked about others, so that there was nothing essentially contradictory in her testimony, and the whole matter was one which called for thorough inquiry. She had, it is true, denied receiving compensation for her work. Taking one check, in amount $200, defendant testified that it was a loan to build a room onto the home of defendant and her husband (not the house deeded herein) and that the loan was paid back. She said "I think there should be a cancelled note."

At this point, respondent's counsel moved that the testimony be stricken on the ground that it was not the best evidence. The court granted the motion and also stated that the court did not believe the testimony.

There followed an attempt by defendant's counsel to go into an explanation of the other checks, and refusal by the court to allow any further testimony by way of explanation. Judgment for plaintiff was directed in a decision from the bench.

It is not clear whether or not the court rejected the evidence as to the check transactions on the ground that it violated the best evidence rule, or that the court found it, so far as it went, unworthy of belief and decided to hear no more on the same subject.

[1] The parol explanation that the first check was a loan did not violate the best evidence rule, and if a similar explanation had been given about the other checks, there would have been no breach of that rule. The reason is that there was no attempt to show by parol the terms of a written instrument. Defendant was attempting to testify as to a claimed fact, namely, repayment of the sums, and she cannot be foreclosed from doing so by the circumstance that a written instrument which was not produced also might show, and perhaps more satisfactorily show, the fact to be as asserted. The best evidence rule does not apply to such proof. The existence of the writing was collateral to the issue of repayment.

Wigmore on Evidence, Third Edition, volume IV, section 1254, states the proposition: "For example, in proving that a defendant paid money upon a note, the payment of the money is an act separate from and not involving the terms of the document, so that to prove the payment is not to prove the document's contents, and therefore the rule of production does not apply * * *"

An excellent explanation of the distinction between an attempt to show the terms of an instrument by secondary evidence, which attempt properly would be denied under the best evidence rule, and the producing of oral evidence although written evidence also exists, is given in the case of Altramano v. Swan, Cal.App., 119 P.2d 401. That case does not appear in the California Appellate Reports because the supreme court granted a hearing. Altramano v. Swan, 20 Cal.2d 622, 128 P.2d 353. The supreme court came to the same conclusion as the district court of appeal as to the disposition of the cause, but did not mention the point of evidence; however, since the cause was remanded for further trial and since the district court of appeal had made its ruling on the point of evidence specifically for the guidance of the trial court at the new trial, and the supreme court did not interfere with that ruling, the ruling may be regarded as authoritative. In that case, a witness sought to testify to deposits she had made in a bank, and it was held on the appeal that she was not foreclosed from doing so by the fact that deposits were shown on the books of the bank, so that claimed deposits might be proved or disproved from such books. See, also, Marriner v. Dennison, 78 Cal. 202, 213, 20 P. 386; People v. Skeen, 93 Cal.App.2d 489, 491, 209 P.2d 132.

[2] On the other hand, if the court in the case before us excluded evidence relating to the other checks, not upon the ground of the best evidence rule, but because the court had found the explanation of the first check inadequate, or even incredible, there was error in doing so. The court surely had the right to disbelieve the witness and, after hearing the entire case, to reject all of her testimony if there was wilful falsehood in part of it; but this does not mean that the witness could be halted in the progress of her testimony. The witness' explanation of other items might have been satisfactory to the court, and might have strengthened her explanation of the first check, so that the court's mind might be changed about that item, either by hearing more about that item or simply by the quality of the testimony that was to come. What the course of the trial would have been we cannot tell; but defendant was entitled to a complete hearing, and to produce all relevant, competent and material evidence on any material issue. Bole v. Bole, 76 Cal.App.2d 344, 172 P.2d 936; Foster v. Keating, 120 Cal.App.2d 435, 261 P.2d 529; Theatrical Enterprises, Inc., v. Ferron, 119 Cal.App. 671, 677, 7 P.2d 351.

[3] Although a complete offer of proof was lacking, since the court made it plain that testimony offered in explanation of the checks would not be received, such offer of proof was rendered unnecessary. Lawless v. Calaway, 24 Cal.2d 81, 91, 147 P.2d 604.

The judgment is reversed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

140 Cal.App.2d 311

SLICK AIRWAYS, Inc., a corporation, Plaintiff and Respondent,

v.

COUNTY of LOS ANGELES, and City of Santa Monica, a municipal corporation, Defendants and Appellants.

Civ. 21178.

District Court of Appeal, Second District, Division 1, California.

March 28, 1956.

Suit to recover taxes paid under protest. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fourt, J., held that airplane purchased by nondomiciliary corporation, engaged solely in interstate and foreign commerce, for exclusive purpose of adding to its fleet of aircraft flying in interstate and foreign commerce should have been classified and valued by assessor as part of fleet rather than as individual item of property in county, notwithstanding fact that airplane had not, on taxable-status determination date, yet made flight in interstate commerce (being at that time engaged in "shake-down and crew-familiarization" flights preparatory thereto).

Affirmed.

1. Commerce ⚷72

Constitutional Law ⚷283

Rule which permits that state in which property is physically located on specific tax date to tax it at full value must yield to extent required by due process and commerce clauses of federal constitution; and assessment of taxes on property which receives benefits in more than one state during tax year is governed by rule of apportionment. U.S.C.A.Const. art. 1, § 8, clause 3; Amend. 14.

2. Commerce ⚷72

Airplane purchased by nondomiciliary corporation, engaged solely in interstate and foreign commerce, for exclusive purpose of adding to its fleet of aircraft flying in interstate and foreign commerce should have been classified and valued by assessor as part of fleet rather than as individual item of property in county, notwithstanding fact that airplane had not, on taxable-status determination date, yet made flight in interstate commerce (being at that time engaged in "shake-down and crew-familiarization" flights preparatory thereto). Revenue and Taxation Code, § 405.

* * *

Harold W. Kennedy, County Counsel, By Gordon Boller, Deputy County Counsel, Los Angeles, for appellants.

John W. Walbert, Burbank, for respondents.

FOURT, Justice.

By this action Slick Airways, Inc., is seeking to recover from the county of Los Angeles and the city of Santa Monica taxes paid under protest to said county and collected by it for its own account and for the city of Santa Monica. Defendants demurred to the complaint. The demurrer was overruled with leave to answer and defendants not having answered, judgment was rendered in favor of plaintiff. Defendants have appealed.

Plaintiff is engaged in flying a fleet of airplanes in interstate and foreign commerce. Such airplanes, under the practice of the county assessor of Los Angeles County, are assessed on the basis of a fair allocation of time, to wit, the ratio of the time spent in Los Angeles County as compared to total time. For the year 1953, this allocation was determined by computing the total hours in Los Angeles County of all plaintiff's fleet aircraft during the week immediately preceding the assessment date and determining the percentage that time bore to the total hours in the week. This ratio was then applied to the assessed value of the fleet to determine the proper assessable value thereof in Los Angeles County.

The tax which plaintiff seeks to recover is the tax on an airplane which was assessed not as a part of plaintiff's fleet but as a single airplane. Such classification of the aircraft as a separate item instead of as a part of the fleet resulted in a higher assessed valuation.

In its complaint plaintiff alleges that it is a Delaware corporation authorized to transact business in California; that its aircraft are flown exclusively in interstate or foreign commerce; the airplane in question was manufactured for it by Douglas Aircraft Company in the city of Santa Monica, where it was delivered to and accepted by plaintiff on February 27, 1953; the aircraft was purchased for the exclusive purpose of adding to plaintiff's fleet of aircraft flying in interstate commerce; prior to acceptance on February 27, 1953, plaintiff conducted a check flight on the airplane and from March 4, to March 8, 1953, plaintiff conducted daily necessary "shake-down and crew familiarization" flights of the airplane; the first scheduled revenue flight of the aircraft took place on March 12, 1953; at all times subsequent to February 27, 1953, plaintiff considered said airplane to be part of its fleet of airplanes flown in interstate and foreign commerce.

[1, 2] The sole question for determination is whether plaintiff's airplane was erroneously classified and valued by the assessor as an individual item of property in the county rather than as a part of plaintiff's fleet of aircraft operating in interstate and foreign commerce.

Defendants contend that the taxable status of property is fixed as of 12:00 o'clock noon on the first Monday in March; that on that date the aircraft in question was not a part of respondent's fleet flying in interstate and foreign commerce and that therefore the assessment as an individual item of property was proper, such assessment having been made according to the condition and status of the property on the controlling tax date. Defendants further contend that the tax apportionment doctrine of Pullman's Palace-Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613, upheld in Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585; Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, and Braniff Airways, Inc., v. Nebraska State Board, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, is inapplicable in the present instance for the reason that the airplane had not become a part of respondent's fleet nor was it available for use therein on the tax date.

The basis of the doctrine in the Pullman case, supra, is the continuous benefits or protection afforded by the taxing state throughout the tax year to a portion of the commerce, and the formula approved was one which fairly apportioned the tax to the commerce carried on within the state. Thus, in Standard Oil Co. v. Peck, supra, it was held that it was a violation of the Due Process Clause of the Fourteenth Amendment for the state of domicile of a corporation which transported oil on inland waters to levy a property tax on all of the corporation's vessels engaged in such transportation when it appeared that most, if not all, were almost continually outside of the domiciliary state during the tax year. The court said, 342 U.S. at pages 384–385, 72 S.Ct. at page 310, "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150 [4 Ann. Cas. 493]. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."

In Ott v. Mississippi Valley Barge Line Co., supra, it was held that the Commerce Clause of the federal Constitution, art. 1, § 8, cl. 3, did not preclude the assessment, on an apportionment basis, for local ad valorem taxes, of vessels owned by a carrier engaged in interstate commerce and used within the taxing state. The court stated, 336 U.S. at page 174, 69 S.Ct. at page 434: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' Nashville, C. & St. L. Ry. Co. v. Browning, 310 U.S. 362, 365, 60 S.Ct. 968, 970, 84 L.Ed. 1254 [1255]. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See [State of] Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 249, 85 L. Ed. 267, 270, 130 A.L.R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

The case of Braniff Airways, Inc., v. Nebraska State Board, supra, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, involved an ad valorem tax levied by the state of Nebraska on the flight equipment of an interstate air carrier which made regularly scheduled stops within the state but was not incorporated there and did not have its principal place of business or home port there. The Supreme Court, in upholding the validity of the tax, said, 347 U.S. at page 600, 74 S.Ct. at page 763:

> "The limitation imposed by the Due Process Clause upon state power to impose taxes upon such instrumentalities was succinctly stated in the Ott case: 'So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State.' 336 U.S. at page 174, 69 S.Ct. at page 434. In Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339 [123 A.L.R. 162], the evolution of such restriction on state power was reviewed and the rule stated thusly:
>
> " 'When we speak of the jurisdiction to tax land or chattels as being exclusively in the state where they are physically located, we mean no more than that the benefit and protection of laws enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as to set practical limits to taxation by others.' Id., 307 U.S. at page 364, 59 S.Ct. at page 904.
>
> "Thus the situs issue devolves into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's power to levy an apportioned ad valorem tax on such aircraft. We think such regular contact is sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the state. 'The basis of the jurisdiction is the habitual employment of the property within the state.' "

Plaintiff is a non-domiciliary corporation engaged solely in interstate and foreign commerce. The airplane in question was purchased by it for the exclusive purpose of adding to plaintiff's fleet of aircraft flying in interstate commerce. Although on the first Monday in March the airplane had not made a flight in interstate commerce, it was engaged in "shakedown and crew familiarization" flights preparatory thereto and it was reasonably apparent to all interested parties that it would be in actual commercial operation during all the tax year except for a very small portion thereof.

Generally speaking the taxable status of property is determined as of some fixed date in most local jurisdictions, see 51 Am. Jur., Taxation, pp. 457–458, Sec. 442, and in California that date is 12 o'clock meridian no the first Monday in March. Rev. & Tax.Code, Sec. 405. But the rule which permits that state in which property is physically located on a specific tax date to tax it at full value must yield to the extent required by the due process and commerce clauses of the federal constitution, and the assessment of taxes on property which receives benefits in more than one state during the tax year is governed by the rule of apportionment. Plaintiff's aircraft was to all intents and purposes part of its fleet operating in interstate and foreign commerce and would receive the benefits or protection of more than one state during the tax year.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

140 Cal.App.2d 458

CALEDONIAN INSURANCE COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF ALAMEDA, Respondent.

No. 17117.

District Court of Appeal, First District, Division 2, California.

April 3, 1956.

Proceedings on petition for writ of prohibition to stay further action under an order which appointed umpire and which was signed by a judge of the Superior Court of Alameda County. The District Court of Appeal, Dooling, J., held that although insurance contract provided for appointment of umpire by judge of a court of record in event that assured's and company's appraisers did not agree on selection of umpire, where no notice of petition for appointment of umpire was served on company, court did not obtain jurisdiction to make order appointing umpire.

Writ issued.

1. Insurance ⚷571

Where contract provided that in event assured's and company's appraisers fail to agree on selection of umpire, umpire shall be selected by judge of court of record, contract intended judicial order rather than personal action in appointment of umpire by judge.

2. Insurance ⚷571

By petition for appointment of umpire under insurance contract providing for appointment of umpire by court in event that assured's and company's appraisers did not agree on selection of umpire, assured elected to invoke judicial action and bound himself to follow established judicial procedure.

3. Insurance ⚷571

Although insurance contract provided for appointment of umpire by court in event that assured's and company's appraisers did not agree on selection of umpire, where notice of petition for appointment of umpire was not served on company, court did not obtain jurisdiction to appoint umpire. West's Ann.Code Civ. Proc. § 1283.

4. Prohibition ⚷10(2)

Although contract provided for appointment of umpire by court in event assured's and company's appraisers did not agree on selection of umpire, where appraisers did not agree and assured petitioned for appointment of umpire without giving notice of petition to company, and court appointed umpire, prohibition was proper remedy for company.

◆

Long & Levit, San Francisco, for petitioner.

Bernard Allard, Bruce R. Geernaert, Oakland, for respondent.

DOOLING, Justice.

Petitioner issued to the real party in interest, Don C. Falloon, a policy of fire insurance. Falloon suffered a loss by fire and filed a proof of loss with petitioner. Petitioner gave notice to Falloon that it disagreed with the value of the property set forth in his proof of loss and demanded an appraisal in accordance with the following provision of the policy:

> "13. *Appraisal.* If the Assured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty (60) days after receipt of proof of loss by the Company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen (15) days to agree upon such umpire, then, on the request of the Assured or the Company, such umpire shall be selected by a judge of a court of record in the state in which such appraisal is pending. The appraisers shall then appraise the loss,

> stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The Assured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire. The Company shall not be held to have waived any of its rights by any act relating to appraisal."

Falloon designated an appraiser to whom petitioner objected as not "disinterested" as required by the policy. The parties reached an impasse and no umpire was appointed within 15 days. Falloon filed a petition with the clerk of the Superior Court of Alameda County praying for the appointment of an umpire as provided in the quoted provision. Thereupon, without any notice to petitioner, an order was signed by a judge of said court appointing an umpire which order was regularly filed and entered in the office of the county clerk.

When a copy of this order was served on petitioner it appeared specially in the Superior Court to move that this order be vacated on the ground that without notice to petitioner the court was without jurisdiction to make the order. This motion was denied and petitioner filed his petition herein for a writ of prohibition to stay further action under said order.

[1] In support of the action of the judge of the Superior Court in making the order without notice it is argued that the provision above quoted does not call for judicial action but only for the personal action of any person who happens to hold any office of "judge of a court of record" in California. Thus it is argued that Falloon might have procured the selection of an umpire by any justice of the Supreme Court or of any District Court of Appeal, or by any judge of any Superior Court or of any Municipal Court in California. This construction would result in the conclusion that both parties could simultaneously each procure the designation of an umpire, without notice to the other, by a different person who held the office of judge of some court of record, with the attendant necessary confusion of two umpires, each designated by a person qualified to do so under the terms of the contract. Any court would hesitate to so construe the contract unless such construction was clearly compelled by its plain language. The more reasonable construction would seem to be that in calling for action by "a judge of a court of record" the contract intended a judicial order rather than a purely personal action.

[2] This question need not here be decided, however, because by filing his petition in the Superior Court of Alameda County which was entitled "In the Superior Court of the State of California," etc., was addressed "To the Honorable Superior Court of the State of California, in and for the County of Alameda," and prayed "that the above entitled Court appoint an umpire," the real party in interest elected to invoke the judicial action of the court rather than the personal action of some person who happened to hold the office of judge of a Superior Court. Having elected to invoke judicial action he thereby bound himself to follow established judicial procedure.

[3] Whether the power to make such a judicial order as the real party in interest sought and obtained in this case is attributable to section 1283 of the Code of Civil Procedure which authorizes the Superior Court to appoint an umpire, where the agreement of the parties so provides and the parties fail to name an umpire in the manner provided in their agreement, "or for any other reason there shall be a lapse in the naming of an * * * umpire," or whether the court acted under its general equity powers in making such order, we are satisfied that to obtain jurisdiction of the person of petitioner herein notice of the petition for appointment of an umpire must be given it. Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 403–404, 55 P.2d 203.

[4] "The general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse

party." McDonald v. Severy, 6 Cal.2d 629, 631, 59 P.2d 98, 99; cf. 2 Witkin, California Procedure, pp. 1641–1642. That the order appointing an umpire affects the rights of petitioner is obvious. Because the court is proceeding without the jurisdiction of the person of petitioner prohibition is a proper remedy. Frey & Horgan Corp. v. Superior Court, supra, 5 Cal.2d at page 402, 55 P.2d 203.

Let the peremptory writ of prohibition issue to restrain all further proceedings under the order attacked.

NOURSE, P. J., and KAUFMAN, J., concur.

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140 Cal.App.2d 428

Evelyn Wray DONLON, Plaintiff and Respondent,

v.

James W. DONLON, Defendant and Appellant.

Civ. 21391.

District Court of Appeal, Second District, Division 2, California.

April 2, 1956.

Divorce action. From that portion of a judgment of the Superior Court, Los Angeles County, Eugene P. Fay, J., awarding five parcels of realty to the wife, the husband appealed. The District Court of Appeal, Moore, P. J., held that where the wife had bought the property with her separate funds and had taken a conveyance to herself and the husband as joint tenants, there was a presumption that he became owner of one-half, but whether he did so was nevertheless, under the evidence in the case, a question of fact for the trial court.

Affirmed; attempted appeal from order denying new trial dismissed.

1. Appeal and Error 🔑994(3), 1011(1)

Where testimony is conflicting, trier of fact is sole judge of weight of evidence and credibility of witnesses.

2. Evidence 🔑588

A judge sitting without a jury may accept or reject any part of the competent evidence, and a trial judge is not required to believe a witness merely because there is no positive contradiction of his testimony.

3. Appeal and Error 🔑996, 1010(1), 1011(1)

Appellate court has no power to disturb judgment when conclusion reached by trial court is supported by findings which in turn are derived from substantial evidence, contradicted or uncontradicted, or when findings are made on reasonable inferences from such evidence, and fact that inference contrary to that deduced by trial court might be fairly drawn by another reasonable mind, does not justify reversal.

4. Husband and Wife 🔑249

With respect to a determination of whether property is separate or community, where a wife has conveyed property to her husband, her intention at time of conveyance is controlling and court may consider motive for conveyance and situation of the parties at the time.

5. Evidence 🔑461(1)

Parol evidence is admissible to establish an intention with respect to a transfer of property.

6. Divorce 🔑286

Husband and Wife 🔑262(1)

Where wife bought property with her separate funds and took conveyance to herself and husband as joint tenants, there was presumption, in divorce case, that he became owner of one-half, but whether he did so was nevertheless, on evidence in the case, a question of fact for the trial court.

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James J. McCarthy, Santa Monica, for appellant.

James A. Starritt, Los Angeles, for respondent.

MOORE, Presiding Justice.

The sole question for decision herein is whether the award to respondent of five parcels of realty as her separate property although they stood in joint tenancy is supported by substantial evidence.

Respondent and appellant James were married at Los Angeles, August 18, 1948, and thereafter resided in California. Having separated on December 15, 1954, respondent commenced an action for divorce eight days later, to which appellant duly filed his answer and cross complaint. Following a trial, an interlocutory decree of divorce was filed March 14, 1955, and the motion for a new trial was denied May 4, 1955. The appeal is from the judgment and from the order denying motion for new trial. The only portion of the judgment appealed from is that awarding the five parcels to respondent.

It was proved and found that at the time of the marriage respondent owned in her separate right real property valued at $43,000 besides cash, stocks, bonds and a joint tenancy interest with her mother in another parcel of real estate, the total aggregating approximately $68,000. At the same time, appellant owned no real property. His total assets did not exceed $1,000, and he was earning a meager living by repairing automobiles. Subsequently, respondent successfully assisted her husband in getting a position of responsibility as a service salesman with a car agency for which he worked for two years. About the same time, respondent announced that she was "to start buying, selling and trading real estate" by using her separate property. She was of the opinion, and so stated to appellant, that the best way for her to accomplish a quick turnover of her property was to place it in joint tenancy and whenever she made a sale to have appellant join her in the conveyance.

Appellant's basic contention is that because the property was in joint tenancy and had been acquired during the marriage, it should have been divided as community property. He contends (1) that there was no substantial evidence to support the finding that the five parcels of real property held in joint tenancy were at all times the separate property of the respondent; (2) that respondent was a real estate broker and, this being her business, her earnings would be community property, and (3) that because respondent stated that the property would be appellant's if she died, this constituted a gift *in praesenti* of the real property.

[1–3] The trial court summed up the problem in a few words when it stated that the question is simply one of resolving the conflict of the testimony of respondent with that of the appellant. In that situation, the rule is that the trier of fact is the sole judge of the weight of the evidence and credibility of witnesses; and also, a judge sitting without a jury may accept or reject any part of the competent evidence. Kilstrom v. Bronnenberg, 110 Cal.App.2d 62, 64, 242 P.2d 65. A trial judge is not required to believe a witness merely because there is no positive contradiction of his testimony. Travis Glass Co. v. Ibbetson, 186 Cal. 724, 727, 200 P. 595. Such is not the situation at hand. The appellate court has no power to disturb a judgment when the conclusion reached by the trial court is supported by findings which in turn are derived from substantial evidence, contradicted or uncontradicted, or when from reasonable inferences from such evidence the findings are made. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. Because an inference contrary to that deduced by the trial court might be fairly drawn by another reasonable mind, a reversal is not thereby justified. Redmond v. City of Burbank, 43 Cal.App.2d 711, 713, 111 P.2d 375.

The testimony of respondent was sufficient to establish her ownership of a separate estate as above detailed and to prove that at the time of her marriage to appellant, he had practically nothing. There is no evidence that respondent ever made a gift to appellant of any property or of an interest therein except in the event of her demise, but on the contrary, he testified that at the time she decided to engage in buying and selling real estate, she told him that she was going to put certain properties in both their names so that in the event either should decease, the property would not "have to go through too much legal procedure and expense." When she told him of her desire to avoid involving him in any transaction and of her wish to trade off certain properties and get others, he told her to go ahead and he agreed that if she made money, it would be her own.

[4] Where a wife has conveyed property to her husband, her intention at the time of the conveyance is the controlling question. DeBoer v. DeBoer, 111 Cal.App.2d 500, 505, 244 P.2d 953. The court may consider the motive for the conveyance of property and the situation of the parties at the time. The mere fact of the purchase of real property with separate funds of a wife would suggest the conveyance thereof should logically be to the wife as grantee, but that fact does not, in and of itself, necessarily compel the conclusion that she has not made a gift. The circumstances, the antecedent facts may so tend to prove her desire to make a gift as to furnish ample warrant for a conclusion that a gift to her husband was intended, and, therefore, that a gift was executed. But where the evidence abundantly proves that not only no community funds were used in acquiring the property in controversy but that, on the contrary, at least half of the living expenses of the family had been paid by the wife and she has a considerable estate of her own and the husband has comparatively nothing, it is then not difficult to find in accordance with her testimony that she had no intention of making a gift of realty to her husband. In the instant matter, the husband testified that in six years and three months of marriage, he had earned $12,712.32, plus certain earnings in 1952. The testimony showed their living expenses for the period of their marriage to have been $350 per month, or $26,250 for the 75 months. Hence, the conclusion is inescapable that appellant not only was unable fully to support his wife, that he could not have invested any of his money in the real property in question, but that in fact respondent was in part responsible for his support.

[5, 6] Parol evidence is admissible to establish an intention with respect to a transfer of property. In a similar situation to the case at bar, the court found that certain pieces of property were acquired with separate funds and placed in joint tenancy "as a mere matter of convenience" in order that such property would pass, at death, to the other party. Huber v. Huber, 27 Cal.2d 784, 786, 788, 167 P.2d 708. Despite the presumption that appellant in this case became the owner of an undivided one-half interest in and to the property, this is a question of fact for the trial court. Id., 27 Cal.2d at page 788, 167 P.2d 708. It is further stated in the Huber decision that income from a business set up with separate funds is allocated to community or separate property in accordance with the extent of the efforts or capital invested by the separate property owner, and that commingling of funds is not necessarily the test of ownership if the funds are accounted for. The evidence before the court showed that appellant had no hand in the managing of the property in question and did little if any work on the property. In Cozzi v. Cozzi, 81 Cal.App.2d 229, 232, 183 P.2d 739, it was held to be a question of fact whether a spouse has done enough work on the separate property of his mate to acquire an interest after marriage.

In the instant cause, the court found that appellant had not expended such effort as would give him an interest in his wife's property. In support of respondent's contention is Luminoso v. Luminoso, 75 Cal.App.2d 472, 474, 171 P.2d 516, which holds that property conveyed to husband and wife as joint tenants under certain circumstances, upon the introduction of extrinsic evidence of an intent to the contrary, may be declared to be the separate property of one of the twain.

Appellant's cases are distinguishable. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, concerns community property, but even there the rebuttable presumption is allowed as to intent of transfer of property. Schindler v. Schindler, 126 Cal.App.2d 597, 272 P.2d 566, involved using community funds in buying property. Cummins' Estate, 130 Cal.App.2d 821, 280 P.2d 128, merely states that "persuasive evidence" of an agreement to convert their separate property into community property will rebut any presumption arising from the form in which the title is held. The trial court obviously felt that the "persuasive evidence" was not in favor of appellant.

The judgment is affirmed. The attempted appeal from the order denying a new trial is dismissed.

FOX and ASHBURN, JJ., concur.

140 Cal.App.2d 368

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Wesley WREN, Defendant and Appellant.

Cr. 3161.

District Court of Appeal, First District, Division 2, California.

March 29, 1956.

Defendant was convicted of statutory rape. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that, where information charged commission of offense on certain date, but complaining witness, in testifying to an act of intercourse on such date, also stated that it was a Saturday, fact that nearest Saturday was date two days before that stated in information was not a fatal variance nor was it prejudicial in view of fact that defendant did not make any objection in the trial court as to the date and did not attempt proof of alibi.

Judgment affirmed.

1. Criminal Law 🔑1032(7)

Indictment and Information 🔑176

Where, in statutory rape prosecution, information charged commission of offense on certain date, but complaining witness, in testifying to an act of intercourse on such date, also stated that it was a Saturday, fact that nearest Saturday was date two days before that stated in information was not a fatal variance nor was it prejudicial, in view of fact that defendant did not make any objection in the trial court as to the date and did not attempt proof of alibi.

2. Criminal Law 🔑1036(1)

Where, in rape prosecution, testimony of mother of complaining witness concerning certain telephone conversations with defendant was admitted without objection, defendant would not be heard to complain on appeal of lack of sufficient foundation as to identity of defendant.

3. Criminal Law 🔑1035(3)

Defense attorney must exercise his own judgment in conduct of the case, and, in absence of complaint by defendant in trial court, acts of defendant's attorney are imputed to him.

4. Criminal Law 🔑1171(1)

In absence of showing that defense was not conscientious and adequate, fact that defense counsel failed to put defendant on stand and failed to call other witnesses whom defendant wished to have presented would not constitute reversible error.

5. Criminal Law 🔑1159(4)

Where, in prosecution for statutory rape, complaining witness' testimony was believed by trial court and supported the conviction, defendant would not be heard to attack credibility of such testimony on appeal.

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Joseph P. Haley, Jr., Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Defendant appeals from a judgment of conviction of statutory rape with a fifteen year old girl rendered by the court sitting without a jury, trial by jury having been duly waived.

Appellant filed his opening brief in pro. per. but thereafter, at his request, counsel was appointed by this court to represent him and appointed counsel filed a closing brief and argued the matter orally.

There is a serious question about the timeliness of the notice of appeal, filed three days late, but since counsel claims circumstances bringing the case within the rule of People v. Slobodian, 30 Cal.2d 362, 181 P.2d 868, and we are satisfied that the case is not a proper one for reversal in any event, we pass the question of the timeliness of the appeal and consider the case on its merits.

[1] The information charged the commission of the offense "on or about the 17th day of January, 1955." The complaining witness testified to an act of intercourse on January 17, 1955, which she said was a Saturday. The nearest Saturday in that year was January 15, so that the witness was in error as to the date of the month or the day of the week. The variance was not fatal. The place fixed was the apartment of a friend and this was the first act of intercourse testified to have occurred in this apartment. Appellant made no objection to the uncertainty as to the date in the trial court and since he attempted proof of no alibi the variance is not prejudicial. People v. Amy, 100 Cal.App.2d 126, 223 P.2d 69; People v. LaMarr, 20 Cal.2d 705, 128 P.2d 345; People v. Powell, 34 Cal.2d 196, 208 P.2d 974.

[2] The mother of the complaining witness testified concerning certain conversations with appellant over the telephone. It is now claimed that no sufficient foundation was laid as to the identity of appellant. The evidence was admitted without objection and the question is therefore not open to appellant. People v. Garnier, 95 Cal.App.2d 489, 502, 213 P.2d 111; People v. Stepp, 82 Cal.App.2d 49, 51, 185 P.2d 417.

[3–5] Appellant argues that his counsel failed to put him on the stand and failed to call other witnesses whom appellant wished to have presented. A defense attorney must exercise his own best judgment in the conduct of the case, and in the absence of complaint by defendant in the trial court the acts of defendant's counsel are imputed to him. People v. Youders, 96 Cal.App.2d 562, 569, 215 P.2d 743. There is nothing in the record to indicate that the defense was not conscientious and adequate. Appellant attacks the credibility of the complaining witness but her testimony was believed by the trial court and supports the conviction.

Other asserted errors and misconduct depend upon allegations of fact not found in the record but only in the briefs and for that reason cannot be considered. People v. Croft, 134 Cal.App.2d 800, 804, 286 P.2d 479.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

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140 Cal.App.2d 316

BANCO MERCANTIL, S. A., a corporation, Plaintiff and Respondent,

v.

SAULS, INCORPORATED, a corporation, Saul N. Ginsburg, Defendants and Appellants.

Civ. 21182.

District Court of Appeal, Second District, Division 1, California.

March 28, 1956.

Rehearing Denied April 16, 1956.

Hearing Denied May 23, 1956.

Action by holder of non-negotiable check against maker. The Superior Court, Los Angeles County, Frederick F. Houser, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, J. pro tem., held that where maker asserted that payee had not delivered goods against which check was an advance, evidence was insufficient to support findings that maker had misrepresented or concealed fact that it intended to assert defenses, and that holder did not have notice of facts sufficient to put a reasonably prudent man upon inquiry.

Judgment reversed.

1. Bills and Notes ⚷147, 149

Check which directed drawee to "pay to", rather than to "pay to the order of", payee, and which did not contain the word "check", was nonnegotiable under both Mexican law and California law.

2. Bills and Notes ⚷516

In action by holder of nonnegotiable check against maker, evidence was insufficient to support findings that maker knew that payee would cash check before payee delivered the merchandise against which it was an advance, and that maker intended holder to rely upon maker's past conduct in not stopping payment on similar checks.

3. Estoppel ⚷52

Equitable estoppel depends upon existence of: (1) a misrepresentation or concealment of matters of fact as to which estoppel is claimed; (2) intention on part of party to be estopped that other party act upon assumption of truth of facts; (3) ignorance of true facts on part of party claiming estoppel; (4) reliance to injury upon conduct of party to be estopped.

4. Estoppel ⚷83(1)

Misrepresentation or concealment of matters of fact, as an essential element of equitable estoppel, may be established either by proof of actual misrepresentation or by proof of careless and culpable conduct resulting in deception of party entitled to claim estoppel.

5. Estoppel ⚷54

Ignorance of true facts, as an essential element of equitable estoppel, requires not only that party claiming estoppel did not have actual knowledge of true facts, but that he did not have knowledge of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge.

6. Bills and Notes ⚷520, 525

In action by holder of nonnegotiable check against maker, wherein maker asserted that payee had not delivered goods against which check was an advance, evidence was insufficient to support findings that maker had misrepresented or concealed fact that it intended to assert defenses, or that holder did not have notice of facts sufficient to put a reasonably prudent man upon inquiry.

7. Bills and Notes ⚷144

By issuing a negotiable instrument, maker holds out to world that he will not assert against a holder in due course any defenses that he may have against payee, but maker of a nonnegotiable instrument does not make such representation, and he may assert any defenses that he has, even though instrument which he issues purports to waive that right. West's Ann. Civ.Code, § 1459.

Dryden, Harrington, Horgan & Swartz, Jacob Swartz, Los Angeles, for appellants.

McLaughlin & Casey, James A. McLaughlin, Los Angeles, for respondent.

NOURSE, Justice pro tem.

By his complaint in this action, the plaintiff, a Mexican banking institution, seeks to recover as the holder in good faith upon an instrument executed by the defendant as drawer in favor of one Barbe as payee and upon the Bank of America as drawee. From a judgment in favor of the plaintiff, the defendant appeals.

The relevant facts established by the evidence viewed in the light most favorable to the respondent are:

The defendant Sauls, Inc., was at the times hereinafter mentioned engaged in business as a commission agent in the marketing, for growers, of various agricultural products.

In January of 1952 it entered into a contract with Forest W. Barbe and R. W. Barbe (hereinafter called "Barbe") who were in possession of a parcel of land near Ensenada, Baja California, which they were desirous of planting to tomatoes. By the terms of the contract, Barbe agreed to plant 350 acres to tomatoes during the 1952 growing season, and designated defendant as his exclusive marketing agent, and to pay it commissions upon sales negotiated by it. Defendant agreed to advance to Barbe not to exceed $21,500 to be used by Barbe in preparing the land and in the planting and growing of the crop, and to further advance Barbe $1.15 for each lug of tomatoes upon receipt of original bills of lading and inspection certificates certifying the grade of the tomatoes. It further agreed to pay to Barbe the amount received by it from the purchasers after deducting commissions due and advances. Defendant did advance to Barbe substantially all of the sum of $21,500, and after the crop started to mature and shipments to be made, made advances to Barbe on the basis of $1.15 per lug. It did not however, in making these advances, demand strict compliance with the terms of the contract by demanding the receipt of bills of lading and inspection certificates, but made the advances upon the oral, and many times telephonic, representation by Barbe that the tomatoes had been inspected and loaded aboard railroad cars, and that bills of lading had been issued. In a number of instances defendant found that Barbe had misrepresented the number of lugs packed and shipped as to which he was entitled to an advance, and that the advances made by defendant were in excess of those to which Barbe was entitled.

[1] The advances of $1.15 per lug made by defendant up to October 23, 1952, were made by checks drawn on the Bank of America and payable to "The Order" of Barbe; they also contained the word "check" in the text of the instrument. In October defendant caused a different form of check to be printed. This new form was identical, not only as to composition but as to color, with those formerly used, except that it read "pay to" rather than "pay to the order of." The word "check" was also omitted from the instrument. Its negotiability was thus destroyed under both Mexican law and the law of California.

Between May 1 and November 15, defendant delivered to Barbe 33 checks. All but two of these were deposited by Barbe in his account in plaintiff's bank at Ensenada. Of these 33 checks, ten, beginning with a check for $1,000 dated October 23, were not made payable to order, but read "Pay to Forest W. Barbe." After the checks were made non-negotiable in form, the defendant, instead of waiting until it was advised that the merchandise had been inspected and bills of lading issued to make its advances to Barbe on account of the shipment, would when advised by Barbe that he was about to pick and pack tomatoes for shipment and of the amount to be picked, packed, and shipped, send or give Barbe a check in the non-negotiable form with instructions that he was not to use the check until the shipment was actually made, and that if he did, payment would be stopped. All of the checks heretofore mentioned were cleared and paid in the ordinary course of business.

On November 15, 1952, defendant issued its check dated November 16, 1952, in the sum of $4,500 and on that day delivered it to Forest W. Barbe with instructions that he was not to use it until a certain number of lugs of tomatoes which were then in the process of being picked and packed had been inspected and shipped. On the same day Barbe took this check to the plaintiff bank and presented it to the manager of its Ensenada branch for deposit. The manager, before accepting the check, noticed that it was post-dated and that it was not payable to order or bearer. He testified, however, that he believed that it was negotiable under the law of California. Parenthetically, we might state here that the evidence showed without conflict that if the check had been issued in Mexico and upon a Mexican bank, it would not have constituted a negotiable instrument because there was not in the text of the document a statement that it was a check. The manager accepted the check for deposit and credited the amount thereof to Barbe, who on that day and the following day withdrew the entire amount of the deposit. Several days later, before the check had been presented to the Bank of America, defendant stopped payment upon it, giving as its reason that it had not received the merchandise for which the check was issued.

In his testimony defendant Ginsburg, president of defendant Sauls, Inc., testified that the reasons for ceasing to issue negotiable checks and issuing instruments such as the one sued upon here were that the growers needed funds as soon as possible after they had delivered the merchandise; that if a check was not issued until the merchandise had been delivered there would be from three to four days' delay in the grower's receiving his money; therefore he issued a non-negotiable instrument to the grower with instructions not to use it in order that he might be protected if the grower did use it before delivering the merchandise for which it was issued, and so that if the merchandise was delivered there would be no delay in the grower's receiving his advances. He further testified that he did not entirely trust Barbe because of the fact that Barbe had in the past represented that he had inspected and shipped merchandise that had not in fact been inspected and shipped; that earlier in the year this did not make so much difference as a great deal of merchandise was being shipped and he could protect himself by deductions on future shipments; but that in October the season was getting late, there was danger of rain spoiling the crop, and he wanted further protection. He knew that Barbe was in need of money to pay his costs in picking, packing, and shipping, and that Barbe used the advances upon the merchandise delivered for that purpose. This in fact was the reason the contract provided for such advances.

After defendant had stopped payment upon the $4,500 instrument it issued a like instrument for the sum of $2,000 to Barbe without telling him that payment had been stopped upon the $4,500 check. This check, while non-negotiable under the law of California, was negotiable in form under the law of Mexico. Barbe took this check to plaintiff but the manager refused to accept it for deposit, giving as his reason that he did not yet know whether the $4,500 check had cleared. This check was also postdated. Barbe then took the check for $2,000 to a businessman in Ensenada, who endorsed it, and upon the faith of this endorsement the bank accepted it for deposit and gave Barbe immediate credit for that amount. Defendant also stopped payment upon this check.

At no time did the officers of defendant communicate with plaintiff or did plaintiff seek to ascertain from it what claims, if any, defendant might have as against Barbe. There was no evidence to indicate that plaintiff had any knowledge of the terms of the contract between defendant and Barbe.

There was a conflict in the evidence as to whether or not the tomatoes on account of which the $4,500 check was issued were inspected, packed, and shipped. Barbe testified unqualifiedly that at the time the check was delivered to him the tomatoes had already been packed, inspected, and were on board the cars. Ginsburg testified that Sauls never received delivery of any of them; although it thereafter received several carloads of tomatoes which did not pass inspection and which, while shipped, had to be destroyed. The trial court did not make any finding upon the issue as to whether or not there was a failure of consideration for the check in that the merchandise was never delivered, although this issue was directly tendered by defendant's answer. The court did find, however, that Barbe was indebted to the defendant in a sum greatly in excess of the sum of $4,500.

The appellant now concedes that the question of the negotiability of the instrument in question is governed by the law of California, that under that law it is not non-negotiable, and that the sole question to be decided here is as to whether or not the defendant is, as found by the trial court, estopped to assert against the plaintiff the offset that it was entitled to assert as against Barbe.

The trial court found a number of probative facts upon which its conclusion of law that the defendant is estopped is based. These facts may be summarized as follows: That the defendant knew that Barbe was in need of funds; that he would immediately upon the receipt of the check (for convenience we will denominate the $4,500 instrument a check) cash it at plaintiff's bank and would use the proceeds to pay his employees; that the defendant intended thereby to provide funds for Barbe's use in paying his employees in connection with the packing, harvesting, crating, and loading of tomatoes; that defendant intended to stop payment upon the check in the event it did not receive within the next day or so bills of lading and inspection certificates pursuant to instructions given at the time of the delivery of the check; that at the time of the delivery of the check the defendant knew the rainy season was approaching, that rain might cause serious damage to the tomato crop, and knew that the season for growing tomatoes was nearing an end and did not know whether the amount of the tomatoes they might ultimately receive from Barbe would be sufficient to enable it to make a profit out of the venture; that the defendant did not wish to risk its money until it had received and sold such an additional quantity of tomatoes as to assure it a profit in the transaction; that the defendant conceived the plan of making the checks non-negotiable in order to enable it to stop payment; that the defendant concealed from plaintiff that it might stop payment and concealed the fact that it had eliminated the words "the order of" from the instruments in order that it might safely stop payment; that the plaintiff had no knowledge of the intent of the defendant to stop payment and had no knowledge that the $4,500 evidenced by the check was not due and owing to Barbe; that the defendant's conduct in causing orders and checks for payment to be sent to Barbe over the months prior to November 17 had caused plaintiff to believe that checks drawn on the bank account in the name of defendant would be paid upon presentation; that neither the plaintiff nor its officers or agents knew that the $4,500 check was non-negotiable under the laws of the state of California; that defendant at all times intended to conceal the fact of the non-negotiability of such order from plaintiff and intended to cause plaintiff to cash the same for Forest W. Barbe in reliance upon the past conduct of defendant in not stopping payment on earlier checks.

We have concluded that certain of these findings are contrary to the evidence and that the facts found by the court do not support its conclusion that the defendant is estopped.

[2] The trial court's finding that the defendant knew that Barbe would cash the check before he had delivered the merchandise against which it was an advance, and its finding that the defendant intended the plaintiff to rely upon defendant's past conduct in not stopping payment on similar checks, are entirely unsupported by the evidence.

The only testimony upon this matter was that given by Ginsburg and Barbe. Ginsburg testified that his express instructions to Barbe were not to use the check until the merchandise had been delivered. He also testified that he made the check non-negotiable in form so as to be protected if his instructions were disobeyed, but there is no evidence that he knew they would be disobeyed. There was no evidence that any of the checks non-negotiable in form which had been delivered prior to November 15 had been used by Barbe contrary to instructions. Barbe's testimony did not contradict that of Ginsburg except that it was his testimony that the merchandise had in fact been delivered at the time he received the check.

[3] Four things are essential to the application of the doctrine of equitable estoppel. They are:

1. There must have been a misrepresentation or concealment of the matters of fact as to which the estoppel is claimed;

2. The party to be estopped must intend that the other party act upon the assumption of the truth of that fact;

3. The party claiming the estoppel must be ignorant of the true facts;

4. He must rely to his injury upon the conduct of the party to be estopped. Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp., 1 Cal.2d 121, 128, 34 P.2d 139; Safway Steel Products, Inc., v. Lefever, 117 Cal.App.2d 489, 491, 256 P.2d 32; Bank of America v. Pacific Ready-Cut Homes, 122 Cal.App. 554, 561, 10 P.2d 478; General Motors Acceptance Corp. v. Gandy, 200 Cal. 284, 297, 253 P. 137.

[4] The first essential may be established either by proof of actual misrepresentation or by proof of careless and culpable conduct resulting in the deception of the

party entitled to claim the estoppel, Safway Steel Products, Inc., v. Lefever, supra.

[5] In order to prove the third essential, it is necessary that the evidence show not only that the party claiming the estoppel did not have actual knowledge of the true facts but that he did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge; the convenient or ready means of acquiring knowledge being the equivalent of knowledge, Smith v. Penny, 44 Cal. 161; Dean v. Parker, 88 Cal. 283, 26 P. 91; General Motors Acceptance Corp. v. Gandy, supra, 200 Cal. at pages 297–298, 253 P. at pages 141–142; Nilson v. Sarment, 153 Cal. 524, 531–532, 96 P. 315; Jones v. Coulter, 75 Cal.App. 540, 550–551, 243 P. 487; Merchants' Ad-Sign Co. v. Sterling, 124 Cal. 429, 434, 57 P. 468, 46 L.R.A. 142; Bank of America v. Pacific Ready-Cut Homes, supra.

[6] The evidence here was entirely insufficient to establish either the first or third essential elements.

The only representation made by the defendant to the plaintiff was that contained in the instrument itself. That instrument was concededly non-negotiable in character and therefore could not constitute a representation that the defendant would not assert against anyone acquiring title to it any defenses that it might have against the payee Barbe.

[7] By issuing a negotiable instrument, the maker holds out to the world that he will not assert against a holder in due course any defenses that he may have against the payee. When, however, he issues a non-negotiable instrument this representation is lacking, and he may assert any defenses that he has against a payee, even though the instrument which he issues purports to waive that right, American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, 369–370, 216 P. 376. The fact that plaintiff's manager accepted the instrument for deposit and gave Barbe credit for the amount under the mistaken belief that it was negotiable does not change the situation even if such mistake be considered one of fact. His mistake could not change the instrument from a non-negotiable to a negotiable one, nor change the character of defendant's obligation under the instrument. The only contract that his mistake could affect was the contract of assignment entered into between plaintiff and Barbe; and we are not concerned with that contract. The manager's mistake could not constitute an element of estoppel in pais as against the defendant, for there is no evidence whatsoever that defendant's officers knew or had reason to believe that plaintiff's manager was ignorant of the true character of the instrument; and in the absence of such knowledge they had a right to assume that the manager of a bank which was engaged in handling foreign paper would know the essentials necessary to make instruments tendered him negotiable.

The fact that Barbe had on numerous former occasions negotiated paper both negotiable and non-negotiable issued by defendant has no possible bearing upon estoppel in pais. There was nothing deceitful on defendant's part in honoring these former instruments, nor was there any evidence that Barbe in negotiating those instruments had done so contrary to instructions and without delivering the merchandise on account of which they were delivered to him, or any evidence that if he had acted contrary to instructions in those instances that the plaintiff knew of Barbe's deceit and therefore had a right to expect that despite his deceit defendant would waive any defense that it might have to the instrument in question.

Nor can the second element be established on the theory that the defendant was negligent in delivering the instrument to Barbe. In delivering it to him it relied upon his good faith in performing his obligations to it, but did not put him in any position to represent that the instrument was anything else other than what it appeared on its face to be, to-wit: a non-negotiable instrument. If the plaintiff was negligent in delivering this instrument to Barbe before it had received the consideration for it, plaintiff was equally guilty of negligence in cashing the check without inquiry. In doing so it, as had defendant, relied upon Barbe's honesty and good faith. And so the maxim stated in section 3543 of the Civil Code that "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer" has no application, for here if either party was negligent then they were equally negligent in that they both relied upon the good faith of Barbe and certainly plaintiff had the last opportunity to, by exercising care, avoid the loss.

The evidence fails to establish the third element. The evidence establishes without conflict that plaintiff had knowledge of facts sufficient to put it upon inquiry and that it had reasonable means of ascertaining the true facts.

Plaintiff's manager was not misled by the form of the check. Before accepting it for deposit and giving Barbe credit, he noticed that it was not payable to bearer or to order, and he must have known that it did not as a part of its text contain the word "check" and therefore, being educated in Mexican law,[1] must have known that it was non-negotiable under the laws of the country in which he was active in business. He knew that the check was post-dated but accepted Barbe's explanation that that was a mistake on the part of Ginsburg. These facts were certainly sufficient to put the plaintiff upon inquiry and it had ample means of ascertaining the true character of the instrument and whether or not it would be honored. It could have made inquiry of defendant, and if it had done so would have learned that the check would not be honored but that the defendant claimed that the consideration for it had failed. It could have accepted it for collection only, and withheld credit upon it until it had cleared. Its failure to take any action to protect itself was not due in any wise to any representation made by the defendant. The fact that other like instruments had been honored when presented did not constitute any representation made by defendant to induce the plaintiff not to make inquiry as to the one in question here.

There was no confidential relationship existing between plaintiff and defendant and defendant was under no duty to advise the plaintiff that it might exercise the rights which the instrument it had issued entitled it to exercise; that is, to assert against an assignee of the instrument all equities and defenses which it had against Barbe, Civ.Code, § 1459. The very form of the instrument was notice of that fact.

If the facts here are sufficient to estop the defendants from asserting the non-negotiability of the instrument in question, then any issuer of a non-negotiable instrument may be likewise estopped, for by issuing the instrument they put it within the power of the payee to assign it, and that in substance is all that the defendant did in issuing the instrument in question.

The conclusion we have come to makes it unnecessary to consider whether or not the defendant Sauls, Inc., is the alter ego of the defendant Ginsburg.

The judgment appealed from is reversed.

WHITE, P. J., and FOURT, J., concur.

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[1] He was a graduate in law and practiced law for some years in Mexico before engaging in the banking business.

140 Cal.App.2d 461

Arthur CURTIS, Plaintiff and Appellant,
v.
TWENTIETH CENTURY-FOX FILM CORPORATION, a New York corporation, Defendant and Respondent.
Civ. 21092.

District Court of Appeal, Second District, Division 3, California.
April 3, 1956.

Hearing Denied May 29, 1956.

Action by author against motion picture company for, inter alia, damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book. The Supreme Court, Los Angeles County, Henry M. Willis, J., overruled author's motion for a new trial, and entered judgment for picture company, and author appealed. The District Court of Appeal, Vallée, J., held evidence sustained verdict for defendant.

Appeal from order denying new trial dismissed, judgment affirmed.

Parker Wood, J., dissented in part.

1. Appeal and Error ⚷1040(4)

In action by author against motion picture company for, inter alia, damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, author was not prejudiced by trial court's sustaining of picture company's demurrer to a second count for unauthorized use of the title of author's book after it had attained a secondary meaning where gist of such additional count was the same as author's first cause of action. West's Ann.Code Civ.Proc. § 339, subd. 1.

2. Pleading ⚷225(3)

Where a motion was made by plaintiff to restore second count to his complaint at opening of trial, more than a year after demurrer to such count was sustained, and record did not show any excuse for such delay, and no reason appeared why the motion was not made sooner, trial court did not abuse its discretion in denying such motion.

3. Appeal and Error ⚷882(8)

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, where author introduced his entire book in evidence, he could not complain because it was read to jury.

4. Trade-Marks and Trade-Names and Unfair Competition ⚷93(2)

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, trial court did not err in permitting picture company to read author's book to the jury and to project its motion picture to the jury since a comparison of the book with the picture was a proper way to show that the title of the picture did not compete with the title of author's book and was proper in determining weight of author's testimony that book had no value after release of picture.

5. Trade-Marks and Trade-Names and Unfair Competition ⚷93(3)

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, evidence sustained verdict for picture company.

6. Trade-Marks and Trade-Names and Unfair Competition ⚷93(2)

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, permitting a branch manager of picture company's Los Angeles Exchange to testify that no complaints of confusion between the book and the picture had been received by him was not error, in view of fact witness had testified that all sales problems, including patron complaints, were relayed to him.

7. Trial ⚷29(1, 2)

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, record did not establish that trial judge said anything which could be construed as showing bias or prejudice or an intimation of his views on the merits of the case.

8. Trade-Marks and Trade-Names and Unfair Competition ⚷99

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, instruction to jury that author's claim was that the public came to identify the phrase "You're in the Navy Now" with author's book to the extent that the use of that title by picture company confused the public and damaged author's book, was a correct statement of law.

9. Trade-Marks and Trade-Names and Unfair Competition ⚷99

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, instructions informing jury that in determining issue of unfair competition they should consider whether picture company used reasonable means to avoid confusion between its picture and author's book, and to consider the fact that picture company stated in its advertising and on the film that the picture was based upon another's story, were proper.

10. Trade-Marks and Trade-Names and Unfair Competition ⚷99

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, instruction pertaining to fact that before jury could find defendant had engaged in unfair competition they must find the manner of use by picture company of the title of its picture was such as to confuse the public into believing the picture was based on the book or in some way connected with the book or depicted characters, incidents or plot contained in the book, was a correct statement of law.

11. Trade-Marks and Trade-Names and Unfair Competition ⚷68(8)

Any one may use a title if there is no secondary significance.

12. Trade-Marks and Trade-Names and Unfair Competition ⚷68(1.1)

Unfair competition consists in palming off one's goods as those of another.

13. Trade-Marks and Trade-Names and Unfair Competition ⚷68(8)

The mere use of a substantially similar title, if not used in such manner as to induce the public to believe that the work to which it is applied is the identical thing which it originally designated, does not constitute unfair competition.

14. Trade-Marks and Trade-Names and Unfair Competition ⚷99

In action by author against motion picture company for damages allegedly caused by picture company's unfair competition in distributing a moving picture under a title which allegedly caused the public to believe such picture was based on author's book, instruction that author could not complain unless he established by a preponderance of evidence that by use of such title picture company sought to mislead public into believing that its picture was based on author's book, was proper.

15. Appeal and Error ⚷110

An order denying a motion for a new trial is not appealable.

Julius A. Leetham, Los Angeles, for appellant.

Musick, Peeler & Garrett, Harold F. Collins, and John P. Pollock, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendant entered on a jury verdict in an action for damages for alleged unfair competition.

In 1944 plaintiff published and copyrighted a book titled "Hey, Mac! You're in the Navy Now." On February 23, 1951, defendant released a motion picture titled "U.S.S. Teakettle." On March 8, 1951, defendant changed the title of the picture to "You're in the Navy Now."

The complaint was in two counts: the first was based on unfair competition; the second was based on unauthorized use of the title of plaintiff's book. The foundation of both counts was the alleged unauthorized use of the title of plaintiff's book after it had attained a secondary meaning. See Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 810, 187 P.2d 474. It was not alleged or claimed that the content of the motion picture is similar to the content of plaintiff's book. In July 1953 defendant's demurrer to the second count was sustained with leave to amend on the ground it was barred by section 339(1) of the Code of Civil Procedure. Plaintiff did not amend. When the cause was called for trial on June 29, 1954, plaintiff orally moved to restore the second count and to substitute therein March 8, 1951, for February 23, 1951. The grounds of the motion were that the tort alleged was a continuing one and that it had been discovered that the first use of the title "You're in the Navy Now" by defendant was on March 8, 1951. No affidavit was filed in support of the motion. It was denied.

[1] Plaintiff's first point is that the court erred in sustaining the demurrer to the second count and in denying his motion to restore it. The complaint was filed on February 27, 1953. The second count alleged the picture was released on February 23, 1951, more than two years prior to the filing of the complaint. Assuming, without deciding, that the wrongful act alleged, i. e., the use of plaintiff's title, was continuous and repeated and that every continuance and repetition gave rise to a fresh cause of action, see 16 Cal.Jur. 524, § 123, plaintiff was not prejudiced by the ruling sustaining the demurrer to the second count with leave to amend. The first count alleged defendant released and exhibited the picture, publicized it throughout the country, and by the "unauthorized, misleading and unfair use" of the title defendant had deceived and misled the general public; that the acts of defendant were with full knowledge of "plaintiff's sole and exclusive rights to the use of said name and title 'You're In The Navy Now' "; that after release of the picture plaintiff contacted defendant "concerning the unauthorized use of said title," but notwithstanding plaintiff's rights defendants have "continued and still continue to use" the title in connection with the distribution and exhibition of the picture; that "defendants have made an unauthorized use of the plaintiff's name and title, 'You're In The Navy Now', and have deprived and are continuing to deprive the plaintiff of the benefits, privileges, and profits from the use of said name and title to which the plaintiff is solely entitled, and that said loss of profits to plaintiff now totals $100,000.00."

The second count adds nothing to the first count. It realleges the averments of the first count except those as to damages, and avers that prior to the release of the picture the reasonable value of plaintiff's title "You're in the Navy Now" for use in motion pictures was $100,000, but by reason of defendant's use of the title it was rendered valueless and plaintiff had been damaged in that amount. As stated by the trial judge, "if the plaintiff is entitled to relief, he can get it under the first cause of action and it won't even be necessary to have a second cause at all." The gist of both counts was the alleged unauthorized use of plaintiff's title. All evidence which could have been introduced under the averments of the second count was introduced under the averments of the first count. Plaintiff testified the loss he sustained "when the defendant made this use of the name" without his permission was "$100,000 plus $100,000." If it was error to sustain the demurrer to the second count with leave to amend, the error obviously was not prejudicial.

[2] The court did not abuse its discretion in denying plaintiff's motion to restore the second count to the complaint. The motion was made at the opening of the trial, more than a year after the demurrer was sustained. The record does not show any excuse for the delay. No good reason appears for not having made the motion sooner. Vogel v. Thrifty Drug Co., 43 Cal.2d 184, 189, 272 P.2d 1; Moss Estate Co. v. Adler, 41 Cal.2d 581, 586, 261 P.2d 732.

[3, 4] It is contended the court erred in permitting defendant, over plaintiff's objection, to read plaintiff's book to the jury and in permitting it to project the motion picture to the jury, also over plaintiff's objection. The argument is that the action is for unfair competition in using the title of plaintiff's book which had acquired a secondary meaning and therefore the content of the book and defendant's picture were irrelevant. Plaintiff introduced his entire book in evidence. Having done so, he cannot complain because it was read to the jury. Plaintiff testified the value of his book prior to the release of the picture was $1,000,000 and in effect that it was of no value after release of the picture. Defendant was entitled to show that "You're in the Navy Now" as the title of the picture did not compete with "Hey, Mac! You're in the Navy Now" as the title of the book. A comparison of the book and the picture by the jury was therefore proper. It was also proper in determining the weight to be given to plaintiff's testimony.

[5] Plaintiff next argues the evidence compelled a verdict in his favor. He says four witnesses testified they had seen his book, they later saw advertising of defendant's picture, and they correlated the two titles; that more than 70,000 copies of the book had been circulated; and because of this evidence the judgment should be reversed for the determination of damages alone. The point is wholly without merit. The book was last circulated in 1945. The jury could have found it was not the subject of a motion picture and no one could have been confused or misled by defendant's use of the title "You're in the Navy Now." It is a series of miscellaneous incidents occurring in the training of sailors at the Farragut Naval Training Station during World War II. It begins with a 2-page account of conversations at the induction center and continues with chapters concerning events in basic training such as the Navy haircut, innoculations, the captain's inspection, scuttlebutt, battalion watch, boats, the captain's review, and graduation. There are 2 pages of definitions of nautical terms and about 3 pages of condensed biographies of outstanding naval figures and famous ships and a bibliography of naval books. There is no plot or theme, and there are no characters. Defendant's advertising showed a girl and ships not present in the book. Its advertising stated the picture was based on a story from "The New Yorker" by John W. Hazard. The cover and title page of plaintiff's book showed the words, "Hey, Mac!" in much larger type than the phrase, "You're in the Navy Now." There was evidence that plaintiff's book was frequently referred to as "Hey, Mac!" The phrase "You're in the Navy Now" is heard quite often in the Navy. In 1926 Paramount produced a motion picture titled "We're in the Navy Now." Prior to plaintiff's book there were eleven titles containing the phrase "You're in the Navy Now" or similar phrases in stories, songs, or motion pictures. The evidence amply supports the verdict for defendant.

[6] The branch manager of defendant's Los Angeles exchange was permitted to testify over plaintiff's objection that no complaints of confusion between the book and the picture had been received by him. Plaintiff asserts error. The witness had testified that all sales problems, including patron complaints, were relayed to him. The ruling was not erroneous. See Sunbeam Lighting Co. v. Sunbeam

Corporation, 9 Cir., 183 F.2d 969, 973; Sunbeam Corp. v. Sunbeam Furniture Corp., D.C., 88 F.Supp. 852, 858.

[7] Plaintiff contends the trial judge made hostile comments against him before the jury to his prejudice. Little need be said on this point. The record reveals that plaintiff, as a witness, would have tried the patience of Job. Seldom did he answer directly. In most instances, instead of answering a question he expatiated at length on irrelevant matters. Plaintiff is an attorney and should have known how to conduct himself on the witness stand. The kindly and patient trial judge did his best to keep plaintiff in order but with little success. At times he became somewhat critical, but nothing he said may be considered as in anywise affecting the integrity of plaintiff's testimony. He at no time said anything which could be construed as showing bias or prejudice or an intimation of his views on the merits of the case. Plaintiff's conduct was perfectly obvious to the jury and nothing said by the judge could have prejudiced him in the slightest.

[8] The court, at defendant's request, gave this instruction to the jury:

> "No right is claimed by plaintiff that he had any ownership in the title used by him. His claim is that by use and by advertising and publicity, the public came to identify the phrase 'You're in the Navy Now' with his book, to the extent that the use of that title by defendant confused the public and damaged plaintiff's book."

It is said the instruction is not a correct statement of the law. We think it is. Plaintiff made no claim that he had any ownership in the title "Hey, Mac! You're in the Navy Now" merely as a title. His claim was that by reason of the use of the title and by advertising and publicity it had acquired a secondary meaning, and he introduced evidence to establish that fact. He alleged and sought to prove that by reason of that fact the use by defendant of the title "You're in the Navy Now" confused the public and caused him damage.

[9] At the request of defendant the court gave these instructions:

> "In determining whether or not the defendant has engaged in any unfair competition, you should consider whether or not the defendant has used reasonable means and methods to avoid confusion between defendant's motion picture and the plaintiff's book.
>
> "The fact that defendant stated both on the film itself and in much of its advertising that its motion picture was based upon a story in New Yorker Magazine by John Hazard, is to be considered by you in determining whether confusion was avoided."

Plaintiff asserts they are not correct statements of the law. We think they are. The facts stated in these instructions were proper matters to be taken into consideration in determining the issues. Warner Bros. Pictures v. Majestic Pictures Corp., 2 Cir., 70 F.2d 310, 311–313; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 893; Collins v. Metro-Goldwyn Pictures Corp., D.C., 25 F.Supp. 781, 784; Selig Polyscope Co. v. Mutual Film Corp., Sup., 169 N.Y.S. 369; Sherwood v. 20th Century-Fox Film Corp., 173 Misc. 871, 18 N.Y.S.2d 388, 390.

[10–14] The instruction set out in the margin was given at defendant's request.[1]

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[1] "Before you may find that defendant engaged in any unfair competition in connection with the production, exhibition and distribution of its motion picture entitled 'You're In The Navy Now,' you must first find by the preponderance of all evidence that each of the following is true:

"1. That plaintiff's book has become identified in a significant portion of the public mind by the title 'You're in the Navy Now.'

"2. That plaintiff's use of such phrase has been so extensive that the phrase 'You're in the Navy Now' was definitely associated with his work by the public.

"3. That the defendant used the title 'You're in the Navy Now' as the title of its motion picture after plaintiff's book had been published.

"4. That the plaintiff has not, by his failure to keep it before the public, lost or abandoned any prior rights he might otherwise have had to use of the phrase

Plaintiff complains of that part which told the jury that one of the things they must find before they could find that defendant engaged in unfair competition was that the manner of use by defendant of the title "You're in the Navy Now" was such as to confuse the public into believing the picture was based on the book or in some way connected with the book or depicted characters or incidents or plot contained in the book. The part of the instruction criticized is a correct statement of the law. Anyone may use a title if there is no secondary significance. Unfair competition consists in palming off one's goods as those of another. The mere use of a substantially similar title, if not used in such manner as to induce the public to believe that the work to which it is applied is the identical thing which it originally designated, does not constitute unfair competition. The instruction did no more than tell the jury that plaintiff may not complain unless he established by a preponderance of the evidence that by use of the title "You're in the Navy Now" defendant sought to mislead the public into believing that its picture was based on plaintiff's book. Sherwood v. 20th Century-Fox Film Corp., 173 Misc. 871, 18 N.Y.S.2d 388, 390; Becker v. Loew's, Inc., 7 Cir., 133 F.2d 889, 893; Brondfield v. Paramount Pictures Corp., 200 Misc. 883, 107 N.Y.S.2d 698, 700–701.

The case was fully and fairly tried. The jury was fully, fairly, and accurately instructed on all principles of law applicable to the evidence. We find no merit in any of the assignments of error.

[15] Plaintiff also appealed from the order denying his motion for a new trial. The order is not appealable and the appeal therefrom will be dismissed.

The appeal from the order denying a new trial is dismissed; the judgment is affirmed.

SHINN, P. J., concurs in the judgment.

PARKER WOOD, Justice (dissenting in part).

I concur in the judgment. In my opinion the conduct of the trial judge in criticizing the plaintiff, while plaintiff was a witness, was improper. Some instances of such criticism are: (1) When an attorney for defendant asked the judge to instruct the witness to answer a question, the judge said, "It is useless." The judge also said, "I doubt if you can ever remodel the witness's method of answering questions." (2) When the judge asked plaintiff how long he had been in the Navy, the plaintiff replied that he had drawn Navy pay four different times. Then the judge said: "Fine; a fine answer. That is a sample of the answer I told you that you have been indulging in and which furnishes us with no information at all." (3) On another occasion the judge said to plaintiff: "And, don't split hairs in your answers. Let's talk plain turkey here." (4) On another occasion, after the judge instructed the jury to disregard a comment of plaintiff (a comment to the effect that he would be glad to put his hand on the Bible), the judge said: "You are not doing yourself any good, young man." (5) Thereupon, the plaintiff said he was sorry, and the judge said: "All you need to do is adhere to the truth and try to make a truthful answer. You are not making any effort at all to comply." (6) Thereupon, the plaintiff said he was sorry, and the judge said: "Your deportment is entirely wrong as a witness, and you better cure it, if you can." The attorneys for respondent assert in their brief that it is only fair to the trial judge that the full context of his comments be included in discussing appellant's claim of hostility upon the part of the judge. Respondent attached to its brief a full context of those comments. In my opinion that context, or

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'You're in the Navy Now.'

"5. That the manner of use by the defendant of the title 'You're in the Navy Now' was such as to confuse the public into believing that the motion picture was based upon plaintiff's book, or in some way connected with plaintiff's book or depicted characters or incidents or plot contained in plaintiff's book.

"6. That as the result, plaintiff has been damaged in that he has been deprived of monetary benefits and profits."

any context or circumstance, would not justify those comments by the trial judge in the presence of the jury. In my opinion, the comments cast insinuations, adverse to plaintiff, with reference to plaintiff's understanding of and compliance with his oath as a witness. If plaintiff deserved a lecture with respect to nonresponsive answers its should have been given when the judge did not have the jury as a part of his audience. However, since the question as to the merits of the case was not a close question, I think that the conduct of the trial judge should not be regarded as a basis for a retrial.

Hearing denied; CARTER, J., dissenting.

140 Cal.App.2d 326

In the Matter of the ESTATE of Fred H. BIXBY, Deceased.

Dana LATHAM, as Guardian ad litem of Florence G. Bixby, an Incompetent Person, Petitioner, Respondent and Appellant,

v.

Katharine Bixby HOTCHKIS, Florence Elizabeth Bixby Janeway, and Deborah Bixby Green, as Trustees of the First, Second and Third Trust, declared in the Will of Fred H. Bixby, the above named deceased, and Security-First National Bank of Los Angeles, a national banking association, as Trustee of the Fourth Trust declared in said Will, Contestants, Appellants and Respondents.

Fred H. Bixby, Jr., Objector and Respondent.

Civ. 21319.

District Court of Appeal, Second District, Division 2, California.

March 28, 1956.

Rehearing Denied April 24, 1956.

Hearing Denied May 23, 1956.

The Superior Court, Los Angeles County, Clyde C. Triplett, J., made an order for preliminary distribution in a decedent's estate proceeding, and appeals were taken. The District Court of Appeal, Fox, J., held that where an executor in making fiduciary tax returns elects to deduct administration expenses for federal income tax purposes rather than for federal estate tax purposes, and residuary beneficiaries would otherwise be thereby deprived of benefit of the deduction, the equitable solution is to reallocate enough of the tax saving to the principal account to offset the detriment to the corpus.

Order reversed and trial court directed to enter new order for preliminary distribution in accordance with views expressed in opinion.

1. Descent and Distribution 🔑74
Wills 🔑721

Rights of beneficiaries of an estate vest as of date of decedent's death, subject only to power of executor or administrator and court to administer the estate for the period required for administration.

2. Wills 🔑728, 736

A specific legacy or devise carries with it all accretions by way of dividends, interest or rents which may accrue after death of testator, less, however, all taxes and other expenses attributable to the property during administration of the estate.

3. Executors and Administrators 🔑91

Executor or administrator is not owner of estate assets; he is given possession and right to collect income solely for purpose of enabling him to settle affairs of the estate.

4. Executors and Administrators 🔑91

Function of executor or administrator is similar to that of receiver or stakeholder, and his duty is to preserve estate and distribute it as court shall direct.

5. Executors and Administrators 🔑75

An executor or administrator represents all the beneficiaries of the estate and must not favor one over another.

6. Taxation 🔑1024

Estates are treated for tax purposes as separate entities, the tax on the income to the estate being payable by the executor or administrator, and the tax applies to the entire taxable income of the estate.

7. Wills ⚿723, 728

Where will specifically bequeathed shares of stock, title thereto vested in legatee eo instante as of date of testator's death, and right to receive post mortem dividends vested in legatee at same time.

8. Executors and Administrators ⚿271

Income taxes assessed against income to a decedent's estate should be paid from income to the estate and not from principal of residue of the estate.

9. Internal Revenue ⚿1744

Where an executor in making fiduciary tax returns elects to deduct administration expenses for federal income tax purposes rather than for federal estate tax purposes, and remaindermen would otherwise be thereby deprived of benefit of the deduction, the equitable solution is to reallocate enough of the tax saving to the principal account to offset the detriment to the corpus. 26 U.S.C.A. (I.R.C.1954) § 642(g).

10. Courts ⚿200¼

It is within province of probate court to bring to its aid the full equitable powers with which, as a superior court, it is invested, to insure that income beneficiaries do not profit at the expense of the remaindermen.

11. Internal Revenue ⚿1744

Where dividends on stock specifically bequeathed to widow amounted to 47.32168 percent of estate's gross income, and executor elected to deduct administration expenses for federal income tax purposes rather than for federal estate tax purposes, and consequent saving in income taxes was $101,649.95 but principal of residue of estate suffered detriment in amount of $58,932.44 because of loss of such deduction for estate tax purposes, 47.32168 percent of such detriment was to be charged, on distribution, against widow so as to prevent her unjust enrichment at expense of residuary beneficiaries. 26 U.S.C.A. (I.R.C.1954) § 642(g).

Latham & Watkins, A. R. Kimbrough and Ira M. Price, II, Los Angeles, for guardian ad litem, petitioner, appellant and respondent.

Blau, Shaw & Miller, Beverly Hills, for Fred H. Bixby, Jr., objector and respondent.

Sherman Anderson, Lawler, Felix & Hall, Wm. T. Coffin, Los Angeles, for testamentary trustees, contestants, appellants and respondents.

FOX, Justice.

These appeals are from an order for preliminary distribution rendered in the matter of the estate of the late Fred H. Bixby. The controversy is with respect to the amount that should be distributed to the decedent's widow, Florence G. Bixby, by virtue of (a) the executor's receipt of $76,000 in dividends on stock specifically bequeathed to her, (b) the taxability of the dividends to the estate under the income tax laws, and (c) the utilization by the executor of expenses of administration as deductions for federal income rather than federal estate tax purposes.

The trial court held that Mrs. Bixby was entitled to receive the amount of the dividends less the portion of the income taxes actually paid by the executor allocable against the dividends. One appeal is taken by the testamentary trustees who are the residuary legatees and devisees, and the other (cross-appeal) is taken by the guardian *ad litem* of Mrs. Bixby. The particulars of the controversy and the contentions of the parties are set forth in an Agreed Statement on Appeal. The following statement of the case is taken from this Agreed Statement.

Statement of the Case.

The decedent, Fred H. Bixby, died testate May 17, 1952, a resident of Long Beach, California. He left an estate of the appraised value of $4,567,493.56 consisting of two automobiles, cash, securities, and real property. Thirty-eight thousand seven hundred fifty-five (38,755) shares of Fred H. Bixby Co. stock appraised at $4,340,560.00 ($112.00 per share) constituted the principal asset of the estate.

The decedent was survived by his spouse, Florence G. Bixby (hereinafter called "Mrs. Bixby"), by four children, Katharine Bixby Hotchkis, Florence Elizabeth Bixby

Janeway, Deborah Bixby Green, and Fred H. Bixby, Jr., and by eight grandchildren. The decedent's will was admitted to probate June 16, 1952, and letters testamentary were issued to Allen L. Chickering and to Mrs. Bixby. At the time of the decedent's death and subsequently Mrs. Bixby was in poor health. She was adjudged to be an incompetent person January 22, 1953, and the four children above named of the decedent and herself were appointed guardians of her person and Security-First National Bank of Los Angeles guardian of her estate. Following such adjudication, Mrs. Bixby was removed as one of the executors of the decedent's will and letters testamentary were issued February 16, 1953, to Allen L. Chickering as sole executor.

By the terms of his will, the decedent gave his automobile and 19,000 shares of Fred H. Bixby Co. stock to Mrs. Bixby and the residue of his estate in equal shares to four trusts designated respectively the First, Second, Third and Fourth Trusts. Each of the trusts is to continue until the death of the survivor of the decedent's four children and thereupon the trust estate is to be distributed to the decedent's then living grandchildren, *per capita,* the then living issue of any then deceased grandchild to take that grandchild's share. During the continuation of each trust, the net income is to be paid to a designated child of the decedent for life and thereafter to the issue of such child, or failing such issue, to the decedent's grandchildren, *per capita,* living at the time of the particular distribution of income, the issue of any deceased grandchild to take that grandchild's share. The three daughters of the decedent are the trustees of the First, Second and Third Trusts and they are respectively the primary income beneficiaries of those trusts. Security-First National Bank is the trustee of the Fourth Trust and the decedent's son, Fred H. Bixby, Jr., is the primary income beneficiary of that trust. The four trusts are particularly declared in the order for preliminary distribution rendered by the trial court under date of December 30, 1954.

In his will, the decedent directed that all succession taxes be paid from the residue of his estate. The California inheritance tax due from the decedent's estate as normally computed amounts to less than the 80 percent credit allowable under the basic federal estate tax law for state inheritance tax. Accordingly, the tax payable from the estate under the California inheritance tax law is equal to the 80 percent credit and the combined succession taxes payable from the estate, viz., those payable under the California inheritance tax law and the federal estate tax law, are equivalent to the federal estate tax undiminished by the 80 percent credit. The highest rate of the succession taxes applicable to the estate is 49 percent.

For California and federal income tax purposes, the executor adopted a fiscal year for the estate ending April 30th. The gross income of the estate for its initial fiscal year which ended April 30, 1953, amounted to $160,602.92, inclusive of $76,000 in dividends received by the executor during that fiscal year on the 19,000 shares of Fred H. Bixby Co. stock bequeathed Mrs. Bixby. Agreeably with the federal tax laws and regulations, the executor concluded to utilize as deductions for income rather than federal estate tax purposes, fees and other expenses of administration aggregating $120,270.28. The federal and California income taxes actually paid by the executor for that fiscal year amounted to $18,728.16 of which $8,713.40 is allocable to the dividends on the 19,000 shares of stock bequeathed to Mrs. Bixby. Had the executor not utilized the aforementioned fees and other expenses of administration as income tax deductions, the income taxes payable by him for the fiscal year in question would have amounted to $120,378.11 and the portion thereof allocable to said dividends on Mrs. Bixby's stock would have been $56,964.96.

The 19,000 shares of stock bequeathed to Mrs. Bixby were distributed to her pursuant to an order for partial distribution rendered by the trial court September 3, 1953. The only dividends on said shares paid to the executor were the aforementioned dividends aggregating $76,000 received by the executor during the fiscal year ending April 30, 1953. Those dividends were received by the executor in the amounts and on the dates following: $19,000, July 1, 1952; $19,000, November 1, 1952; $38,000, February 28, 1953.

Had the 19,000 shares of stock been distributed to Mrs. Bixby as of the date of the decedent's death and the $76,000 in dividends consequently paid to her as declared, the federal and California income taxes payable by Mrs. Bixby for the calendar years 1952 and 1953 would have been increased by amounts aggregating $56,497.48. Had the aforementioned fees and other expenses of administration aggregating $120,270.28 been utilized as deductions by the executor for federal estate tax purposes rather than as deductions for federal income tax purposes, the succession taxes payable from the decedent's estate would have been reduced by $58,932.44.

Mrs. Bixby has no interest in the estate's income except to the extent of the $76,000 in dividends, the residuary beneficiaries being entitled to the benefit of the balance ($84,602.92) of the gross income for the fiscal year in question. The utilization by the executor of administration expenses aggregating $120,270.28 as income tax deductions reduced ratably the portion of the income taxes allocable to the $76,000 in dividends and the portion of the income taxes allocable to the remaining income of $84,602.92.

November 3, 1954, the executor filed his Second Account Current, Report of Administration and Petition for Preliminary Distribution. By such petition, the executor prayed distribution to Mrs. Bixby of the amount due her by virtue of the executor's receipt of said dividends and further prayed distribution of a part of the residue of the estate to the testamentary trustees. In his petition, the executor alleged that $19,035.04 was distributable to Mrs. Bixby by virtue of his receipt of said dividends, that sum being the amount of the dividends ($76,000) minus the portion ($56,964.96) of the income taxes allocable against the dividends which the executor would have had to pay for the fiscal year ending April 30, 1953, had he not utilized the expenses of administration aggregating $120,270.28 as income tax rather than federal estate tax deductions.

November 29, 1954, Fred H. Bixby, Jr., filed his Objections to Executor's Second Account Current, Report of Administration and Petition for Preliminary Distribution. In his objections, Fred H. Bixby, Jr., alleged that the executor's petition failed to set forth sufficient facts to show that Mrs. Bixby's estate, the decedent's estate or any one interested therein, would not suffer loss or prejudice through the distribution to Mrs. Bixby of $19,035.04 in lieu of the $76,000 received by the executor as dividends on the 19,000 shares of stock prior to the distribution of said stock to Mrs. Bixby.

When the executor's petition and objections thereto came on for hearing, it appearing that with respect to the issue as to the amount distributable to Mrs. Bixby by virtue of said dividends, Security-First National Bank was in an inconsistent position being, on the one hand, guardian of Mrs. Bixby's estate, and on the other, one of the testamentary trustees, the court appointed Dana Latham, Esquire, guardian *ad litem* of Mrs. Bixby.

In acting on the executor's petition and pursuant to stipulation between the guardian *ad litem* and executor, the court, by order for preliminary distribution rendered December 30, 1954, ordered distribution to the testamentary trustees as prayed and distribution to Mrs. Bixby of the amount alleged by the executor to be due her by virtue of his receipt of said dividends, viz., $19,035.04. Also, it declared that such distribution to Mrs. Bixby should be without prejudice to the determination on or prior to the final distribution of the estate of the right of Mrs. Bixby to any additional sum that might be due her by virtue of the executor's receipt of the dividends and directed the guardian *ad litem* to present that issue for determination either by petition for further preliminary distribution or by other appropriate pleading.

Pursuant to such direction, the guardian *ad litem* initiated the instant proceeding by filing his petition for distribution to Mrs.

Bixby of the difference between the amount of the dividends, $76,000, and the amount of $19,035.04 ordered distributed to her on account of said dividends by the order of December 30, 1954. The testamentary trustees filed an answer to such petition alleging that nothing was distributable to Mrs. Bixby by reason of said dividends in addition to the $19,035.04 distributed to her by the order of December 30, 1954. Responsive to the guardian *ad litem's* petition, Fred H. Bixby, Jr., filed a statement in support of the petition.

At the hearing on April 4, 1955, of the guardian *ad litem's* petition and the pleadings responsive thereto, the guardian *ad litem* and Fred H. Bixby, Jr., contended:

Income taxes assessed against the income of the estate received by the executor during administration are expenses of administration chargeable against the residue of the estate. Mrs. Bixby, therefore, was entitled to receive the whole of the $76,000 in dividends undiminished by any amount on account of income taxes paid or payable by the executor. In any case, the dividends should not be diminished by more than the portion ($8,713.40) of the income taxes actually paid by the executor allocable against the dividends. They make the same contentions here.

The testamentary trustees, on the other hand, contended below, and contend on these appeals:

Income taxes assessed against the income of the estate received by the executor during administration are not expenses of administration payable from the residue of the estate, but are charges against and payable from the income. Nothing, therefore, should be distributed to Mrs. Bixby on account of the dividends in addition to the $19,035.04 distributed to her by the order of December 30, 1954, because the amount distributable to Mrs. Bixby on account of the dividends should be diminished by the portion of the income taxes of the estate chargeable there against and expenses of administration being payable under the California law from the principal of the residue of the estate, the amount of the estate income taxes chargeable against the dividends should be computed without regard to the executor's election to utilized expenses of administration aggregating $120,270.28 as deductions for federal income rather than federal estate tax purposes. In any case, the tax saving resulting from the utilization by the executor of the expenses of administration as income tax deductions should be credited to the principal of the residue of the estate at least to the extent necessary to offset the depletion in the residue resulting from the loss of the expenses of administration as federal estate tax deductions and the corresponding increase in the succession taxes.

The court below resolved the controversy by holding that Mrs. Bixby was entitled to receive $48,251.56 as the unpaid balance ($56,964.96) of the $76,000 in dividends minus the portion ($8,713.40) of the income taxes actually paid by the executor allocable against the dividends.

There are two basic problems presented by these appeals. The question presented by the guardian *ad litem's* appeal is this: Are income taxes paid by the personal representative during the period of administration chargeable against the income, or are they to be treated as expenses of administration payable from the principal of the residue of the estate? The primary question presented by the trustees' appeal is: What is the effect on the rights of the beneficiaries of the executor's utilization of expenses of administration as federal income rather than federal estate tax deductions? A few guiding principles should be stated before we attempt to answer these questions:

[1] 1. The rights of the beneficiaries of an estate vest as of the date of the decedent's death subject only to the power of the executor or administrator and the court to administer the estate for the period required for administration. Noble v. Beach, 21 Cal.2d 91, 94, 130 P.2d 426; Fountain v. Bank of America, 109 Cal.App.2d 90, 94, 95, 240 P.2d 414.

[2] 2. A specific legacy or devise carries with it all accretions by way of dividends, interest or rents that may accrue

after the death of the testator less, however, all taxes and other expenses attributable to the property during the administration of the estate. In re Estate of Daly, 202 Cal. 284, 287, 260 P. 296; In re Estate of De Bernal, 165 Cal. 223, 235–236, 131 P. 375; In re Estate of McSweeney, 123 Cal.App.2d 787, 790, 268 P.2d 107.

[3–5] 3. The executor or administrator is not the owner of the estate assets; he is given possession and the right to collect income solely for the purpose of enabling him to settle the affairs of the estate. Fountain v. Bank of America, supra. His function is similar to that of a receiver or stakeholder whose duty is to preserve the estate and distribute it as the court shall direct. Murphy v. Crouse, 135 Cal. 14, 17, 66 P. 971; In re Estate of Healy, 137 Cal. 474, 477, 70 P. 455. He represents all the beneficiaries of the estate and must not favor one over another. In re Estate of Lynn, 109 Cal.App.2d 468, 473, 240 P.2d 1001; In re Estate of Babb, 200 Cal. 252, 255, 252 P. 1039; Roach v. Coffey, 73 Cal. 281, 282, 14 P. 840.

[6] 4. Estates are treated for tax purposes as separate entities, the tax on whose income is payable by the executor or administrator. The tax applies to the entire taxable income of the estate. (Income Taxes, 26 Cal.Jur.2d p. 288, sec. 34.)

[7, 8] Bearing these principles in mind, we turn now to a consideration of who must bear the thrust of income taxes paid by the executor upon income accruing to the estate while in the course of administration. In the instant case, we are concerned with the dividends amounting to $76,000 which the executor received upon the 19,000 shares of stock of which Mrs. Bixby was the outright legatee. As legatee of this stock, title thereto vested in her *eo instante* as of the date of the testator's death, at which time there also originated her right to receive the income (dividends) produced by this stock subsequent to the testator's death. Had the legatee received this income when her right thereto accrued, it is undisputed that the payment of an income tax on these funds would have been the legatee's obligation. However, distribution not having as yet been made and the estate being a taxable entity, the executor was required to pay an income tax on this and the other income received by him during the course of administration. Since such taxes are the subject of and measured by the income, it seems only fair that they should be paid therefrom and not from the principal of the residue of the estate. Although the precise point has not been directly adjudicated in this state,[1] such a rule is in harmony with the equitable principle that the burden of the tax accompanies the income and should be borne by the account into which the taxed item goes. In re Estate of Mankowski, Sur., 110 N.Y.S.2d 677, 680; Holcombe v. Ginn, 296 Mass. 415, 6 N.E.2d 351, 353, 108 A.L.R. 1134; 2 Scott on Trusts, secs. 232.2 and 233.3, pp. 1260, 1265; Nossaman on Trust Administration and Taxation, sec. 253, p. 226. Although the estate bears the burden of the tax when it holds the income, it transfers that burden (the extent of which will be discussed later) to the legatee when it distributes the income to him. See In re Estate of De Bernal, supra; In re Estate of McSweeney, supra.

When consideration is given to the high rates at which federal income taxes are assessed, it is at once apparent that if those taxes are not to be paid from the income which is the subject of and measures the income taxes but from the principal of the residue of the estate, the distributive shares of the residuary beneficiaries are vulnerable to substantial depletion. To charge the estate's income taxes against the principal of the residue gives the persons entitled to the income substantial benefits over and above what they possibly could have realized if the income had been distributed to them as received, thus giving the person entitled to the income a windfall which he would not realize were it possible to effect distribution as of the date of the decedent's death. The windfall, moreover, comes from the pockets of the residuary legatees. Any such rule would be patently inequitable; its application would not mean that the income escapes taxation but that the onerous burden of the income taxes would be shifted from the recipients of the income to the persons entitled to the residue.

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[1] However, this point has been involved, incidentally, in two cases: In Re Estate of Schiffmann, 86 Cal.App.2d 638, 195 P.2d 484, the trial court in ordering distribution treated the income taxes paid by the executor as expenses of administration payable from the principal of the residue. The decree of distribution was affirmed. In Re Estate of Welsh, 89 Cal. App.2d 43, 200 P.2d 139, the trial court in ordering distribution of the estate charged the income taxes paid by the executor against the income. This decree of distribution was also affirmed. But in neither case does it appear that any issue was presented as to where the burden of income taxes paid by an executor shall fall, nor is the point discussed in either opinion.

On the basis of logic and as a matter of equity, the conclusion is inescapable that income taxes assessed against the estate's income during the period required for administration should be charged against that income and not against the principal of the residue.

We pass now to the problem presented by the trustees' appeal, viz.: What is the effect on the rights of the beneficiaries of the executor's utilization of expenses of administration as federal income rather than federal estate tax deductions? In order to strip the problem of its esoteric trappings and place it in its proper perspective, a few prefatory observations are in order by way of clarification of the treatment of deductions in connection with the fiduciary returns which an executor is required to file under the provisions of the Internal Revenue Code, 26 U.S.C.A.

The taxable income of an estate, with certain exceptions not here germane, is computed in the same manner as that of an individual. The tax imposed upon the taxable income of an estate must be paid by the executor. The period of administration or settlement of the estate is, of course, the period actually required by the executor to perform his normal administration functions. During this period administration expenses accrue, and these expenses, in the case at bar, have been paid from the principal of the residue of the estate. The propriety of using that fund as the source of payments is not challenged. Taxwise, administration expenses of estates may be treated as a deduction under the income tax return or under the estate tax return. However, to obviate double deductibility, administration expenses are allowable as a deduction only once, and the executor is afforded an election as to whether he will apply the deduction against the estate tax or against the income tax. Section 162(e), Internal Revenue Code, 26 U.S.C.A., reenacted as section 642(g) of the Internal Revenue Code of 1954, 26 U.S.C.A. This gives the executor an opportunity of determining under which return it would prove more advantageous taxwise to claim the administrative expense deduction, and places him in a position to minimize the aggregate of taxes paid by the estate. Confronted with this elective treatment of deductions, the discreet executor will, of course, study the applicable estate tax and estate income rates and if he finds that there is a wide disparity between them, it would be judicious to avail himself of the deduction in the place where the optimum advantage will accrue to the estate, that is, by diminishing the aggregate amount of taxes payable to the federal government.

In the case at bar, the executor discharged his responsibility wisely under the circumstances by electing to utilize the administration expenses as an income tax deduction, although such expenses were borne by the principal of the residuary estate. In so doing, having reported an income of some $160,000, he paid a tax of $18,728.16. Had he not utilized this deduction on the estate income tax return, the tax would have been $120,378.11. He thus effected a tax saving of $101,649.95, resulting in a very substantial benefit to the legatees and beneficiaries entitled to the income. While this is a most obviously desirable result, its correlative effect on those entitled to corpus is unfortunate. For had the administrative expenses been used as a deduction in the federal estate tax return, the succession taxes payable from decedent's estate would have been reduced by $58,932.44. To that extent the remainder beneficiaries of the residuary trusts have been penalized to effect the income tax saving previously described.

[9] It is at once manifest that the election to effect a tax saving afforded the executor under the Revenue Code does not justify the severe disruption and disarrangement of what would otherwise constitute the beneficial interests of the legatees and remaindermen under the will. Recognizing this inequity, the court below charged Mrs. Bixby's income account with the sum of $8,713.40, this sum being the part of the $18,728.16 in federal and state income taxes paid by the executor which is allocable to the dividends on the stock bequeathed to her. This, however, does not go far enough in adjusting the rights of the parties and in repairing the detriment occasioned to the corpus of the estate by giving only the income beneficiaries the benefit of the deduction for administration expenses. The total income tax saving, as we have seen, was $101,649.95. The consequent impairment of corpus was $58,932.44, the amount by which the estate tax was increased by being deprived of the deduction of administration expenses. The impact of this loss to corpus is borne by the remaindermen. In such a situation, the equitable solution is to reallocate enough of the tax saving to the principal account to make whole the detriment suffered by corpus. In re Estate of Warms, Sur., 140 N.Y.S.2d 169. The virtue of this approach is that while a significant benefit in the form of tax saving still accrues to Mrs. Bixby and the income beneficiaries, it is not exacted in the form of an unjust enrichment at the expense of the residuary beneficiaries.

Precisely this technique was adopted in Re Estate of Warms, supra, where, as here, the executor elected to utilize expenses of administration as deductions for income tax purposes, causing an increase in the succession taxes and a proportionate diminution in the residue of the estate. In approving the suggestion that the income tax saving resulting from the use of the deductions on the income tax should be credited to the principal to the extent necessary to offset the depletion in the residue by the nonavailability of such deductions for estate tax purposes, the surrogate remarked, 140 N.Y.S.2d at page 171: "With respect to his alternative claim, the special guardian does not object to the income beneficiary retaining any amount in excess of the saving in estate tax that would have resulted had administration expenses been deducted from principal on the estate tax return. His position is that the amount of such tax saving should be credited to the remainder interest. This position is sustained by the court. The tax option which results in a benefit to the income beneficiary, especially where she is co-executrix, should not be exercised to the detriment of the remaindermen. The remainder interest is entitled to the benefits which would have resulted if the expense with which it is charged had been deducted on the estate tax return."

[10] Such a rule commends itself to the conscience of the court as one under which no one is injured by an unjust encroachment on his inheritance. Apart from its simplicity of application, we adopt this rule because it places the burden of the income tax on the income legatee, where it properly belongs, and obviates any dislocation of the testator's bounty by shifting the burden of an income tax to a residuary legatee. While the executor's election as to the use of deductions under the present circumstances still enables the income beneficiaries to receive an actual cash benefit in the form of tax savings, by the process of reallocating an appropriate portion of such savings to principal, no part of any beneficiary's inheritance is diminished so that another may reap a profit at his expense. It is within the province of the probate court to bring to its aid the full equitable powers with which as a superior court it is invested to insure that income beneficiaries do not profit at the expense of the remaindermen. In re Estate

of Eilert, 131 Cal.App. 409, 416–417, 21 P.2d 630.

[11] In the case *sub judice,* the estate's gross income was $160,602.92. The income tax thereon, but for the utilization of the administration expense deduction, would have been $120,378.11. The income tax saving resulting from the utilization of the expenses of administration as a deduction on the income tax return was $101,649.95. The $76,000 in dividends on Mrs. Bixby's stock amounted to 47.32168 percent of the estate's gross income, giving her that proportionate share of the above tax saving. However, the depletion in the residue resulting from the nonavailability of administration expenses as estate tax deductions was $58,932.44. As has been pointed out, to prevent unjust enrichment at the expense of the remaindermen, 47.32168 percent of this depletion should therefore be charged to Mrs. Bixby who has received the benefit of the tax saving. This charge amounts to $27,887.41. In restoring this amount to corpus, Mrs. Bixby still retains a substantial tax benefit for herself. But she obtains this advantage now solely at the expense of the federal government, while the residuary beneficiaries are in no worse position than if the deduction had been taken for estate tax purposes. The ultimate result is salutary in that the reciprocal and correlative rights of all the takers under the will remain vested in the posture prescribed by the state rules governing rights and interests in the estates of decedents, undisrupted and undisturbed by the transient vagaries of the federal income tax laws.

The order dated May 2, 1955, is reversed and the trial court is directed to enter a new order for preliminary distribution in accordance with the views herein expressed. The testamentary trustees are awarded their costs on appeal.

MOORE, P. J., concurs.

ASHBURN, J., deeming himself disqualified, did not participate herein.

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140 Cal.App.2d 233

The PEOPLE of the State of California, Respondent,

v.

George VILLARICO, Appellant.

Cr. 3174.

District Court of Appeal, First District, Division 2, California.

March 26, 1956.

Prosecution for robbery while armed with a deadly weapon, and for assault with intent to commit robbery. The Superior Court, San Francisco County, Melvyn I. Cronin, J., entered judgment of conviction, and denied a motion for a new trial, and defendant appealed. The District Court of Appeal, Nourse, J., held evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⚿576(5)

Where defendant consented to a postponement of his trial, such consent was equivalent to postponement on his application and was sufficient cause for not bringing him to trial within sixty days after information was filed. West's Ann.Pen.Code, § 1382, subd. 2; West's Ann.Const. art. 1, § 13.

2. Criminal Law ⚿576(5)

Where defendant did not move in trial court for dismissal of an information on ground of delay of more than sixty days in bringing him to trial, he thereby waived the benefit of statutory and constitutional provisions requiring trial within sixty days after an information is filed. West's Ann. Pen.Code, § 1382, subd. 2; West's Ann. Const. art. 1, § 13.

3. Criminal Law ⚿1128(2)

Facts outside the record, stated in briefs only, cannot be considered on appeal.

4. Criminal Law ⚿1044

Where defendant did not move in the trial court to set aside an information, any objections to the information were waived.

5. Criminal Law 🔑200(1)

Where defendant was tried for robbery while armed with a deadly weapon, and for assault with intent to commit robbery, even though both offenses were charged in one information, defendant was not twice tried or punished for the same offense, and double jeopardy was not involved. West's Ann.Pen.Code, §§ 211, 220, 954.

6. Robbery 🔑24(1, 6)

Evidence sustained conviction for robbery while armed with a deadly weapon, and for assault with intent to commit robbery.

7. Robbery 🔑11

Where a robbery was perpetrated by defendant while armed with a gun, he was guilty of robbery in the first degree. West's Ann.Pen.Code, § 211a.

8. Criminal Law 🔑742(1)

Credibility of witnesses is for the jury.

9. Criminal Law 🔑1159(5)

Jury's resolution of a conflict in alibi evidence against defendant could not be disturbed by District Court of Appeal on appeal.

10. Arrest 🔑71

A reasonable search without a warrant may be made as incident to a lawful arrest, and it is not important whether the search precedes or follows the arrest.

11. Arrest 🔑63(4)

Where defendant's portrait was identified by two independent witnesses of felonies, prior to his arrest, such identification provided reasonable cause required by statute to permit a peace officer to arrest defendant without a warrant. West's Ann. Pen.Code, § 836, subd. 3.

12. Arrest 🔑63(4)

"Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. West's Ann.Pen. Code, § 836, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

13. Searches and Seizures 🔑7(27)

Where arresting officers searched the apartment of defendant without express permission and without a search warrant, but without protest from defendant or a woman present in his apartment, such search, and introduction of evidence obtained thereby were not unlawful.

14. Assault and Battery 🔑96(1, 8)

In prosecution for robbery while armed with a deadly weapon, and for assault with intent to commit robbery, instructions given by court as to assault with a deadly weapon and simple assault as lesser offenses included in the charge of assault with intent to commit robbery, were proper since defendant could have complained if they had not been given on ground no possibility of conviction for such lesser offenses had been open to him West's Ann.Pen.Code, §§ 211, 220.

George Villarico, in pro. per.

Edmund G. Brown, Atty. Gen., of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was found guilty by a jury of two felonies as stated in an information in two counts, to wit robbery committed on March 18, 1955, armed with a deadly weapon on a certain Lum, § 211, Penal Code, and assault with intent to commit robbery perpetrated on March 17, 1955 on a certain Romero. § 220, Penal Code. His motion for a new trial was denied and he was sentenced to San Quentin, the two sentences to run concurrently. He appeals in propria persona from the judgment and from the order denying his motion for a new trial.

[1–3] Appellant complains that he was not brought to trial within 60 days after the information was filed in contravention of section 1382, subd. 2 of the Penal Code and Article I, section 13 of the State Constitution, the filing of the information having occurred on April 11, 1955 and the trial having commenced on June 20, 1955. However, the clerk's transcript shows that the trial was set for May 2, 1955 and thereupon continued "by consent" from May 2 to May 23 and from May 23 to June 20. "The defendant's consent to the postponement of his trial is equivalent to a postponement on his application and is sufficient cause for the delay." In re Lopez, 39 Cal.2d 118, 120, 245 P.2d 1, 2. Moreover appellant did not move in the trial court for dismissal on the ground of the delay and thereby waived the benefit of the provisions he now relies on. People v. Hawkins, 127 Cal. 372, 374, 59 P. 697; People v. Scott, 74 Cal.App.2d 782, 784, 169 P.2d 970. Appellant's contention that he refrained from protesting the delay because of intimidation by police officers is not based on anything contained in the record. Facts outside the record, stated in briefs only, cannot be considered on appeal. People v. Croft, 134 Cal.App.2d 800, 803, 804, 286 P.2d 479.

[4] Appellant's contention that he was arrested on a complaint charging him with assault with intent to do bodily harm to Romero and other unclear grievances relating to illegality of the commitment are equally unsupported by the record and any such objection to the information was waived because not taken in the trial court by motion to set aside the information, Penal Code, §§ 995, 996; People v. Thompson, 133 Cal.App.2d 4, 9, 284 P.2d 39.

[5] Double jeopardy, repeatedly urged by appellant is not involved in this case. Appellant was not twice tried or punished for the same offense, but for two separate offenses of the same class by one information in accordance with section 954 of the Penal Code. (See People v. Finkel, 94 Cal.App.2d 813, 817, 211 P.2d 888.)

Appellant's several grievances, as to alleged failure to prove the corpus delicti, conviction on perjured evidence known to be false, and misconduct of prosecution, court and jury have no specific basis and amount to no more than a contention that the evidence does not support the verdict and judgment. They are without merit.

The evidence showed the following: In the morning of March 18, 1955 shortly after 9:30 a. m. two men separately entered Lum's shop and after they had busied themselves a few moments in the shop one, which Lum later identified as the defendant, drew a gun, said it was a stick up, and pushed Lum to the back room, where the other man tied him up. Defendant, who had gone back to the shop, where later the cash register proved to have been emptied, came back to Lum, searched him and took from $175 to $200 from his pockets, after which both men ran away. Lum pointed out a portrait of defendant in the police files as possibly the robber with the gun and at the trial positively identified him as such.

On March 17, 1955 Romero, who was having supper in the kitchen behind his store together with his wife, his daughter and his son-in-law Mikroulis, heard the store bell ring. When Romero went there a man threatened him with a gun and said, "This is a stick-up." Romero pushed him and they struggled on the floor. Another man kicked Romero in the ribs. When the others from the kitchen came into the shop the man with the gun hit Romero two or three times over the head with it and both men backed out of the shop. Romero and Mikroulis followed them. Romero, who was wounded, had to give up soon. He could not identify his assailants. Mikroulis pursued the men further; the two went different ways. Mikroulis caught up with one of them, the defendant. The defendant refused to go back with him and ran off. Mikroulis the next day pointed out a portrait of defendant in the police files as very much like the man he followed and later he identified defendant positively in a police line-up and at the trial.

Defendant was arrested on March 25 in his home, a small apartment next to the garage in the basement of 518 Pennsylvania Avenue, San Francisco. At the time of the arrest police inspectors searched the apartment, the garage and defendant's car parked in front of the house, and found and seized rope and electric wire similar to that with which Lum had been bound. Both the rope and wire with which Lum had been bound and those found at the search were introduced in evidence and an expert testified as to their similarity and to the fact that examination of the ends showed that the two pieces of rope had once been one and also the pieces of wire.

Defendant denied all connection with the crimes and he and the woman with whom he was living at the apartment testified that at the time of both crimes he was at the apartment taking care of the woman who was not well and at any moment expected the birth of defendant's child, which in the afternoon of March 18 was born in a hospital where defendant brought her.

[6–9] The above evidence proves all the elements of the two crimes with which defendant was charged and the fact that defendant was armed with a gun, a deadly weapon, caused the robbery perpetrated on Lum to be of the first degree, § 211a, Penal Code; People v. Rainey, 125 Cal.App.2d 739, 741, 271 P.2d 144. It is true that the testimony of Mikroulis proved only that defendant was one of the two men who attacked Romero, but even if he would have been the man who participated by kicking only, such would have constituted an assault and from the statement of the other man the intent of both participants to rob clearly appeared. The credibility of the witnesses was for the jury. The alibi evidence caused a conflict only with the testimony of Mikroulis and Lum, who saw defendant at the scene of the crimes, and the resolution of the conflict by the jury against defendant cannot be disturbed on appeal, People v. Mercer, 103 Cal.App.2d 782, 791, 230 P.2d 4.

[10–13] Appellant contends, however, that part of the evidence was illegal, because obtained by a search of his home without a warrant and that because of the influence of the illegal evidence reversal must follow. People v. Berger, 44 Cal.2d 459, 282 P.2d 509; People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505. A motion to have the evidence introduced stricken because it was taken during illegal search and seizure was made in the trial court and denied. Correctly so. A reasonable search without a warrant may be made as incident to a lawful arrest, People v. Winston, 46 Cal.2d 151, 293 P.2d 40, and it is not important whether the search precedes or follows the arrest. People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535. Section 836, subd. 3 of the Penal Code permits a peace-officer to arrest a person without a warrant "When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it." The identification of defendant's portrait by two independent witnesses of the two similar felonies, even if not with certainty, prior to the arrest provided the required reasonable cause for believing that defendant was the robber. "'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122, 133. Moreover, although no express permission of search was given neither the owner of the premises nor defendant or the woman present in his apartment, who all spoke to the police officers when the arrest and search were made, protested the search at any time during the action of the police officers, which circumstance may influence the reasonableness of the search. We hold that the search and the introduction of the wire and rope seized were not unlawful.

[14] Appellant also predicates prejudicial error on certain instructions given by the court as to assault with a deadly weapon and simple assault as lesser offenses included in the charge of assault with intent to commit robbery. The instructions were correct. Appellant could have complained if they had not been given and therefore no possibility of conviction for the lesser offenses had been open to him. People v. Duncan, 72 Cal.App.2d 423, 426, 164 P.2d 510. That appellant was nevertheless found guilty of the higher offense cannot have been caused by the instructions complained of.

No separate grievances have been developed with respect to the denial of defendant's motion for a new trial.

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

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140 Cal.App.2d 301

W. D. HENKEL, as surviving partner of the firm of Miller & Henkel, Plaintiff and Respondent,

v.

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, Defendant and Appellant.

Civ. 4979.

District Court of Appeal, Fourth District, California.

March 27, 1956.

Rehearing Denied April 18, 1956.

Hearing Denied May 23, 1956.

Action for breach of contract of insurance. The Superior Court, Fresno County, Philip Conley, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mussell, J., held that since insurer had agreed, in workmen's compensation and employer's liability policy, not only to indemnify insured against loss by reason of his liability as an employer but also to defend all suits and claims against him as such employer, and since insured's employee would not have filed personal injury action and attached insured's equipment if insurer had paid such employee's claim when demand was made therefor, insured could recover for damage sustained by reason of attachment and for attorneys' fees and other expenses incurred.

Affirmed.

1. Judgment 🔑739

Even though damages were alleged in insured's action for declaratory relief, and judgment therein made no mention thereof, such judgment was not conclusive on insured's subsequent action to recover damages by reason of attachment levied on his machinery and equipment and for attorneys' fees and other expenses incurred by reason of insurer's refusal to defend action against insured, where issue of damages was not determined in declaratory judgment action because amount thereof was not then ascertainable. West's Ann.Code Civ. Proc. § 1062.

2. Insurance 🔑514, 514½

Where insurer had agreed, in workmen's compensation and employer's liability policy, not only to indemnify insured against loss by reason of his liability as an employer but also to defend all suits and claims against him as such employer, and insured's employee would not have filed personal injury action and attached insured's equipment if insurer had paid such employee's claim when demand was made therefor, insured could recover for damage sustained by reason of attachment and for attorneys' fees and other expenses incurred. West's Ann.Civ.Code, § 3300.

3. Attachment 🔑375(3)

Reasonable value of use of property is proper measure of damages sustained by reason of attachment.

4. Judgment 🔑721

Where insurer, which had agreed (in workmen's compensation and employer's liability policy) to defend all suits or claims against insured as employer and to indemnify insured against loss by reason of his liability as employer, had been decreed, in declaratory judgment suit, to be obligated to indemnify insured for damages he might be required to pay for employee's injuries, insurer could not recover on cross-complaint, in insured's subsequent action to recover for loss incurred by reason of insurer's failure to fulfill obligation to defend, sum paid in settlement of employee's action.

5. Judgment 🔑721

Unappealed declaratory judgment as to insurer's liability under contract of insurance was binding on insurer in insured's subsequent action for breach of agreement to defend suits against insured. N.C.L. 1929, § 2680 et seq.

Ray W. Hays and James N. Hays, Fresno, for appellant.

Lopez & Hyde, Fresno, for respondent.

MUSSELL, Justice.

This is an action for damages on a contract of insurance. Plaintiff was engaged in a general contracting and engineering business and on April 7, 1951, the defendant issued to him a Workmen's Compensation and Employer's Liability Policy wherein defendant agreed (as far as is material here) as follows:

> "I. (t)o insure the liability of this Employer to employees of this Employer and, in the event of their death, to their dependents, to pay, and the Company will promptly pay to any person entitled thereto, the compensation, including medical benefits, if any, for which this Employer is liable on account of such injuries, including occupational diseases, under the Workmen's Compensation Laws of the State of California (excepting, however, liability for payment of additional compensation recoverable by reason of the serious and wilful misconduct of this Employer, insurance against which is prohibited by law).
>
> "II. (t)o indemnify this Employer against loss by reason of liability as an Employer for damages (other than liability under any workman's compensation law) imposed upon this Employer by the law of any state of the United States or province of the Dominion of Canada on account of such injury or death of such employees.
>
> "III. (t)o defend in the name and on behalf of this Employer suits or claims against this Employer with respect to such injuries, for such damages or for such compensation benefits, which may be instituted against this Employer by or on behalf of such employees or their dependents, and to pay all costs of such defense."

On September 14, 1951, plaintiff entered into a contract with the Corps of Engineers, United States Army, to dredge the channel of the Truckee River in Reno, Nevada. On October 11, 1951, one Bernie Esker Garrett, a truck driver, who was hired by plaintiff in Nevada to work on the project, was injured during the course of his employment. Defendant Pacific Employers Insurance Company was notified by plaintiff of the injury to Garrett and disclaimed any liability under their insurance contract with plaintiff. On October 27, 1951, Garrett filed suit in Nevada against plaintiff and his firm to recover for his injuries and obtained an attachment under which plaintiff's equipment was impounded until a release bond could be secured. On January 30, 1952, plaintiff filed an action against defendant in Fresno county, California, for declaratory relief and damages. The complaint in this action, number 85822, contained six counts. Count one stated a cause of action for declaratory relief and counts two, three, four and five realleged the allegations of count one and alleged damages for attorneys' fees, loss of use of machinery caused by the attachment and damage to plaintiff's business. The demurrer to these counts was sustained without leave to amend. However, the allegation of damages in counts two, three, four and five were realleged in count six of the complaint and the demurrer was overruled as to that count.

Trial was had by the court without a jury and a judgment was rendered on January 13, 1953, decreeing that the defendant Pacific Employers Insurance Company was obligated and bound under the terms of the policy of insurance to defend on behalf of Henkel the suit which had been filed in Nevada by Garrett. Defendant was ordered to pay all costs of defending said suit and it was further ordered that the defendant was obligated and bound to indemnify Henkel against loss, if any, because of damages that plaintiff might be required to pay because of the purported injuries suffered by Garrett on October 11, 1951.

On August 4, 1953, Henkel filed the present action, after the judgment in the former action, number 85822, had become final and in his complaint for damages alleged the execution of the insurance contract, the execution of the Nevada contract, the hiring of Garrett and the statement that he was injured in the course of his employment, the filing of an action by Garrett in Nevada, the notification of defendant of said action and demand that defendant appear in and defend said suit, its refusal and the employment of counsel by plaintiff to appear therein. It was further alleged that by reason of defendant's refusal to defend said action, plaintiff suffered damages by reason of an attachment levied on his machinery and equipment and incurred attorneys' fees and other expenses by reason of said refusal. Defendant filed a cross-complaint for $3,500 which it paid to Garrett on April 14, 1953 and for $267.99 paid to investigators on August 14, 1952. A jury trial was had in the instant action, which resulted in a verdict in favor of plaintiff Henkel in the sum of $7,630.19. Judgment was thereupon entered in favor of plaintiff for said amounts and costs and defendant appeals therefrom.

[1] It is first contended that the prior judgment in action number 85822 is res judicata. This argument apparently is based on the premise that the order sustaining the demurrers as to counts two, three, four and five of the first action filed by plaintiff was, in effect, a judgment on the issue of damages. However, since the demurrer to the sixth cause of action therein was overruled and the same damages were alleged therein as in counts two, three, four and five, it cannot be said that there was a judgment on the issue of damages occasioned by the sustaining of the demurrer as to said counts. No findings of fact were made by the trial court on the issue of damages and there was no mention thereof in the judgment. There is no record before us of the testimony taken in said action and no evidence of the date of the termination of proceedings in the Nevada action, and there is evidence that defendant paid Garrett $3,500 on April 4, 1953, and that on September 9, 1954, plaintiff's attorneys were billed for counsel fees by a firm of attorneys in Nevada, which fees were in addition to a $500 retainer paid by plaintiff's counsel. This evidence indicates that the issue of damages was not determined in said action because the amount thereof was not then ascertainable.

Section 1062 of the Code of Civil Procedure, in the chapter pertaining to equitable relief, provides as follows:

> "*Cumulative remedy.* The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts."

As is said in California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P. 2d 4, 11, 167 A.L.R. 306:

> "* * * section 1062 of the Code of Civil Procedure expressly provides that the remedy through declaratory relief is cumulative and not restrictive of any other remedy provided by law."

In action number 85822 the judgment for declaratory relief fixed the obligations of the defendant under the terms of the insurance policy and made no determination of the issue of damages. We conclude that under the circumstances shown by the record, plaintiff was not precluded from a later determination of the issue of damages in the instant case.

[2] Appellant's next claim is that the evidence is insufficient to sustain the verdict and in support of this contention it is argued that appellant performed all that it was required to do under the former judgment by settling the Nevada action; that its agreement and the judgment did not bind it to provide an attachment release bond or to pay plaintiff for any loss he might have sustained because a writ of attachment was levied upon his equipment. These contentions are without merit.

Section 3300 of the Civil Code provides as follows:

> "*Measure.* For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the

> detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

The evidence is sufficient to support a finding that appellant's failure and refusal to accept its liability under its insurance contract at the time demand was made upon it was the proximate cause of the insured employee's filing suit in Nevada, the attachment of plaintiff's equipment and the payment of costs and other expenses by plaintiff. Appellant agreed in its insurance contract not only to indemnify plaintiff against loss by reason of his liability as an employer, but also to defend all suits or claims against him as such employer. The evidence supports an inference that had appellant paid the claim of Garrett when demand was made therefor, the suit in Nevada would not have been filed or the attachment issued.

In Venturi v. Zurich General Accident & Liability Co., 14 Cal.App.2d 89, 57 P.2d 1002, 1003, an action for breach of a contract of liability insurance, plaintiff was the owner of an automobile upon which he placed an insurance policy under which defendant contracted "'to Indemnify the Assured against loss from liability imposed by law upon the Assured for damages.'" Judgments were obtained against plaintiff for damages resulting from a collision with plaintiff's automobile. The insurance company defended these actions but refused to pay the judgments, to appeal, or to furnish *supersedeas* bonds, and the judgment creditors levied upon plaintiff's business, forcing him into bankruptcy. Plaintiff claimed damages for loss of his business through forced sale and the court held that the cause of action rested upon section 3300 of the Civil Code. The judgment for defendant was reversed. In the instant case the same reasoning applies and the measure of damages is that stated in section 3300 of said code.

[3] It is next argued that excessive damages were awarded. This contention is likewise without merit. In Atlas Development Co. v. National Surety Co., 190 Cal. 329, 332, 212 P. 196, 197, the court, in discussing the measure of damages sustained by reason of an attachment, said:

> "The complaint alleges as damages arising from the attachment suit that plaintiff was deprived of the use and possession of said rig and outfit for a period of 78 days, and that the reasonable usable value of the same was $50 per day during said period. Other claims by way of special damages were alleged, but these were subsequently waived, and the directed verdict for $1,000, the full penalty of the attachment undertaking, was based solely upon the value of the use of the property while detained under the writ.
>
> "We are of the opinion that this point was correctly decided. There is no ground to question that a proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention. Hurd v. Barnhart, 53 Cal. 97; McGill v. W. P. Fuller & Co., 45 Wash. 615, 88 P. 1038; McCarthy Co. v. Boothe, 2 Cal. App. 170, 83 P. 175; 6 Corp.Jur. 539; Sutherland on Damages, (4th Ed.), §§ 512, 513."

There is substantial evidence in the record that plaintiff was required to pay interest on the attachment bond in the sum of $1,050, attorneys' fees and court costs in the Nevada suit, $706.19, $200 for reasonable rental value of a dragline for two days, $400 for the rental of five dump trucks, $2,700 rental for one bulldozer for two months, and $2,856 rental for a low bed transport for 42 days. These items total $7,912.19, a sum greater than the amount awarded by the jury.

[4] Finally, it is argued that the court erred in directing a verdict against cross-complainant and in refusing and giving certain instructions. The record shows that appellant paid Garrett $3,500 on his claim and that it incurred $267.99 in investigation expenses. Appellant sought reimbursement for these amounts in its cross-complaint. However, the prior final judgment in said action number 85822 provided that appel-

lant was obligated to indemnify Henkel against loss for damages he might be required to pay for Garrett's injuries and the sums paid by appellant pursuant to said judgment were not recoverable in the instant action.

[5] Appellant's contention relative to the instructions is that the court refused to give defendant's instruction relating to the interpretation of contracts and the applicable provisions of the Nevada Industrial Insurance Act, N.C.L.1929, § 2680 et seq. The judgment in the prior action, number 85822, fixed and determined appellant's rights under the contract of insurance and since no appeal was taken from that judgment, it is binding on appellant, and the refusal to give the offered instructions was not error.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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140 Cal.App.2d 340

Douglas Arthur COLE, Individually and as a representative of Underwriters At Lloyd's London, subscribing Certificate LC-17341, Plaintiffs and Respondents,

v.

A. A. CALAWAY, Defendant and Appellant.

John MEACOCK, Individually and as a representative of Underwriters At Lloyd's London, subscribing Certificates LC-20852 and LC-22530, Plaintiffs and Respondents,

v.

A. A. CALAWAY, Defendant and Appellant.

Civ. 4977.

District Court of Appeal, Fourth District, California.

March 28, 1956.

Action by underwriters for declaratory relief as to the rights and liabilities under physician's liability insurance certificate because of alleged misrepresentations in application to obtain insurance in reference to malpractice coverage. Judgment for plaintiffs in the Superior Court of Fresno County, Philip Conley, J., and the defendant appeals. The District Court of Appeal, Griffin, J., held that the findings that the plaintiffs were not estopped from asserting the defense of concealment in application for the liability policy, that there was no waiver of the provision thereof and no unreasonable delay in effecting rescission were supported by the evidence.

Judgment affirmed.

1. Declaratory Judgment 🔑347, 369

In action by underwriters for declaratory relief as to the rights and liabilities under physician's liability insurance certificate because of alleged misrepresentations in application to obtain insurance in reference to malpractice coverage through an insurance agency licensed to carry on business as a surplus line broker, findings of the trial court as to the limitation of the agency of the broker were not insufficient as without evidentiary support and as containing an indefinite conclusion.

2. Appeal and Error 🔑1010(1)

The question of laches is one for the trial court and its conclusion thereon will not be set aside by an appellate court if the conclusion finds substantial support in the evidence.

3. Insurance 🔑267

Under the Insurance Code defining "concealment" as neglect to communicate that which a party knows, and ought to communicate, concealment occurs as respects breach of warranty in application for the policy whether the concealment is intentional or unintentional. West's Ann. Insurance Code, § 330.

See publication Words and Phrases, for other judicial constructions and definitions of "Concealment".

4. Insurance 🔑268

Under the statute, a breach of warranty in an application for insurance without fraud merely exonerates an insurer from the time it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk. West's Ann. Insurance Code, § 449.

5. Insurance ⚷247

The Insurance Code section providing that whenever a right to rescind a contract of insurance is given the insurer, such right may be exercised at any time previous to the commencement of an action on the contract, is not inconsistent with the Civil Code section that acting promptly is a condition of one's right to rescind. West's Ann. Insurance Code, § 650; West's Ann.Civ.Code, § 1691.

6. Insurance ⚷247
Statutes ⚷223.2(1)

The Insurance Code section respecting the right to rescind contract of insurance by the insurer should be read with the Civil Code section respecting rights of rescission generally, and former statute should be interpreted as meaning that the insurer may rescind at any time within the statutory period, providing no action has been commenced on the policy, and the statute is actually a limitation on the right to rescind rather than an extension of it. West's Ann. Insurance Code, § 650; West's Ann.Civ.Code, § 1691.

7. Insurance ⚷371, 372

An insurer may waive provisions placed in a policy solely for its own benefit and may by its conduct be estopped from asserting defenses that might otherwise be available.

8. Declaratory Judgment ⚷347

In action by underwriters for declaratory relief as to physician's liability insurance certificate because of alleged misrepresentations in application to obtain insurance in reference to malpractice coverage, finding that plaintiffs were not estopped from asserting defense of concealment of institution of malpractice actions against defendant and that there was no waiver of provisions of policy relating thereto and no unreasonable delay in effecting rescission were supported by evidence. West's Ann. Insurance Code, §§ 330, 331, 449, 650; West's Ann.Civ.Code, § 1691.

9. Declaratory Judgment ⚷368

In declaratory judgment action, whether insurance underwriters and agency were estopped from asserting defense of concealment of alleged institution of malpractice actions against the insured, applying for a liability policy, whether there was a waiver of the provisions of the policy and unreasonable delay in effecting rescission was a question of fact for the determination of the trial court and not one of law.

◆

Frank H. Marvin, John D. Chinello, Fresno, for appellant.

Orville A. Schulenberg, Fresno, for respondents.

GRIFFIN, Justice.

In these two actions, consolidated for trial and on appeal, plaintiffs and respondents Douglas Arthur Cole and John Meacock, individually and as representatives of Underwriters at Lloyd's London subscribing certificates LC-17341, LC-20852 and LC-22530 respectively, brought this action in declaratory relief against defendant and appellant A. A. Calaway, a medical doctor (hereinafter referred to as defendant) et al., to declare the rights and duties of the respective parties under said certificates and to declare them null and void under certain claimed breaches of warranty by defendant in misrepresenting or concealment of facts in his application to obtain insurance in reference to malpractice coverage through Pacific Marine Insurance Agency (hereinafter referred to as Pacific). A copy of the application or "proposal form" and certificates of coverage were attached to the amended complaint. It alleged generally that Pacific was a corporation duly organized and existing under the laws of California and authorized to carry on business as a "surplus line broker"; and authorized to enter into and execute the certificates of insurance described on behalf of plaintiffs. The proposal form for each of the three policies for three successive annual periods of coverage from December 15, 1950, to December 15, 1953, and signed by defendant, recites: "No claims or suits for professional services rendered, or which should have been rendered have been made against me except as follows: Instrument broke during tonsillectomy several years ago. No payment made." Defendant secured a reduction of 15 per cent in his insurance premium because his application showed that no suits had been filed nor claims made against him for malpractice. The amended complaint alleges that said warranties were untrue in that "defendant had had several claims and/or suits filed against him, alleging acts of malpractice upon his part; that if plaintiffs would have known of these facts previous to the issuance of said insurance certificates, no certificate of insurance would have been issued by plaintiffs to defendant"; that "said warranties were made to and did induce plaintiffs to issue the same through" Pacific; that during the month of June, 1953, or thereabouts, plaintiffs learned that previous to December 13, 1950, "defendant had had several claims and/or suits filed against him, alleging acts of malpractice upon his part;" that upon learning thereof plaintiffs did, on July 3, 1953, give defendant a written notice of rescission of said certificates of insurance along with the return of all moneys paid by defendant as premiums; that plaintiffs claim all obligations on their part, as therein provided, have terminated, which defendant disputes, and plaintiffs having elected to terminate said insurance certificates, desire a declaration of their rights and duties in the premises, including a declaration that said insurance certificates are and were null and void *ab initio*.

Defendant answered and claimed that the proposal form was filled out by the insurance agent for Pacific and that defendant signed it without reading it. He denied he wilfully made any false statements with the intent of inducing plaintiffs to issue said certificates. He admitted he then knew of the four malpractice suits which had previously been filed against him, as alleged, but denied generally the other allegations of the amended complaint. He admitted he was served on July 3, 1953, with notice of rescission and that plaintiffs tendered the premium paid but claims he returned it. By way of affirmative defense he alleged that on or about February 5, 1953, plaintiffs became aware of and had full knowledge of these several claims and/or law suits filed against him and that notwithstanding such knowledge on their part, they gave no notice of rescission of said certificates to defendant until July 3, 1953. It is contended that plaintiffs waived said claimed breach and were estopped from claiming it because, after obtaining knowledge of it, plaintiffs continued to investigate certain claims of malpractice of defendant Calaway in reference to defendant Perez, et al., for the purpose of effecting a settlement; that defendant was therefore lulled into a sense of security by their action and was prejudiced by it.

The court found generally that plaintiffs were underwriters authorized to engage in the insurance business at Lloyd's London; that Pacific was licensed in this state to carry on business as a surplus line broker and authorized to enter into and execute the certificates of insurance on behalf of plaintiffs, "subject to the rules and regulations of plaintiffs"; that defendant was a practicing physician and on December 13, 1950, signed the completed "proposal form and declaration for malpractice insurance", and submitted it to the agent of Pacific, requesting the issuance of a policy; that it is untrue that the soliciting agent was an agent of plaintiffs, and untrue that Pacific was the agent of plaintiffs except to the extent specifically authorized. It then found that defendant, at the time of the application, knew that four lawsuits had been filed against him alleging acts of malpractice and did not disclose them, and that if disclosed plaintiffs would not have issued the insurance certificates; that Pacific had no authority to issue said certificates had such information been disclosed, without having first submitted the proposal to plaintiffs, and that plaintiffs relied solely upon the warranties of defendant; that plaintiffs tendered the $169.28 premium paid on the policy to defendant, who refused it, and plaintiffs deposited said sum with the county clerk, subject to the order of the court; that there was a notice of rescission of the certificates of insurance given on

July 3, 1953, and, due to the breach of warranty, no liability of plaintiffs attached to the risk and the certificates were, accordingly, void from their inception; that there was no unreasonable delay in giving the notice of rescission and that the affirmative defenses claimed by defendant were untrue. Judgment was entered accordingly.

The main complaint is that these findings are not supported by the evidence in this, that the finding as to the limitation of agency of Pacific had no evidentiary support and is an indefinite conclusion.

[1] The original "proposal form" was attached to and made a part of the certificate of insurance issued. The vice president of Pacific testified that Lloyd's London is a non-admitted carrier of insurance in California and operates in conformity with the requirements imposed upon such insurers; that Pacific is a surplus broker in this State and the business placed with Lloyd's London is placed through a surplus broker's license. He testified that all of Pacific's dealings are with the London broker; that Pacific had authorization to accept specific types of insurance, such as malpractice, based upon certain requirements; that the acceptance of any such insurance during the period here in question was controlled by this agreement; that Pacific was not authorized to write such business but only authorized to place this business in non-admitted companies; that the certificates issued by plaintiff were issued through Pacific; that the procedure was to submit a "proposal form" to the customer or "producer" who may be a licensed agent of this or any other company, and if properly filled out and signed the proposal is reviewed, and if in accordance with Pacific's authority from the London broker required to be obtained to effect that type of coverage, Pacific was authorized, under its master malpractice contract, and subject to its terms, to issue a certificate of insurance; that if the proposal indicates an unsatisfactory loss experience, the risk is submitted to the Underwriters for their specific approval and such approval is necessary before Pacific is authorized to issue the certificate; that Pacific had no discretion to issue such certificate if the proposal showed that there had been or was about to be a malpractice action filed against the applicant. However, this was qualified by the statement that if a suit had been filed against the applicant and "nothing had happened on the thing," and the statute of limitations had run on it, and his company "knew that nothing came out of it * * * in other words, * * * the Underwriters did not pay anything on it", his company would not consider the loss record or claims history unsatisfactory, and would probably issue the certificate. He further stated that as to a "producer", Pacific had no authority to delegate any binding authority to such producer. The witness further testified in some detail as to the *modus operandi* of the Underwriters at Lloyd's London, somewhat in accord with the historical background related in People v. Caldwell, 55 Cal.App.2d 238, footnote page 247, 130 P.2d 495. From this evidence we must conclude that it supports the court's findings as to the limitation of Pacific's agency.

Defendant claims that the terms of the policy and certificate give Pacific a greater authority because it recites that the assured, in event of claim or suit, shall advise "Underwriters" immediately "through Pacific" managers and forward to the Underwriters' representative any summons served; that all notices and communications to the Underwriters and all processes required to be forwarded to it under the terms of the certificate shall be delivered to Pacific, "the Underwriters' representative", and delivery accordingly shall be conclusively deemed to constitute the receipt thereof by the Underwriters. This added authority would not necessarily or materially impeach the finding.

In defendant's closing brief his counsel states that this appeal is not based on any finding that Pacific had no authority to issue a policy of malpractice insurance wherein previous malpractice claims against doctors have been disclosed, but on the fact that the plaintiffs did not rescind promptly after having knowledge of any prior malpractice claims. We will therefore not further labor the point but will consider it under that claim.

It is contended that plaintiffs, through Pacific and its agent, learned of three of the four previous lawsuits against defendant on February 6, 1953; that accordingly plaintiffs did not rescind promptly, were guilty of laches in giving notice of rescission, waived their right to, and were estopped from rescinding, and that the findings should be corrected accordingly, citing section 1691 of the Civil Code; Gedstad v. Ellichman, 124 Cal.App.2d 831, 835, 269 P.2d 661; and authorities cited therein to the effect that acting promptly is a condition of one's right to rescind, and a delay of more than one month in serving notice of rescission requires explanation, citing J. Frank & Co. v. New Amsterdam Casualty Co., 175 Cal. 293, 295, 165 P. 927.

The facts giving rise to the contentions here raised are that Pacific received notice of the claim by defendants Perez, et al., on December 9, 1952, respecting some contemplated action against defendant for alleged malpractice, and on January 30, 1953, notice of suit was received. An independent adjuster in Fresno was appointed to investigate the claim. When called as a witness he testified he called defendant on the telephone about the Perez claim and after relating the facts about it defendant said something in reference to other claims. Apparently the adjuster had defendant sign a statement dated January 5, 1953, about the Perez claim, in which he also stated:

> "Prior to the hereinafter described occurrence a claim was made against me during 1950 or 1951 because of a broken leg suffered by the colored baby born by Caesarian Section. I do not remember the exact details, but my recollection is that the insurance company covering me for malpractice made a contribution of some $500.00, the company covering the hospital having paid the remainder of the settlement. On another occasion, about ten years ago, Ray Carter, a local attorney, filed a suit for $50,000.00 on a case involving a boy with a ruptured appendix. This case was tried and a verdict rendered in my favor." (This still leaves one law suit which defendant never did disclose.)

It appears that thereafter considerable investigation was conducted in reference to witnesses and the possible liability of the defendant on said claim. On April 10, 1953, the adjuster forwarded his report to Pacific and Pacific forwarded it to its adjuster in San Francisco who informed the Fresno adjuster that they were obliged to report the matter to Lloyd's Underwriters to be reviewed by Messrs. Mendes and Mount, in New York. This letter read in part: "* * * the record above indicates a breach of warranty, however, we are sure that no fraud was intended either by the insured or by * * * the agent in this case. In view of the amount of our exposure, however, we recommend that a declaratory judgment action be filed." On April 30, 1953, Pacific received advice from Lloyd's London informing Pacific it had received transmittal slip dated April 1, 1953, and adjuster's report advising that the claim had been referred to Mendes and Mount. On June 16th, Mendes and Mount wired the Fresno adjuster that "in view of possible misrepresentations make no commitment to assured or client Perez." On July 1, 1953, after considerable correspondence and investigation, Mendes and Mount wired Pacific that Underwriters authorized rescission action and premium refund. Thereafter, on July 31, 1953, this action was filed. The point is that defendant claims plaintiffs were notified through their duly authorized agent, the adjuster, of at least three prior malpractice claims and/or suits by virtue of the letter or statement signed by defendant on February 5, 1953, and by the original proposal form, and therefore plaintiffs were, as a matter of law, charged with such knowledge as of that day; that accordingly they failed to thereafter promptly rescind, citing such authority as Federal Life Insurance Co. v. Cary, 20 Cal.App.2d 257, 259, 67 P.2d 129.

[2] The court was justified in believing that the adjuster was employed for the limited purpose of obtaining information regarding the Perez claim. Wilson v. Maryland Casualty Co., 19 Cal.App.2d 463,

65 P.2d 903; Iverson v. Metropolitan Life Insurance Co., 151 Cal. 746, 91 P. 609, 13 L.R.A.,N.S., 866. It appears that the other statements made as to prior suits were only incidental to the investigation. The adjuster had no means of knowing what defendant stated in his former application or proposal, and this information did not actually reach plaintiffs' attention until April, and was acted upon shortly before this action was commenced. Regardless of the time of actual discovery by plaintiffs of the concealed facts, whether it was February 5, 1953, as claimed, or "during the month of April, 1953", as found, the main question is whether the time elapsing between the date of discovery and the time of rescission was unreasonable under the circumstances. As was said in Fabian v. Alphonzo E. Bell Corporation, 55 Cal. App.2d 413, 415, 130 P.2d 779–781:

> "The question of laches is one for the determination of the trial court and its conclusion thereon will not be set aside by an appellate court, if such conclusion finds substantial support in the evidence. * * *
>
> "It is not possible to designate a definite period of time within which a party must give notice of rescission of a contract because of misrepresentation, fraud etc., but the facts peculiar to each case are determinative thereof." See also Hunt v. L. M. Field, Inc., 202 Cal. 701, 705, 262 P. 730.

[3, 4] Section 330 of the Insurance Code defines "concealment" as "Neglect to communicate that which a party knows, and ought to communicate * * *" And this is true whether the concealment is intentional or unintentional. Sec. 331, Ins. Code; Telford v. New York Life Ins. Co., 9 Cal.2d 103, 69 P.2d 835; Mirich v. Underwriters at Lloyd's London, 64 Cal.App.2d 522, 149 P.2d 19. Under Section 449 of the Insurance Code a breach of warranty without fraud merely exonerates an insurer from the time it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk. Section 650 of the Insurance Code provides that "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract."

[5, 6] It does not appear that there is any inconsistency between section 1691 of the Civil Code and Section 650 of the Insurance Code. In Federal Life Insurance Co. v. Cary, 20 Cal.App.2d 257, 261, 67 P.2d 129, it was contended that the general statute of limitations, § 338, subd. 4, Code Civ.Proc., and the code sections relating to rescission, § 1689 et seq., Civ.Code, do not apply because section 650 of the Insurance Code permits an insurer to rescind "at any time previous to the commencement of an action on the contract." It was held that these sections should be read together and that the latter be interpreted as meaning that the insurer may rescind at any time within the statutory period providing no action has been commenced on the policy, and that Section 650 is really a limitation on the right to rescind, rather than an extension of it.

[7–9] It is true that an insurance company, like any other contracting party, may waive provisions placed in a policy solely for its own benefit and may, by its conduct, be estopped from asserting defenses which might otherwise be available. J. Frank & Co. v. New Amsterdam Casualty Co., 175 Cal. 293, 295, 165 P. 927. The findings of the trial court that plaintiffs were not estopped from asserting the defense of concealment, that there was no waiver of the provisions of the policy, and no unreasonable delay in effecting the rescission are supported by the evidence. The question was a matter for the determination of the trial court and not one of law. Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779; Gedstad v. Ellichman, 124 Cal.App.2d 831, 835, 269 P.2d 661.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 239

Donald Y. MITCHELL et al., Plaintiffs,

v.

Joseph H. WALKER et al., as Members of the Council of the City of Monrovia, a municipal corporation et al., Defendants.

Civ. 21632.

District Court of Appeal, Second District, Division 1, California.

March 26, 1956.

Hearing Denied May 23, 1956.

Mandamus proceedings brought to compel city council to submit to vote of electorate of city an initiative ordinance which had been submitted to defendants and which they had refused to adopt. The District Court of Appeal, Nourse, J. pro tem., held that effect of proposed ordinance, requiring Monrovia City Council to increase or decrease salaries of policemen and firemen in amount equal to percentage of increase or decrease applied to members of comparable rank of Los Angeles County sheriff's office and Los Angeles County Fire Department, would be to delegate to governing body of another political subdivision of the state (Board of Supervisors of Los Angeles County) power vested in council to fix salaries in question, and held that therefore ordinance was not one which could be adopted by means of initiative.

Peremptory writ denied and alternative writ discharged.

1. Municipal Corporations ⚷162(1), 220(1)

Under Government Code, Monrovia city council had power and duty to fix compensation of appointed officers and employees. West's Ann.Gov.Code, § 36506.

2. Municipal Corporations ⚷108.2

Administrative act upon part of Monrovia city council could not be subject of initiative proceeding.

3. Statutes ⚷303

It is only legislation that may be enacted by legislative body itself which may be subject of initiative proceeding.

4. Municipal Corporations ⚷162(1), 220(1)

In fixing salaries of city's officers and employees, Monrovia city council is required to exercise its discretion, and if it exercises that discretion and in good faith fixes compensation for office or position, its decision is final and is not subject to review by courts. West's Ann.Gov.Code, § 36506.

5. Municipal Corporations ⚷162(1), 220(1)

Monrovia city council could not itself delegate to any other body power given it to fix salaries of city's officers and employees, nor could it abandon that power and refuse to perform duty placed upon it by statute or so act as to impede future exercise of that power. West's Ann.Gov. Code, § 36506.

6. Municipal Corporations ⚷108.2

Under Constitution section giving electorate of municipality power to initiate local legislation, electorate cannot initiate legislation which contravenes general statute passed by legislature. West's Ann.Const. art. 4, § 1.

7. Municipal Corporations ⚷108.2

Effect of proposed ordinance, requiring Monrovia city council to increase or decrease salaries of policemen and firemen in amount equal to percentage of increase or decrease applied to members of comparable rank of Los Angeles County sheriff's office and Los Angeles County Fire Department, would be to delegate to governing body of another political subdivision of the state (Board of Supervisors of Los Angeles County) power vested in council to fix salaries in question, and therefore ordinance was not one which could be adopted by means of initiative. West's Ann.Gov. Code, § 36506.

8. Mandamus ⚷74(2)

Where two sections of proposed ordinance were not subject of enactment through initiative procedure, Monrovia city council could not be compelled by mandate to submit ordinance to electorate, despite purported savings clause contained therein.

Howser, Coughlin & Schmitt, Fred N. Howser, Arcadia, for plaintiffs.

Homer H. Bell, City Atty. of City of Monrovia, Monrovia, and O'Melveny & Myers, Pierce Works, Howard J. Deards, William D. Moore, Los Angeles, for defendants.

NOURSE, Justice pro tem.

The plaintiffs, as residents and taxpayers of the City of Monrovia, a city of the sixth class, seek a writ of mandate to compel the defendants, as the council of that city, to submit to a vote of the electorate of the city an initiative ordinance which by proper petition had been submitted to the defendants and which they have refused to adopt.

On filing of the petition, we issued an alternative writ and the defendants have made return to that writ by demurrer and by answer. In view of the conclusion that we have reached, that the general demurrer must be sustained, it is unnecessary for us to consider the issues of fact tendered by the answer and the stipulation of facts filed by the parties.

The petition here alleges that prior to the filing of the initiative petition the City Council duly adopted a resolution, which is now in effect, providing for a systematic classification and a standardization of the salaries of appointive officers and employees of the city; that on the 6th day of December, 1955, there was submitted to the City Council a petition requesting that they adopt or submit to the electorate of the city an ordinance entitled "An Ordinance of the People of the City of Monrovia, California, Establishing a Basic Salary Schedule for use in Fixing the Salary for City Policemen and City Firemen, not Otherwise Provided for by Charter, Ordinance, Resolution, and Amending all Present Existing Resolutions or Ordinances." The form of the ordinance is attached to the petition. The petition further alleges that the council has refused to adopt the ordinance or to submit the same to a vote of the people.

[1–7] Defendants do not question the sufficiency of the petition, but claim (1) that the act of the council in fixing salaries is administrative rather than legislative in character, and (2) that the proposed ordinance would constitute a delegation by the council of its powers and an abandonment of those powers, and that therefore the ordinance is not one which might be enacted by the people through the initiative process.

Sections 3 and 4 of the ordinance contain the basic salary schedule referred to in the title of the ordinance, the remaining sections of the ordinance being entirely dependent upon and explanatory of these two sections, with the exception of a purported savings clause contained in section 9.

Section 3 of the proposed ordinance provides first that the basic salary plan for "Police Department and Fire Department" is adopted. It then fixes the basic salaries to be paid to all officers and employees of the Police and Fire Departments, and provides a five-step plan for advancement in pay for patrolmen and firemen.

Section 4 of the proposed ordinance provides that the basic salaries fixed by section 3 shall, commencing on July 1, 1956, and on the first day of each fiscal year thereafter, be increased or decreased by the City Council in an amount equal to the percentage of increase or decrease that is paid or approved for payment to members of like or comparable grade or rank of the Los Angeles County Sheriff's Office and the Los Angeles County Fire Department for that current fiscal year.[1]

Section 36506 of the Government Code provides, "By resolution or ordinance, the city council *shall* fix the compensation of all appointive officers and employees. Such officers and employees hold office during the pleasure of the city council." [Emphasis added.]

There can be no doubt but that the section just quoted not only gives the City Council power to fix the compensation of the appointive officers and employees of the city but makes it its duty so to do.

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[1] The Charter of the County of Los Angeles makes no provision for a Fire Department. It does provide for a Department of Forester and Fire Warden, which is charged with the duty of fire fighting and prevention outside of Fire Protection Districts.

There is some question as to whether or not in exercising this power and performing this duty the council acts in an administrative or executive capacity rather than in a legislative one. In Spencer v. City of Alhambra, 44 Cal.App.2d 75, 111 P.2d 910, and in Collins v. City and County of San Francisco, 112 Cal.App.2d 719, 247 P.2d 362, it is held that a City Council, in fixing salaries of officers and employees, acts in a legislative capacity. In both of these cases, however, the court was considering action taken by the City Council in adopting ordinances and fixing salaries under the provisions of the charters of the cities concerned, and it appears to have been unnecessary in view of the charter provisions involved to decide whether or not the fixing of salaries was a legislative matter rather than an administrative one. On the other hand, in Simpson v. Hite, 36 Cal.2d 125, 222 P.2d 225, the Supreme Court held that the supervisors of the County of Los Angeles, in performing a duty placed upon them by the Legislature, were acting in an administrative rather than a legislative capacity and in the performance of that duty were not subject to control by the electorate through the initiative.

It is unnecessary for us to decide here whether the act of the council of a city of the sixth class in fixing the salaries of appointive officers and employees is legislative or administrative in character; for in the case here, if such an act on their part is administrative in character then it is not the subject of an initiative proceeding, Simpson v. Hite, supra, 36 Cal.2d at page 129, 222 P.2d 225; Housing Authority of City of Eureka v. Superior Court, 35 Cal.2d 550, 557, 219 P.2d 457; Essick v. City of Los Angeles, 34 Cal.2d 614, 624–625, 213 P.2d 492. On the other hand, if the council, in fixing salaries, acts in its legislative capacity, the proposed ordinance would not constitute a valid exercise of that power and therefore could not be exercised by the electorate through their reserve power to initiate legislation.

It is only legislation that may be enacted by the legislative body itself which may be the subject of an initiative proceeding. That is to say, an initiative law must constitute such legislation as the legislative body to which it is presented for adoption might itself initiate and enact. Hurst v. City of Burlingame, 207 Cal. 134, 140, 277 P. 308; Newsom v. Board of Supervisors, 205 Cal. 262, 270 P. 676; Galvin v. Board of Supervisors, 195 Cal. 686, 235 P. 450.

As we have heretofore said, section 36506 of the Government Code not only empowers the City Council to fix the salaries of the city's officers and employees but makes it its duty so to do. In performing this duty it is required to exercise its discretion. In the exercise of that discretion it might and probably would give consideration not only to the salaries paid to officers and employees of the County of Los Angeles, but to those paid by other municipalities of comparable population and territorial extent, the duties and burdens placed upon the officers and employees, and the prevailing rates of wages in private employment. It could not refuse to fix compensation, nor could it fix the compensation at so low a figure that no one would discharge the duties of the positions. If it exercises this discretion and in good faith fixes the compensation for an office or position, its decision is final and is not subject to review by the courts. De Merritt v. Weldon, 154 Cal. 545, 549, 552, 98 P. 537, 671; Butler v. Williams, 207 Cal. 732, 735, 279 P. 992.

The council could not itself delegate the power given it to any other body, Coulter v. Pool, 187 Cal. 181, 190, 201 P. 120; People ex rel. Attorney General v. Wheeler, 136 Cal. 652, 655, 69 P. 435; People v. Johnson, 95 Cal. 471, 474, 31 P. 611; Dougherty v. Austin, 94 Cal. 601, 606–607, 28 P. 834, 29 P. 1092, 16 L.R.A. 161, nor could it abandon that power and refuse to perform the duty placed upon it by the statute or so act as to impede the future exercise of that power. In re Collie, 38 Cal.2d 396, 398, 240 P.2d 275; Briare v. Matthews, 202 Cal. 1, 6, 258 P. 939; Thompson v. Board of Trustees, 144 Cal. 281, 282–283, 77 P. 951; McNeil v. City of South Pasadena, 166 Cal. 153, 155–156, 135 P. 32, 48 L.R.A.,N.S., 138; San Francisco Gas Light Co. v. Dunn, 62 Cal. 580; Payne & Dewey v. Treadwell, 16 Cal. 220, 237.

The effect of the proposed ordinance is to delegate to the governing body of another political subdivision of the state, to-wit: the Board of Supervisors of the County of Los Angeles, the power vested in the council to fix the salaries in question; under it the council would abandon that power and the duty placed upon it by the statute and take that power and duty away from any future council. This the council could not do by an ordinance initiated and enacted by it, and therefore, as we have shown, the ordinance is not one which may be adopted by means of the initiative.

There is a further reason the people do not have power to enact the ordinance in question. Under article IV, section 1 of the Constitution of this state the electorate of a municipality are given power to initiate local legislation only. Under it they do not have the power to initiate legislation which contravenes a general statute passed by the Legislature. Galvin v. Board of Supervisors, supra, 195 Cal. at page 693, 235 P. 450; Alexander v. Mitchell, 119 Cal.App.2d 816, 823, 826, 260 P.2d 261. Here the Legislature has by a general statute governing all cities of the sixth class placed the power and the duty to fix the salaries in question in the city council. The intendment of the proposed ordinance is to contravene the general statute by taking that power and that duty away from the council and placing them elsewhere

[8] We conclude that sections 3 and 4 of the proposed ordinance are, for the reasons we have given above, not the subject of enactment through initiative procedure. The defendants therefore cannot be compelled by mandate to submit the ordinance to the electorate, despite the purported savings clause contained therein. Myers v. Stringham, 195 Cal. 672, 676, 235 P. 448; Bennett v. Drullard, 27 Cal.App. 180, 183, 149 P. 368; Alexander v. Mitchell, supra, 119 Cal.App.2d at pages 829–830, 260 P.2d 261.

A peremptory writ of mandate is denied and the alternative writ is discharged.

DORAN, Acting P. J., and FOURT, J., concur.

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140 Cal.App.2d 365

Howard B. LEWIS, doing business under the firm name and style of Lewis & Lewis, Plaintiff and Respondent,

v.

Alfred J. HOPPER and Vincent L. Walker, individually and as copartners doing business under the name of A. J. Hopper Co., Vincent L. Walker, A. M. McKelligon and Richard Cook, individually and as copartners doing business under the name of Hopper Co., Rathbone, King & Seely, a corporation, Peerless Casualty Company, a corporation, First It, a corporation, Second It, a copartnership, and John Doe and Richard Roe, individually and as copartners doing business as Third It, a copartnership, Defendants,

Peerless Casualty Company, a corporation, Defendant and Appellant.

Civ. 16615.

District Court of Appeal, First District, Division 2, California.

March 29, 1956.

Action by subcontractor on a labor and materialmen's bond, against surety, for balance due subcontractor upon his subcontract in construction of building. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment for plaintiff, and the surety appealed. The District Court of Appeal, Dooling, J., held that where labor and materialmen's bond, which secured subcontractor for balance due him on contract, precluded action on bond, if he filed no claim of lien, unless commenced within six months after completion of work described in contract, and he brought action on bond within six months after installing four soap dispensers, but about eight months after owner had recorded notice of completion, action was timely.

Judgment affirmed.

1. Mechanics' Liens ⚷317

Where subcontractor's agreement required him to install four soap dispensers, installation of dispensers constituted "completion of work" described in contract, within materialmen's bond provision precluding action on bond unless commenced within six months after completion of work described in contract, though dispensers were installed about two months after owner had recorded notice of completion. West's Ann.Code Civ.Proc. §§ 1187, 1200.1 (b).

See publication Words and Phrases, for other judicial constructions and definitions of "Completion of Work".

2. Limitation of Actions ⚷14

Contractural stipulations which limit right to sue to a period shorter than that granted by statute are not looked upon with favor, because they are in derogation of statutory limitation; they should be construed with strictness against party invoking them. West's Ann.Code Civ. Proc. § 1200.1(b).

3. Mechanics' Liens ⚷317

Where labor and materialmen's bond, which secured subcontractor for balance due him on contract, precluded action on bond, if he filed no claim of lien, unless commenced within six months after completion of work described in contract, and he brought action on bond within six months after installing four soap dispensers, but about eight months after owner had recorded notice of completion, action was timely. West's Ann.Code Civ.Proc. §§ 1187, 1200.1(b).

◆

Robert H. Fouke, Robert A. Wertsch, John Alfred Davis, San Francisco, for appellant.

Dwyer & King, Sacramento, for respondent.

DOOLING, Justice.

Plaintiff, a sub-contractor, recovered a judgment against defendant Peerless Casualty Company upon a labor and materialmen's bond for the balance due him upon his sub-contract in the construction of a building for Pacific Telephone & Telegraph Company in Auburn, California. Appellant's bond contained the following provision:

"No suit or action on this bond to recover for labor performed or material furnished in respect to work herein referred to shall be sustained unless the same be commenced within the period provided by law after the claimant files his claim or lien, or if he files no such claim or lien, unless the suit or action shall be commenced within six (6) months after completion of the work described in said contract."

No lien claim was filed by respondent and the only question presented on appeal is whether he commenced his action "within six (6) months after completion of the work described in said contract" as required by the last clause of the provision of the bond above quoted.

The owner recorded notice of completion on November 3, 1952, over six months before the filing of this action, since the complaint herein was filed on June 12, 1953. The agreed statement of facts, however, recites that on January 5, 1953, the plaintiff installed four soap dispensers in the building "called for in his sub-contract, and specified in the general contract * * and the testimony was to the effect that the work took about four hours, and would be worth about One Hundred Dollars * * * The reason for the delay in installing the said soap dispensers was that the type of soap dispenser specified in the general contract and insisted upon by the owner was not theretofore obtainable. Neither party is chargeable with any fault insofar as this delay is concerned."

[1] The question presented is whether the installation of these four soap dispensers constituted the "completion of the work described in said contract" within the meaning of those words as used in the quoted provision of the bond. Actually, since the agreed statement of facts shows that installation of the soap dispensers was work specified in the contract, the work described in the contract was not completed until the soap dispensers were in-

stalled and hence the action was commenced "within six (6) months after completion of the work described in said contract."

Appellant cites and relies upon cases construing the meaning of "completion" in the mechanics lien law and holding that the building is completed when there is a substantial completion and that trivial imperfections in performance do not operate to extend the time for filing a lien. Hammond Lbr. Co. v. Barth Invest. Corp., 202 Cal. 606, 262 P. 31; Hammond Lumber Co. v. Yeager, 185 Cal. 355, 197 P. 111; Joost v. Sullivan, 111 Cal. 286, 43 P. 896; Fontaine v. Storrie, 7 Cal.App.2d 104, 45 P.2d 361; Grettenberg v. Collman, 119 Cal.App. 7, 5 P.2d 944; Mott v. Wright, 43 Cal.App. 21, 184 P. 517. Respondent points out that these decisions had their origin in a former provision of section 1187 Code of Civil Procedure, which read: "Any trivial imperfection in the said work, or in the completion of any contract by any lien claimant, or in the construction of any building, * * * shall not be deemed such a lack of completion as to prevent the filing of any lien * * *." Harlan v. Stufflebeem, 87 Cal. 508, 512, 25 P. 686. This provision was removed from this section in 1929. Stats.1929 p. 1928.

In Fontaine v. Storrie, supra, 7 Cal.App. 2d 104, 45 P.2d 361, the court was dealing with a contract entered into in 1926 and, although the opinion was filed in 1935, the reference of the court to the provision concerning "trivial imperfections" in section 1187 Code of Civil Procedure, is obviously to that section before the 1929 amendment removed that language therefrom. We do not feel called upon in this case, however, to determine whether any change was made in the law of mechanics liens by the removal of the "trivial imperfections" provision from section 1187.

Given its natural construction the language of the bond "completion of the work described in said contract" includes the installation of the soap dispensers since that installation was "work described in said contract." The Supreme Court pointed out in Nelson v. Trounce, 184 Cal. 732, 735–736, 195 P. 393, 394, that the words "'completion of the contract'" should be given their ordinary meaning in cases not falling directly under the mechanics lien law.

[2] By express provision of the code the bond which is the subject of this action "will be construed most strongly against the surety and in favor of all persons for whose benefit such a bond is given". § 1200.1(b) Code Civ.Proc., formerly § 1183. Furthermore "[c]ontractual stipulations which limit the right to sue to a period shorter than that granted by statute, are not looked upon with favor because they are in derogation of the statutory limitation. Hence, they should be construed with strictness against the party invoking them." Hauer Const. Co. v. City of New York, 195 Misc. 747, 85 N.Y.S.2d 42, 44, affirmed 276 App.Div. 841, 93 N.Y.S.2d 915; appeal denied 276 App.Div. 898, 94 N.Y.S.2d 823; Dechter v. National Council of K. & L. of Security, 130 Minn. 329, 153 N.W. 742, 744; Burgardt v. Lincoln Nat. Life Ins. Co., Iowa, 56 N.W.2d 15, 17–18; Commercial Standard Ins. Co. v. Lewallen, Tex. Civ.App., 46 S.W.2d 355; Simmons v. Western Indemnity Co., Tex.Civ.App., 210 S.W. 713, 716.

[3] Any ambiguity in its bond must be construed against appellant and the language "completion of the work described in said contract" should be given its natural and normal meaning, without regard to any special meaning that this language may have in construing our mechanics lien law. The bond itself shows that this limitation was one on actions not covered by the mechanics lien law, and another limitation was provided in the bond for cases where the lien law was invoked.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

140 Cal.App.2d 447

The STATE of California, acting by and through the STATE PUBLIC WORKS BOARD, Plaintiff and Appellant,

v.

WESTOVER CO., a corporation; Pacific Rolling Mill Company, a corporation; Elbon Land Co., a corporation; H. Moffat Co., a corporation, et al., Defendants and Respondents.

Civ. 8760.

District Court of Appeal, Third District, California.

April 2, 1956.

Rehearing Denied April 27, 1956.

Hearing Denied May 29, 1956

The Superior Court, Merced County, Sherrill Halbert, J., entered an order denying motion to tax costs and awarding to defendants $150,000, for attorneys' fees and $2,000 for services of four expert witnesses in condemnation action, which the State had abandoned after the trial court, sitting without a jury, had assessed damages for proposed taking in amount of $1,516,312.25. On the State's appeal, the District Court of Appeal, Van Dyke, P. J., held that there had been no abuse of discretion by the trial court in making the allowances in question.

Affirmed

1. Eminent Domain 🔑265(3)

Determination of reasonable fee for attorney's services in abandoned condemnation proceeding rests in trial judge's discretion. West's Ann.Code Civ.Proc. § 1255a.

2. Attorney and Client 🔑140

When trial court is informed of extent and nature of attorney's services, its own experience furnishes it with every element necessary to fix their value.

3. Eminent Domain 🔑262(1)

An appellate court can interfere with trial court's decision, as to what constitutes reasonable attorney's fees for services rendered in condemnation proceeding which was discontinued, only where there has been a plain and probable abuse of discretion. West's Ann.Code Civ.Proc. § 1255a.

4. Appeal and Error 🔑893(1)

Appellate court cannot convert appeal, from order retaxing costs, into a trial de novo.

5. Eminent Domain 🔑262(3)

Burden of one who appeals from trial court's determination of what constitutes reasonable fee for attorney's services in abandoned condemnation proceeding is much heavier than when, in trial of that issue before trial court, attempt is made to fix the fee at less than that fixed at close of hearing.

6. Eminent Domain 🔑262(1)

What constitutes reasonable fee for attorney's services in abandoned condemnation proceeding is confided in first instance to trier of fact, and it matters not whether an appellate court sitting in review of trial court's order finds itself in agreement as to amount so fixed; sole inquiry being whether sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion.

7. Eminent Domain 🔑265(3)

On record presented, it could not be said that trial court had abused its discretion in awarding $150,000 for attorneys' fees and $2,000 for services of four expert witnesses in condemnation action which state abandoned after trial court assessed damages for proposed taking of land (for migratory wild fowl sanctuary) in amount of $1,516,312.25. West's Ann.Code Civ. Proc. § 1255a.

8. Eminent Domain 🔑265(5)

Trial court, denying motion to retax costs in abandoned condemnation proceeding, was not required to make findings of fact. West's Ann.Code Civ.Proc. §§ 632, 1255a.

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Edmund G. Brown, Atty. Gen., by R. H. Williamson, and Thomas W. Martin, Deputy Attys. Gen., and Walter S. Rountree, Asst. Atty. Gen., for appellant.

C. Ray Robinson, San Francisco, and D. Oliver Germino, Los Banos, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from an order of the trial court denying a motion to tax costs and awarding to respondents $150,000 for attorneys' fees and $2,000 for the services of four expert witnesses in a condemnation action which the appellant State abandoned after the trial court sitting without a jury had assessed damages for the proposed taking in the amount of $1,516,312.25. Upon the filing of notice of abandonment pursuant to the code the defendants in condemnation filed a cost bill pursuant to section 1255a of the Code of Civil Procedure claiming that they were entitled to recover as costs the sums which, after hearing, the court allowed them.

[1–4] Appellant contends that the order denying its motion to tax costs should be reversed upon the ground that there has been a plain and palpable abuse of discretion by the trial court in making the allowances for attorneys' fees and expert witness fees. Before discussing the merits, we think it well to refer to the test applicable on appeal in such a case as laid down in existing case law concerning which the parties are not in dispute. We quote the following from Riverside County v. Brown, 30 Cal.App.2d 747, 749–750, 87 P.2d 60, 61:

> "Section 1255a of the Code of Civil Procedure provides that in cases of this kind where the action is discontinued the defendants shall be allowed a reasonable fee for the services of their attorney. What is a reasonable fee for such services is first committed to the sound discretion of the trial judge. An appellate court can only interfere with the decision of the trial court as to what constitutes reasonable attorney's fees where there has been a plain and palpable abuse of discretion. [Citing cases, including City of Los Angeles v. Los Angeles-Inyo Farms Co., 134 Cal.App. 268, 25 P.2d 224.
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> "It is well established in this state that, as held in Spencer v. Collins, 156 Cal. 298, 104 P. 320, 324, 20 Ann.Cas. 49: 'The value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with very element necessary to fix their value.' * * *
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> " 'We are not at liberty to convert this appeal into a trial de novo.' City of Los Angeles v. Los Angeles-Inyo Farms Co., supra."

We quote the following from 6 California Jurisprudence 2d, section 181:

> "What constitutes a reasonable fee in a particular case depends on various factors, such as the nature of the litigation; its importance to the parties; its difficulty; the time consumed; the overhead expense of the attorney; the skill required, the skill employed, and the attention given; the attorney's standing in the profession; the success or failure of the attorney's efforts; * * *; and the attorney's age and experience in the type of work for which he claims compensation. * * *
>
> "A determination of a reasonable fee is not likely to be changed on appeal, unless a gross abuse of discretion is shown."

[5, 6] It is apparent from the case law that the burden of one who appeals from a trial court's determination of what constitutes a reasonable fee is much heavier than when in the trial of that issue before the trial court the attempt is made to fix the fee at less than that fixed at the close of the hearing. We are not given authority to fix a reasonable fee on appeal. As said in the case from which we have quoted, the appeal is not a trial de novo of the basic issue of reasonableness of the fee allowed. What constitutes a reasonable fee is and ought to be confided in the first instance to the trier of fact, the court called upon to make the allowance, and it matters not whether an appellate court sitting in review of the trial court's order finds itself in agreement with or differing from the amount so fixed. We can inquire only as to whether or not the sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion.

Turning now to the record, we find that, speaking generally, there was here no mere casual resolution of the issue presented to the trial court. On the contrary, both sides fairly, fully and with frank antagonism fought the issue out. The court which fixed the fee not only presided at the trial of the action, but also considered and ruled upon the numerous and complex legal issues tendered while the pleadings were being settled. To the fixing of this fee, therefore, the trial court brought personal knowledge of the extent and value of the work done by respondents' attorneys which cannot be disclosed by the record and equally cannot be ignored. The record itself discloses the following: The purpose of the condemnation was to obtain an area of land fitted for and to be used for the preservation of game, notably migratory wild fowl. A part of the purpose to be served, although it may have been a minor part, was, after there had been furnished for migratory fowl a refuge, feeding and resting area, to permit licensed hunters to hunt the area. The resolution whereby the Wildlife Conservation Board, meeting on May 18, 1950, declared that the area here in question should be taken for said purposes, stated that the proposed taking of a previously favored area had developed such landowner opposition as to make desirable the selection of another site and said that a desirable alternate had been located on San Luis Island involving a tract of 6,678 acres offered, said the resolution, for a "willing sale". (That the tract was offered for willing sale turned out to be an unwarranted assumption.) The resolution continued with the description of the area which later became the subject of these condemnation proceedings, asserting that soil surveys show it to be largely alkali free, and of poor to fair agricultural quality according to the Storie rating; that 941 acres lay within a water service district where deliveries averaged about 4 feet per acre annually; that the remaining 5,737 acres were outside any water service, but that the owner had been granted a permit by the Division of Water Resources to divert continuously from Salt Slough 71.7 cubic feet per second; that the authorized diversion, fully exploited, would provide 52,341 acre feet or 7.8 feet per acre annually for the entire tract, which was more than necessary for efficient operation of the area for waterfowl. The resolution contained an estimate of the board that the grand total of the cost for the project would be $699,400. It appears that not only were the owners unwilling to sell their land, but strenuously opposed its taking at any price and retained counsel, whose fees are here in question, to resist in all proper ways such taking and if that could not be avoided then to obtain the best available price for the property. The legislation under which the state was acting was new, that is, the set-up of a state agency of the sort here involved and the granting to it of the power of eminent domain presented questions unique in so far as the laws of this state were concerned. The constitutionality of the legislation was immediately and seriously challenged. Included in this challenge was the lesser challenge of the right of the state to condemn anything more than the surface rights, it being the contention of the owners that there was involved in the taking subsurface mineral rights of great potential value and since the state sought to take the title in fee, there was controversy over its right to do so. There were also controversies involving the extent and validity of the water rights through which the subject land was being supplied with water, and among these controversies was that of whether or not the possession and use of the appropriative permit referred to could be considered as a factor by those who testified concerning the value of the land. These matters and others, which we need not here mention, were presented from the beginning. Demurrers were filed to the complaint and in support of and in opposition to these contentions a substantial amount of investigation was made by respondents' attorneys and extensive briefs were filed. The first demurrers were sustained, amendment was allowed, the issues were again presented and demurrers overruled. This, of course, did not remove from the case the contentions made, and the answer filed renewed and reasserted substantially all of the contentions litigated when the demurrers were heard, the trial judge in respect of some of them announcing that he considered factual proof necessary to their determination. The case moved on for trial before the court sitting without a jury, a jury having been waived. After trial the court found the value of the land to be the sum hereinbefore stated, which sum exceeded by more than 100% the best offer for the land the state had made prior to trial, that offer being $675,000. At the trial the issue of the right of the state to take the subsurface rights was resolved by stipulation, whereby only the surface rights were to be taken and there was to be reserved to the owners all minerals, oils and hydrocarbon substances lying beneath the surface, with the right to enter upon the land and mine and extract the same. What the state initially, therefore, sought to take and for which it made its offer was substantially lessened before the trial court fixed the value of the surface rights at $1,516,312.25. Something more than two years had passed between the filing of the action and the entry of judgment fixing the value. There was much evidence taken when the court heard the motion of the state to tax costs as to the extent of the efforts of respondents' attorneys in preparation for trial and in trial. A number of attorneys, qualifying as expert witnesses, testified in respondents' behalf, and in doing so commented on the contents of the record submitted to them, and to the trial court. Parts of their testimony will well serve to illustrate the nature and extent of the factors going to establish reasonable attorneys' fees which the record presented.

Mr. Frank B. Belcher, an attorney at law practicing since 1914, a senior member of the firm of Belcher, Kearney & Fargo of Los Angeles, a member of the State Board of Bar Governors for three years, President of the State Bar for one year, a member of the Board of Bar Examiners for five years, and of various State Bar committees, testified as follows: He had engaged in general civil practice, devoting his time largely to the field of litigation, having tried many cases over a long period of time with his attention devoted for the last ten years mainly to specialized types of litigation, usually involving issues of considerable importance. Mr. Belcher listed some of his regular clients, the list justifying the conclusion that his standing and prestige before the bar and with those who sought lawyers' services were high. He said that, in preparing to testify concerning the value of the services of C. Ray Robinson, D. Oliver Germino and William Boone, respondents' attorneys, he had read the transcript of the trial proceedings, had read the deposition of C. Ray Robinson taken in connection with the hearing to tax costs and the deposition of Mr. Boone on the same matter, had read the depositions of the three appraisers who testified on values, examined another file containing copies of the pleadings in the case and memorandums of authority filed in support of demurrers, with the various briefs in support of and in opposition thereto. He said he had spent several days in studying the record; that in his opinion the reasonable value of the attorneys' services would run from $150,000 to $200,000. On cross-examination he explained that in arriving at these figures he had considered the following factors: The matter had been pending in counsel's offices for several years; that the case was a very substantial one, involving nearly 7,000 acres of land that were being condemned; that there were many problems in connection with the condemnation proceeding and the case was complicated with difficult questions of law involved. He stated he considered the skill exhibited by counsel and the skill normally required to successfully handle a case of that kind; he considered the offer of settlement before trial and the results obtained at the trial; he considered to some extent the earnings which Mr. Robinson customarily made in practice; he considered the amount of time that he thought could properly have been actually devoted to the litigation. He attempted, he said, no specification of actual time involved in working on the case by any of the counsel for respondents, but knew from his experience that many, many details had to be investigated, and that considerable time had to be spent with the appraisers and other witnesses and the attorneys must achieve a complete and thorough knowledge of the property involved; he considered from his own knowledge that adequate and proper preparation and presentation of the case took an extended amount of time, the record indicating that many, many conferences and many examinations of the property would be required. He said he attached no great importance to the element of time, deeming it a minor element in cases such as this; that he believed the major consideration in the earning of fees was the result obtained and that the comparison of the state's offer and the court's judgment led him to assume that counsel had obtained a "brilliant" result; that he believed people hired lawyers to get results and that when an excellent result was obtained the determination of fair compensation should be influenced thereby. He had considered that the owners had, during the trial, been permitted to reserve the mineral rights from condemnation. He concluded from his study of the record that one of the prime things the owners had desired to accomplish was to be allowed to retain their land free from condemnation and he attached some importance in that way to the fact the state, after trial, had elected not to take the land at the price fixed.

It appears from the record that the trial court could justifiably conclude that Mr. Robinson, in particular, and also Mr. Germino and Mr. Boone were attorneys of high standing and competence in the practice of their profession; that Mr. Germino had spent nearly 50% of his time during the pendency of the action prior to trial in the handling of the issues presented and in the preparation for trial; that Mr. Boone had exhaustively and extensively investigated complex legal issues involved in the proceedings; that Mr. Robinson was an attorney of unusually large experience. It was shown that he maintained an organization with its home office in Merced, at which place he employed 11 attorneys and 18 secretaries and that the expense of maintaining his organization amounted to $300,000 per year.

One of the witnesses who testified that from his study of the record and from his knowledge of the subject matter at issue the services rendered by the attorneys were worth the sum of $150,000 was M. Mitchell Bourquin, an attorney practicing in San Francisco, who for many years had represented the federal government in the conduct of many condemnation suits throughout the state arising out of the construction of federal works, such as Shasta Dam and related projects. He based his estimate of reasonable compensation on his experience in that type of litigation, upon his knowledge of the capacity of the trial attorneys for respondents and upon the record presented to him. He considered much the same factors as were considered by Mr. Belcher. Mr. Robinson and Judge Germino both testified as to the extent and character of services rendered and that the amount requested in the bill for costs, to-wit, $150,000, was reasonable as fees for the attorneys of respondents. It is unnecessary to recite their testimony in detail.

For appellant three expert witnesses were sworn and testified. Mr. Edwin Sprague Pillsbury, practicing in San Francisco, an attorney of high standing and long experience, testified that fair compensation for respondents' attorneys would be the sum of $60,000. When asked for the basis of his opinion he said in part: "There are many factors to take into consideration in the difficult matter of fixing attorney's fees. It is not an easy matter, and reasonable minds can differ, and lawyers who have worked together side by side for many years can have different opinions on matters of this kind because there is no absolute rule." He stated that he had endeavored, through studying the record, to appraise the nature of the work undertaken, the time consumed by respondents' attorneys and the goals they were trying to reach. He understood that Mr. Robinson had instructions from his clients to prevent condemnation, if that was possible, and he took that to be the paramount objective; that Mr. Robinson had accomplished that result by various means; that he had tried to head off the condemnation in the first place; that after the suit was filed he had raised legal points supporting contentions in substance that this taking would not be justified by law; that he had done some excellent research, including analyses of cases from other jurisdictions; that he had raised technical points as to the authority of the officials who acted in the case to exercise the power of condemnation and that, as the witness put it, Mr. Robinson had, as a means of preventing the taking "threatened to, if there were a taking, if the award under the lower court were made justifying a taking and fixing the value, he threatened to appeal that, * * * not only to the highest court of our land, but the Supreme Court of the United States, so he had a legal approach to the objective which he had in mind of saving this land for the client;" that he considered the other approach was to obtain the highest possible price for the land and in that respect respondents' attorneys had brought conviction to the court's mind through their witnesses and the court rendered an award of $1,516,312.25, some $640,000 in excess of what the state's witnesses had testified to; that he considered the attorneys had done a good job for their clients. Mr. Bestor Robinson testified as an expert witness for appellant and, without detailing either his qualifications, which were high, or the basis for his opinion, he estimated a reasonable fee to be $40,000. Mr. Francis C. Whelan, the third expert witness for appellant, a man of recognized ability, fixed the proper fee at $62,500.

[7] When we consider the record in this case, the personal knowledge of the trial judge as to the extent and character of the services rendered by respondents' attorneys, the professional stature and qualifications of the expert witnesses and their serious approach to the problem presented, when we consider the importance of the issues involved and the correspondingly heavy responsibilities shouldered by counsel in such cases, when we consider the circumstances hereinbefore related concerning the valuation which the state sought to fix for the property taken, and the vastly greater value determined by the trial court, when we consider all the matters which we must on such an appeal as this, we are firmly convinced that appellant here has not borne its burden of showing the sum fixed by the trial court as reasonable attorneys' fees to be plainly and palpably an abuse of the broad discretion which the law vests in that tribunal. The amount ordered paid by the trial court must be accepted here as justified.

Little more need be said in the determination of this appeal. Appellant contends that the trial court's allowance of $500 each for four expert witnesses who testified for respondents constitutes an unreasonable and an excessive allowance, but the record will not support the contention. It appears these witnesses, their number not being excessive in view of the magnitude of the issues involved, were men of substance and experience and especially skilled in the subject of their testimony; that they had spent considerable time in preparation to testify, in consultation with respondents' attorneys and in studies of the subject property and the surrounding property, including attention paid to past sales of land in the general vicinity. They attended and testified at the trial. The allowance of $500 each cannot be successfully attacked as unreasonable, or as excessive, and, indeed, appears to be quite reasonable.

[8] Finally, appellant contends for reversal on the ground that the trial court failed to make findings of fact in denying appellant's motion to tax costs. Appellant claims that such findings, although not expressly required, are impliedly required by Section 1255a of the Code of Civil Procedure, but no authorities so construing the section are cited. We find no merit in the contention. The Code of Civil Procedure, § 632 does require that findings, unless the same are waived, shall be made responsive to the issues presented by the pleadings and presented to a court in the trial of a case, but there is no requirement that such findings be made in a proceeding to tax costs. Since the legislature has not seen fit to require it, we see no reason why the case law should do so.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; GIBSON, C. J., and SHENK, J., dissenting.

140 Cal.App.2d 120

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, as Administrator with the Will Annexed of the Estate of Anna M. Bluett, deceased, Plaintiff, Cross-Defendant and Respondent,

v.

A. VANNINI and Providence Tuolumne Gold Mines, Inc., a corporation, Defendants, Cross-Complainants and Appellants,

Irene Van de Carr, Cross-Defendant and Respondent.

Civ. 16545.

District Court of Appeal, First District, Division 1, California.

March 22, 1956.

Rehearing Denied April 20, 1956.

Action for balance due on contract to purchase mining properties, wherein defendants answered and cross-complained on ground of fraud. The Superior Court of the City and County of San Francisco, Harry J. Neubarth, J., rendered judgment on the pleadings for plaintiff and defendants appealed. The District Court of Appeal, Peters, P. J., held that purchaser who had right and duty under 1939 contract to investigate for seventeen months before exercising option to purchase, and exercised option in 1946, was barred by limitations from obtaining affirmative relief on ground of fraud, and had no legal right to rely on the misrepresentations as matter of defense.

Affirmed.

1. Pleading 🔑34(1)

As against a general demurrer, pleadings must be liberally construed.

2. Pleading 🔑345(1.3)

If answer puts in issue a material allegation of complaint or sets up affirmative matter constituting a defense, motion for judgment on pleadings should not be granted.

3. Appeal and Error 🔑854(3)

On appeal from order sustaining demurrers, which apparently referred to statute of limitations, reviewing court was not limited to consideration of the ground given by trial court.

4. Appeal and Error 🔑854(1)

If judgment is right upon any theory of law applicable to the case, it must be sustained regardless of considerations which may have moved trial court to its conclusion.

5. Limitation of Actions 🔑40(1)

The statute of limitations runs only against a cause of action, and if answer pleads purely defensive matter, without calling for affirmative relief, defensive relief will not be barred by limitations even though it could have been used as basis of cause of action for affirmative relief on which statute has run.

6. Limitation of Actions 🔑40(2)

The principle that statute of limitations does not bar purely defensive matter is applicable where plaintiff sues on contract and defendant denies liability on ground of fraud, though statute will run against a cross-complaint seeking damages for such fraud by way of affirmative relief. West's Ann.Code Civ.Proc. § 338, subd. 4.

7. Limitation of Actions 🔑179(2)

If plaintiff does not discover fraud when it is perpetrated, he must set forth circumstances to excuse the late discovery, as preventing bar by limitations. West's Ann.Code Civ.Proc. § 338, subd. 4.

8. Limitation of Actions 🔑100(11)

Where 1939 contract for sale of abandoned gold mine provided that purchaser would perform certain work and could run exploration tunnel, within seventeen months period, during which he had option to buy, facts that other operations were necessary before work could be done, and that during war period from 1942 to 1946 a government order prohibited mining operations, and that vendor waived contractual time limits on performance of exploration work, did not excuse failure to discover vendor's alleged fraud until 1952, and hence purchaser's cross-complaint for affirmative relief on ground of fraud was barred by limitations. West's Ann.Code Civ.Proc. § 338, subd. 4.

9. Notice 🔑6

Where there is duty to investigate, plaintiff may be charged with knowledge of facts which would have been disclosed by an investigation.

10. Limitation of Actions ⚷99(1)

The signing of an agreement for extension of contract for sale of gold mine did not imply a repetition of fraudulent representations inducing the original contract, for purposes of limitations.

11. Fraud ⚷41

One pleading a defense based on fraud is required to set forth all elements of fraud, including that material representation was made, that it was false, that it was known to be untrue or made without sufficient knowledge to warrant a belief that it was true, that it was made with intent to induce action in reliance thereon, that pleader reasonably believed it to be true, that it was relied on by pleader and that pleader suffered damages thereby.

12. Appeal and Error ⚷916(1)

For purposes of appeal from judgment on pleadings, reviewing court must assume that fraudulent representations alleged were false and were made either with knowledge that they were false or without sufficient information.

13. Fraud ⚷21

Where one conducts an investigation, he may still be entitled to rely upon certain representations concerning conditions as to which the investigation does not extend.

14. Mines and Minerals ⚷55(8)

In action for balance due on contract to purchase mining properties, which provided that purchasers should have seventeen months in which to investigate the property before exercising their option to purchase, answer merely alleging vendor's false representations and purchaser's reliance thereon was insufficient for failure to show excuse for nonperformance of purchaser's legal duty to make investigation, or that vendor intended by representations made in 1939 to induce purchaser to exercise option in 1946.

15. Mines and Minerals ⚷55(1)

Where contract for sale of mining property provided for purchaser to investigate for seventeen months before exercising option, representations made by vendor in 1939 must be deemed as matter of law not intended to induce purchaser to exercise option in 1946, and purchaser had no right to rely on such representations.

Howard C. Ellis, E. F. Delger, San Francisco, for appellants.

Donahue, Richards, Rowell & Gallagher, A. R. Rowell, Joseph A. Woods, Jr., Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiff brought this action against defendants for $40,000 balance alleged to be due on a contract to purchase certain mining properties. Defendants answered and cross-complained, negatively and affirmatively pleading fraud on the part of plaintiff. The trial court sustained a demurrer without leave to amend to the third amended answer and cross-complaint. Plaintiff moved for judgment on the pleadings. The motion was granted. Defendants appeal from the judgment thus secured.

The controversy involves the purchase and sale of an abandoned gold mine in Tuolumne County. The pleadings show the following: This mine was owned by the Estate of Anna Bluett. In 1939 Ben F. Woolner was executor of that estate. On March 27, 1939, Woolner, as executor, acting under court authorization, entered into a written contract with defendant A. Vannini for the purchase and sale of the mine for $50,000 payable in accordance with the terms, covenants and conditions set forth in the agreement. One of these provisions was that Vannini agreed that within 6 months of the date of the agreement he would commence active preliminary work to unwater and clear the mine, and would perform a designated quantity of such work within the next 8 months. In addition to this required work Vannini was given the election to run an exploration tunnel into the mine to further determine whether he wanted to go forward with active mining operations. If Vannini elected to do this exploration he was granted an additional 3 months for this purpose.

Within these periods, totalling a possible 17 months, Vannini was given the option to buy the mine by notifying the executor and by paying the first $5,000 on the purchase price, or within the enumerated periods he could elect not to proceed by executing a quitclaim deed back to the executor. If Vannini elected to proceed, he was required to make the $5,000 payment above referred to, and within 5 years thereafter the balance of the purchase price became due and payable.

The pleading, without stating when, then avers that sometime thereafter Vannini elected to operate and purchase the mine, but by agreement with the executor and with the approval of the court the time for the payment of the original $5,000 was extended to July 1, 1946. On that date Vannini paid the $5,000 which made the balance of $45,000 due on July 1, 1951. Sometime after Vannini exercised the option to buy the mine, the exact time not being pleaded, he assigned his interest in the project to Providence Tuolumne Gold Mines, Inc., the other defendant.

On July 1, 1951, the balance of the purchase price was not paid. On November 2, 1951, Woolner, as executor, entered into an agreement with the two defendants to the effect that, with the approval of the probate court, defendants could pay $5,000, and thereafter $5,000 annually, or could pay a 15 per cent royalty from the gross revenues, whichever was greater, until the full purchase price was paid. Under this extension agreement if any annual payment on the purchase price was not paid within 90 days of its due date, the executor was given the election to declare the entire balance due, or to cancel the agreement and retain all sums paid as liquidated damages. On December 3, 1951, the probate court approved the extension, and a $5,000 payment was made by defendant mining company.

Under this extension agreement the next payment of at least $5,000 was due on December 3, 1952. Neither defendant made this payment. The Bank of America, it having been substituted as executor of the estate, waited the 90 days, elected to treat the entire balance as due, and on March 9, 1953, brought this action for the $40,000 remaining due on the purchase price.

Defendants answered and cross-complained. By stipulation a demurrer to these pleadings was sustained and an Irene Van de Carr brought in as a cross-defendant. Thereafter, defendants filed their first and later their second amended answer and cross-complaint. Plaintiff demurred. So far as the record shows, no hearings were had or orders made in reference to these demurrers. Defendants then filed their third amended answer and cross-complaint, and plaintiff again demurred. These demurrers to both the answer and cross-complaint were sustained without leave to amend. The order so providing contains a reference to "Par. Five (5)," apparently referring to paragraph 5 of the demurrer which raised the statute of limitations. Thereafter, plaintiff moved for judgment on the pleadings. The motion was granted, judgment was entered accordingly, and defendants have appealed.

The question presented on this appeal is whether the third amended answer and cross-complaint alleges a valid defense and/or cause of action, good against a general demurrer. The answer and cross-complaint involved are predicated on the theory that defendants signed the agreements involved as a result of the fraud of Woolner, Irene Van de Carr and one John Chapman. In this connection paragraph II of the answer alleges, in part:

"On or before the 27th day of March, 1939, the defendants discussed with Woolner, Van de Carr and Chapman, the possibility of purchasing the mining property described in Exhibit 'A' which is attached to and made a part of the complaint herein. During the course of the aforesaid various conversations and discussions, Woolner, Van de Carr and Chapman, and each of them, asserted to defendants that the property described in Exhibit 'A' had been an active gold mine, from which large amounts of commercial gold ore had been extracted in years past; they further stated that the mining property described in Exhibit 'A', prior to the date thereof, and the Agreement marked Exhibit 'B,' also attached to and made part of the complaint herein, had been shut down and unworked for many years. Woolner, Van de Carr and Chapman, and each of them further asserted that the mining operations on the aforesaid property had ceased, owing to differences between the former owners of the aforesaid property and their manager, while the mine located on aforesaid property was in the midst of active and profitable operation. Woolner, Van de Carr and Chapman, and each of them, further asserted that the property described in Exhibit 'A' contained extensive gold ore already blocked out. They further represented that said blocked out ore was commercial ore and that in order to prevent it from being removed after it had been determined to close the mine, the shaft and timbering therein was destroyed but that said commercial ore would be found intact when the mine was dewatered, cleared and retimbered. That said statements were false, that the falsity of these statements was known, or that the statements were not warranted by the information of Woolner, Van de Carr and Chapman, and each of them, even though they may have believed the statements to be true. That such representations of fact were made in an effort to bring about the sale of said properties and did bring about the sale of said properties, * * *

"* * * immediately after the execution of the Agreement marked Exhibit 'A,' operations were commenced to rehabilitate the mining property described therein. It was first necessary to repair the road and bridge leading to the mine so that the heavy equipment which was necessary for mining operations could be brought in; an adit was then commenced which was to be driven nearly a mile into the side of the mountain in order to tap the old workings of the mine and to drain off the 11 million gallons of water which inundated the old mining operations. When 900 ft. of this tunnel had been completed, all work on the mine had to be shut down due to Order No. L 208 of the United States Government, which banned mining operations for the duration of World War II. At the close of World War II, with the lifting of Order L 208, work was again begun, but it was then found that most of the equipment had to be replaced and that some of the work which had been done immediately prior to the war had to be redone, for the reason that part of the tunnel had caved, necessitating the replacing of timbers. By January of 1948 the tunnel had progressed into the side of the mountain some 2,000 feet, but because the operation had led to a badly faulted area, the State Safety Mining Engineer ordered the abandonment of this tunnel stating that it would be too dangerous to attempt to drain the 11 million gallons of water from the shaft through this means. A new tunnel was commenced and carried through to the old workings, through which the water was drained above said level, thereby making it possible to begin pumping the water which remained below that level. After all the water was removed, it then became necessary to extract approximately 50,000 tons of debris that clogged the old shaft and it was necessary to tram this debris a distance of nearly a mile. After the debris was removed, the old shaft was found to be badly caved necessitating its retimbering. In addition thereto, it was necessary, because of the request of the State Safety Mining Engineer, to replace the emergency raise in order to protect the workers who would be working in the old shaft. It was not until February 24, 1952, that the mine shaft was cleared and ready for actual mining operations. It was not until this time that it became possible for defendants to ascertain the falsity of the statements hereinbefore alleged to have been made by Woolner, Van de Carr and Chapman, and each of them, and to ascertain that there was no blocked out ore of commercial value or any value whatsoever, as had been represented by aforesaid parties, and each of them."

The cross-complaint is based on substantially the same allegations, and prayed for the return of the $10,000 already paid on the purchase price, and for $387,000 expended by defendants in developing the mining property involved.

[1,2] The rules applicable to such an appeal are well settled. As against a general demurrer the pleadings must be liberally construed. Buxbom v. Smith, 23 Cal.2d 535, 145 P.2d 305. All of the allegations of the third amended answer and cross-complaint must, of course, be accepted as being true. If the answer puts in issue a material allegation of the complaint, or sets up affirmative matter constituting a defense, the motion for judgment on the pleadings should not have been granted. MacIsaac v. Pozzo, 26 Cal.2d

809, 161 P.2d 449; Cass v. Rochester, 174 Cal. 358, 163 P. 212.

[3,4] In addition to these well settled rules appellants erroneously contend that this court on this appeal is limited to considering the sole ground given by the trial court in sustaining the demurrers, and contend that, since the minute order sustaining the demurrers apparently refers to the statute of limitations, the sole question presented is whether the statute of limitations bars their action and defense. This is not the law. "'If the judgment * * * is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'" Campbell v. Bauer, 104 Cal.App.2d 740, 743, 232 P.2d 590, 592; see also Keenan v. Dean, 134 Cal.App.2d 189, 285 P.2d 300; Evarts v. Jones, 104 Cal.App.2d 109, 231 P.2d 74; Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443; Burke v. Maguire, 154 Cal. 456, 98 P. 21.

[5,6] The quoted rule is important because, as stated in 1 Witkin, California Procedure, page 601, it is settled that the statute of limitations "runs only against a cause of action. If the answer pleads purely defensive matter, i. e., something which constitutes a defense to plaintiff's claim without calling for any affirmative relief, this defensive relief will not be barred by limitations. This is so even though the defensive matter could have been used as the basis of a cause of action for affirmative relief, and the statute has run on any such cause of action; it may still be used defensively. This principle is chiefly applied where the plaintiff sues on a contract, and the defendant denies any liability on the obligation on grounds of fraud. * * *"

In Re Estate of Cover, 188 Cal. 133, at page 140, 204 P. 583, at page 587, this rule is stated as follows:

"In such a case neither the limitation of the statute nor the doctrine of laches will operate to bar the defense of the invalidity of the agreement upon the ground of fraud, for, so long as the plaintiff is permitted to come into court seeking to enforce the agreement, the defendant may allege and prove fraud as a defense. In short, it is not incumbent upon one who has thus been defrauded to go into court and ask relief, but he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." See also Sanders v. Sanders, 117 Cal.App. 231, 3 P.2d 599.

Although the statute of limitations is inapplicable to the defense of fraud, it will, of course, run against a cross-complaint seeking damages for such fraud by way of affirmative relief. See Jones v. Mortimer, 28 Cal.2d 627, 170 P.2d 893; Sanders v. Sanders, 117 Cal.App. 231, 3 P.2d 599; Strong v. Strong, 22 Cal.2d 540, 140 P.2d 386; Hermosa Beach Land & Water Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254.

The first question presented is whether the statute of limitations has run on the cross-complaint. The applicable statute of limitations is section 338, subd. 4, of the Code of Civil Procedure providing a three-year statute for: "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

[7] The quoted section, however, does not state all of the law on the subject. As stated in Johnson v. Ehrgott, 1 Cal.2d 136, 137, 34 P.2d 144: "The action for fraud and deceit must be commenced within three years after the discovery of the fraud, and if the plaintiff does not discover it when it is perpetrated, he must set forth the circumstances to excuse the late discovery. The court must determine from the allegations whether the delay was excusable or was caused by lack of diligence on the part of the plaintiffs." See also Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Twining v. Thompson, 68 Cal.App.2d 104, 156 P.2d 29.

Here the pertinent dates are March 27, 1939, when the original option contract was entered into giving appellants 17 months to decide whether to purchase; July 1, 1946, when Vannini paid $5,000, and agreed to pay balance on July 1, 1951; November 2, 1951, the date of the agreement by respondents to accept $5,000, and this sum was paid on December 3, 1951; December 3, 1952, when the next installment became due and was not paid; March 9, 1953, when this suit was filed.

Respondent points out that three years from the date of the contract was March 27, 1942, and contends that no sufficient facts are alleged as an excuse for failing to discover the alleged fraud prior to that date. Respondent concedes that from October 8, 1942, until 1946 there was a government order prohibiting all mining operations, so that appellants could not have discovered the alleged fraud during that time, but points out that from 1946 to 1952 there was no prohibition, and contends no sufficient facts are alleged to excuse the failure to discover the alleged fraud during this period.

The facts alleged that are relied upon to excuse the delay are these: That extensive road repairs were necessary before work could be done in the mine; that it was necessary to drive an adit or tunnel nearly a mile into the mountain to reach the mining area; that there were 11 million gallons of water to be drained and 50,000 tons of debris to be removed before operations could begin; that the old shaft had to be retimbered, and, after the war had stopped development for 4 years, much of the work done before the war had to be done again.

[8, 9] We agree with respondent that, as a matter of law, these facts do not constitute a legal excuse for failing to discover the alleged fraud until 1952. The contract required the appellants to clear and dewater the mine within 17 months from March 27, 1939, the date of the original agreement. During these 17 months appellants were under no obligation to purchase. They were given that period of time to make their own investigation and to determine whether they desired to exercise their option to buy. Thus, the contract placed upon appellants the duty of making their own investigation, within a period of 17 months, to determine whether they wanted to buy. In other words, the contract necessarily contemplated that appellants were to rely on their own investigations and not on representations made by respondent before they were obligated to pay one cent on the purchase price, and they were given 17 months to make this investigation. The fact that it became difficult for them to make these investigations, as long as it was not impossible to make them, is no legal excuse for failing to make them. Here, the only period of impossibility alleged is from 1942–1946, during the war. But from 1939 to nearly the end of 1942, and from 1947 to 1952 there is no impossibility alleged. The fact that respondent waived the time limits on the requirement of performing the exploration work did not excuse appellants from discovering the facts they should have discovered had they performed their part of the contract. The rule is well settled that where "there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation." Hobart v. Hobart Estate Co., 26 Cal.2d 412, 442, 159 P.2d 958; see also Johnson v. Ehrgott, 1 Cal.2d 136, 34 P.2d 144. That is this case.

Appellants attack this conclusion, contending that whether or not they exercised due diligence in discovering the fraud is a question of fact, citing Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854; Uchida Investment Co. v. Inagaki, 108 Cal.App.2d 647, 239 P.2d 644; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243, and Twining v. Thompson, 68 Cal.App.2d 104, 156 P.2d 29. Those cases undoubtedly so hold, but they are distinguishable from the instant case, because in all of them there was no allegation showing that the pleader was under a duty to investigate prior to the discovery of the fraud. In fact, in one of the cases, Twining v. Thompson, supra, 68 Cal.App.2d at page 112, 156 P.2d at page 33, this distinction is expressly made. In the instant case there was a contractual duty to investigate, and this is pleaded. It must be held under the facts pleaded that appellants had a duty to clear the mine and investigate the project within 17 months of making the contract; that without legal justification they failed to do so; that they must, therefore, charged with knowledge that they would have gained had they performed their contractual obligations.

[10] Appellants also argue that the signing of the extension agreement implies a repetition of the fraudulent representations made in 1939. Actual repetition is not alleged. The only case authority cited by appellants on this point is Kalkruth v. Resort Properties, Ltd., 57 Cal.App.2d 146, 134 P.2d 513, but in that case there was an express repetition of the misrepresentations. Here that is not alleged. Such repetition cannot be implied.

For these reasons it must be held that the third amended cross-complaint asking for affirmative relief shows on its face that it is barred by the statute of limitations.

[11] This same defect in the pleadings of appellant also appears in the defensive matter pleaded in the answer. While the statute of limitations, as already pointed out, is not applicable to a defense predicated on fraud, even as to a defense based on fraud, the pleader is required to set forth all of the elements of fraud. What are these elements? In Nathanson v. Murphy, 132 Cal.App.2d 363, at page 367, 282 P.2d 174, at page 177, this court summarized them as follows: "The elements required [of fraud] are succinctly set forth in Hobart v. Hobart Estate Co., 26 Cal.2d 412, 422, 159 P.2d 958, 964: 'In general, to establish a cause of action for fraud or deceit plaintiff must prove that a material representation was made; that it was false; that defendants knew it to be untrue or did not have sufficient knowledge to warrant a belief that it was true; that it was made with an intent to induce plaintiff to act in reliance thereon; that plaintiff reasonably believed it to be true; that it was relied on by plaintiff; and that plaintiff suffered damage thereby.' "

[12–14] Here the materiality of the alleged representations sufficiently appears. Obviously, the representations as to the existence of a workable gold vein were of the very essence of the agreement. For the purposes of this appeal from a judgment on the pleadings we must assume that the representations were false and that Woolner, Van de Carr and Chapman either knew they were false or made them without sufficient information. It is equally true that damage is properly alleged. The real questions presented are whether it sufficiently appears that the false representations were made with the intent to induce appellants to act upon them, whether appellants had the legal right to rely upon them, and whether they did so rely. Appellants cite several cases holding that where the facts or pleading show that an investigation was made but such investigation did not disclose the falsity of the representations, either because the false representations and reliance thereon prevented a full inspection or because the defects unknown to the plaintiff were of a latent character, fraud can nevertheless exist. This is so because "Where one conducts an investigation, he may still be entitled to rely upon certain representations concerning conditions as to which the investigation does not extend", Lobdell v. Miller, 114 Cal.App.2d 328, 338, 250 P.2d 357, 364; or, as was said in Dow v. Swain, 125 Cal. 674, 683, 58 P. 271, 273, the examination "may have been imperfect because of the representations." See also Blackman v. Howes, 82 Cal.App.2d 275, 185 P.2d 1019, 174 A.L.R. 1004; Shearer v. Cooper, 21 Cal.2d 695, 134 P.2d 764. But the facts here pleaded do not bring that rule into operation. Here, under the facts pleaded, appellants agreed that, before they would determine whether to exercise their option, they would investigate the property, and they were granted 17 months to make the investigation. They were under a legal duty to make such investigation. In legal effect, this amounted to an agreement that appellants were not to rely on the representations made by respondent, but were to rely on their own investigation. But they made no real investigation before exercising the option. While it sufficiently appears from the pleading that in exercising the option the appellants relied on the false representations, the real question is not whether appellants relied on the false representations, but whether they had the legal right to rely upon them. It is in this respect that the pleading is defective.

[15] What does the pleading disclose? That in 1939 appellants signed the option agreement. Obviously, when this agreement was signed, appellants had no way of knowing whether ore in commercial quantities existed in the mine. The respondent, as vendor, had superior knowledge of this fact. Under the allegations of the answer the respondent made the false representations as to the existence of ore in commercial quantities with intent to induce appellants to enter into the contract, and appellants had a right to rely on them. At this point, however, appellants had not been damaged because they had paid nothing for the option. They were supposed to make an investigation in the next 17 months. Clearly, the facts above stated, would have supported a cause of action for expenses incurred in that investigation. But, as already pointed out, the right to such affirmative relief is now barred. Then, on July 1, 1946, 7 years later, appellants exercised the option to purchase. The real question is whether on that date appellants had the legal right to rely on the representations made in 1939. The option agreement makes it clear that appellants obligated themselves and they were under a contractual duty to clear out the water and debris and have it ready for mining operations within 17 months of the date of the option agreement. At the expiration of that time they had the power and right to exercise the option. Had they performed this obligation and duty they would have gained full knowledge of the falsity of the representations made to induce the contract. The very essence of their pleading is that when, in 1952, they completed the investigation which should have been completed in 1942, they discovered the falsity of the representations. Thus, their failure to acquire this information prior to 1952 can be attributable only to their failure to live up to the terms of the option agreement. Certainly, it cannot be successfully argued that when appellants exercised the option in 1946, respondent intended by the representations made in 1939 to induce appellants to exercise the option. Nor can it successfully be argued that in 1946 appellants, under the circumstances, had the legal right to rely on the 1939 representations. As a matter of law it must be held that the alleged misrepresentations were not intended, nor could not have been intended, by respondent to induce appellants to exercise their option. It must also be held, as a matter of law, that appellants had no legal right to rely on the false representations at the time that they exercised the option.

For the foregoing reasons, it must be held that the demurrer was properly sustained to the cross-complaint because of the running of the statute of limitations, and was properly sustained to the answer because it affirmatively appears that appellants had no legal right to rely on the alleged misrepresentations.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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140 Cal.App.2d 65

Application of Murray MELLMAN, for a Writ of Habeas Corpus.

Cr. 5563.

District Court of Appeal. Second District. Division 3, California.

March 20, 1956.

Proceeding in the matter of an application of petition for a writ of habeas corpus. The District Court of Appeal, Shinn, P. J., held that where defendants were restrained by judgment entered by consent from selling a manufacturer's products at prices below those stipulated in fair trade contracts, sales below the stipulated prices were violative of the injunction notwithstanding purchasers were acting on behalf of the manufacturer and paid by it for the purpose of ascertaining whether the injunction was being violated.

Writ discharged and petitioner remanded.

1. Trade-Marks and Trade-Names and Unfair Competition ⚷97

Where defendants were restrained by judgment entered by consent from selling a manufacturer's products at prices below those stipulated in fair trade contracts, sales below the stipulated prices were violative of the injunction notwithstanding purchasers were acting on behalf of the manufacturer and paid by it for the purpose of ascertaining whether the injunction was being violated. West's Ann.Bus. & Prof.Code, §§ 16900 to 16905, 16902.

2. Trade-Marks and Trade-Names and Unfair Competition ⚷97

Where defendants were restrained by consent judgment from selling the products of manufacturer at prices below fair trade contracts, duties of the defendant were measured by the injunction and it would avail the defendant nothing to show that certain transactions that were forbidden by the injunction were permitted by the fair trade contract. West's Ann.Bus. & Prof. Code, §§ 16900 to 16905, 16902.

3. Trade-Marks and Trade-Names and Unfair Competition ⚷97

Where defendants were restrained by a consent judgment from selling products of the manufacturer at prices below the fair trade contract, affidavits to punish for contempt for violation of injunction were sufficient to show that the articles sold were in fair and open competition with commodities of the same general class produced by others within the Fair Trade Act. West's Ann.Bus. & Prof.Code, § 16902.

Ward Sullivan, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

Landels & Weigel, Stanley A. Weigel, San Francisco, Harry A. Keithly, Los Angeles, for real party in interest.

SHINN, Presiding Justice.

Habeas corpus. A writ was heretofore issued, return filed and hearing has been had at which it was stipulated that the petition should be considered as a traverse to the return.

Petitioner Murray Mellman was imprisoned by virtue of a judgment and commitment for contempt issued by the Superior Court of Los Angeles County. The proceeding in the Superior Court was initiated by affidavits from which it appeared that on November 1, 1950 in an action of Sunbeam Corporation v. Mart, also known as Masters Mart, Inc., the defendant corporation, its officers, directors, agents and employees, were restrained by a judgment entered by consent from selling, offering for sale or advertising for sale any Sunbeam commodity at prices below those stipulated in plaintiff's Fair Trade contract entered into between plaintiff and its retailers pursuant to sections 16900 to 16905 of the Business and Professions Code, as set out in a price supplement which was made a part of the decree by reference.[1]

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[1] "It Is Hereby Ordered that the said defendant and its officers, directors, agents, servants, representatives, clerks and employees Should Be, And They Are, And Each Of Them Is, Hereby Restrained And Enjoined from attempting to do or causing to be done, either directly or indirectly, by any means or method or device, any of the following acts:

"1. Selling, offering for sale or advertising for sale any Sunbeam commodity at prices less than the prices now stipulated in plaintiff's Fair Trade Contract, said contract entered into between plaintiff and its retailers pursuant to Sections 16900 to 16905, inclusive, of the Business and Professions Code of the State of California, also known as the Fair Trade Act, plus the State Sales Tax, as set out in the current Fair Trade Contract Price Supplement No. 29, attached to the stipulation, which is made a part of this decree by reference as though set out fully herein, or any amendment of said fair trade prices as shall be made by plaintiff from time to time of which the defendant shall have notice.

"This decree shall not apply to any sale of plaintiff's commodities made in closing out the owner's stock for the purpose of discontinuing delivering any such commodity, or when the goods are damaged or deteriorated in quality, if notice is given to the public thereof, or by any officer acting under the orders of any court."

The corporation and Mellman, its president, were accused of having made 21 separate sales of Sunbeam products in violation of the injunction. Upon the hearing in response to an order to show cause why they should not be punished for contempt, a stipulation was entered into between plaintiff and the citees with the approval of the court. The following material facts were established for the purposes of the hearing, namely, that the sales described in the affidavits were made as alleged therein; that the persons making said sales and affidavits were acting as employes of Western States Bureau of Investigation which was to pay said persons for their services pursuant to Sunbeam's having engaged the bureau to have said purchases made and witnessed; that Mellman as president of the corporation had full knowledge of the provisions of the injunction; that all prior records and files in the action might be considered by the court and that the right to present oral testimony was waived. The court made findings that the corporation and Mellman separately wilfully, deliberately and contemptuously violated said injunction on 21 separate occasions between December 7, 1954 and May 2, 1955 by knowingly selling and permitting to be sold a fair-traded Sunbeam commodity, an appliance bearing Sunbeam's trademark, brand or name, at less than the fair trade price as required therefor by said injunction and that said sales were not within any exception provided in said injunction. The corporation was fined $200 for each of 21 contempts and Mellman was fined $100 for each thereof with a proviso that if said fine be not paid by Mellman he serve one day in the Los Angeles County Jail for each $2 of said fine until the same should be fully paid or served and in addition thereto, Mellman was sentenced to serve five days in the County Jail.

[1] Petitioner's principal contention is that the purchases, although below the stipulated prices, were not violative of the injunction because the purchasers were acting on behalf of Sunbeam, being operatives of an investigating bureau employed and paid by Sunbeam for the purpose of ascertaining whether the injunction was being violated. It is argued that the purpose of the Fair Trade laws is to protect the property rights in a trade name or trademark by permitting the producer to control by contract the price of the article to the ultimate consumer, and that when the producer, himself, buys the article at less than the agreed retail price he is not harmed and has no right to complain.

Petitioner says "Where, however, the producer, either directly or indirectly purchases his own product from the retailer not for the purpose of resale and not as the ultimate consumer of such product such purchases do not come within the scope and purpose of the Fair Trade Act and cannot constitute a contempt of the injunction issued against petitioner."

Petitioner has cited no authority which lends support to his contention. Sunbeam calls attention to a number of cases in which courts have had an opportunity to consider the significance of purchases made by a producer in the course of his investigations of suspected violations of injunctions by retailers or as affecting the producer's right to an injunction. Among them are Revere Copper & Brass, Inc., v. Stern, Sup.1953, 150 N.Y.S.2d 244; General Electric Co. v. Automobile Ass'n of New Jersey, 1955, 37 N.J.Super. 477, 117 A.2d 673; Lionel Corp. v. Klein, Del.Ch.1955, 114 A.2d 652; Seagram Distillers Corp. v. New Cut Rate Liquors, Inc., 7 Cir., 1955, 221 F.2d 815. In these and other cases the employment of "shoppers" by the producer has been regarded as somewhat of a routine procedure in the enforcement of fair trade contracts and sometimes as essential, when other evidence of violations is unavailable, for protection of the producer against the claim that he had lost his rights under his contracts by failing to assert them. See General Electric Co. v. Home Utilities Co., Inc., D.C.Md.1955, 131 F.Supp. 838, affirmed 4 Cir., 1955, 227 F.2d 384.

It may be that a court might in some circumstances discharge a citee upon an accusation for contempt if the conduct of his adversary had intentionally led him into a technical violation of an injunction, but even in such a case the question would not go to the jurisdiction of the court. However, there is no such situation here. All Sunbeam did was furnish an opportunity for the corporation and its agents to sell Sunbeam's products at prices fixed by them and they were fixed without any connivance on the part of the purchasers. It was the conduct of the sellers that was under review and their acts were none the less wilful and intentional because, unknown to them, the purchasers of the articles were acting on behalf of Sunbeam.

The injunction made no exception of sales made to Sunbeam or its agents nor did it incorporate all or any part of the contract by reference or otherwise. The 21 sales were made in violation of express and clear provisions of the injunction. They did not fall within the exception which related to closing out sales. If other exceptions had been deemed desirable the time to request or demand them was at the time of trial and before entry of judgment. To read into the injunction other exceptions would be modification, not interpretation. The judgment as it stands is final and conclusive. It does not permit sales to Sunbeam or its agents at less than the stipulated prices; it prohibits them.

It is immaterial whether Sunbeam's rights in its trademarks and trade brands were affected by the 21 sales in question. Sunbeam had rights under the contract, as they were declared in the injunction, the principal one being that the contract be not breached by the retailer. Every sale made at prices below those stipulated in the injunction was by force of the injunction a breach of the agreement and of Sunbeam's right to hold the retailer to its terms. When the injunction was issued the court became an interested party. It had a duty to see that the injunction was obeyed. The sole question was whether it had been violated by the citees. The fact that Sunbeam's agents made the purchases was not a valid defense to the accusation.

Petitioner again endeavors to go behind the injunction to the contract, contending for an interpretation that would permit him to make sales such as the ones in question. He says in his petition "The exceptions in the said Retail Sales Contract authorize 'sales of such commodities to persons who have agreed not to resell the same except at the retail price stipulated in accordance with said Agreement', and the sales to the aforesaid affiants fall within such exception and said sales are therefore not violative of the order of Court and do not constitute a Contempt of said Court." And in a letter memorandum submitted to the court he says: "We earnestly and sincerely contend that Paragraph 3 of the Retail Sales Agreement between Sunbeam Corp. and Masters Mart (Exhibit B) was intended to exempt from the provisions thereof sales of the producers commodities to persons, firms or corporations who had agreed that they would not in turn resell the same except at the retail price stipulated in accordance with that agreement. * * * Such sales were, therefore, excepted from the provisions of petitioner's Fair Trade Agreement and could not constitute a contempt of the Decree of the Superior Court." The provision he relies upon is paragraph 3, to wit: "3. Retailer will not resell said commodities or any of them to any person, firm or corporation (excepting only bona fide consumers) who shall not have agreed that such purchasers will not in turn resell the same except at the retail price stipulated in accordance with this Agreement at the time of such resale, nor will the Retailer assist any third person, firm or corporation in obtaining any of said commodities for purposes of resale." It will be noted that in each instance there is an omission of the words "excepting only bona fide consumers," but the phrase is not material to the questions that are presented. The entire paragraph is irrelevant.

[2] The parties discuss at length the meaning of certain provisions of the contract. As we have said before, petitioner's duties were measured by the injunction. It would avail petitioner nothing to show that certain transactions that are forbidden by the injunction are permitted by the contract. All this discussion is irrelevant. No one questions the meaning of the injunction, which, of course, stands alone, independent of the contract. In the present view it supersedes the contract. We may add, however, that we find nothing whatever in paragraph 3 of the contract which even

remotely tends to permit the retailer to make individual sales at cut-rate prices. The paragraph not only fails to support petitioner's argument but may not even be considered. The sales were violations of the injunction. The trial court in the contempt proceeding was governed by the clear provisions of the injunction, even if it proscribed acts which were permitted by the contract.

[3] The further contention that there was no showing by the accusatory affidavits that the articles sold were "in fair and open competition with commodities of the same general class produced by others" (see § 16902 Bus. & Prof.Code) is answered by the injunction itself. It lists the articles and stands as an adjudication that they were proper subjects of a fair trade contract. A later contract of the parties which was in force at the time of the sales was before the court as an exhibit to the affidavit of one Cervenko and it recited that the articles listed, including the subjects of the 21 sales, were in "free, fair and open competition with commodities of the same general class produced by others." Petitioner signed the contract as president of the corporation and it constituted evidence of the facts recited therein.

Petitioner, on behalf of his corporation, entered into the contract with Sunbeam having full knowledge of its consequences. He consented to terms of the injunction and disobeyed them without just cause or excuse. However rebellious he may feel over being obliged to exact from his customers, regardless of their necessities, prices dictated by producers, supposedly in fair competition with each other, the courts can afford him only such solace as he may derive from reflecting upon the contribution he is making to the general welfare of the state.

The evidence of petitioner's guilt was conclusive. We have considered all the grounds urged upon his application and have found them untenable.

The writ is discharged and the petitioner is remanded.

PARKER WOOD, J., concurs.

VALLÉE, J., concurs in the judgment.

140 Cal.App.2d 278

Martin F. SCHAEFER, on Behalf of Himself and all other Taxpayers of the City of Compton, State of California, and on Behalf of the said City as such Taxpayers, Plaintiff and Appellant,

v.

Samuel BERINSTEIN, T. A. Rombotis, John F. Bender, Helen Bender, Gizella Allen, Roy L. O. Adams, Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Ann Sipe, Frank R. Sipe, Elbert, Ltd., a corporation, Luberco, Ltd., a corporation, The Sterling Company, City of Compton, and Doe One through Doe Fifty, Defendants.

Samuel Berinstein, T. A. Rombotis, John F. Bender, Helen E. Bender, Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, Ann Sipe, Elbert, Ltd., a corporation, Luberco, Ltd., a corporation, and The Sterling Company, a corporation, Respondents.

Civ. 21144.

District Court of Appeal, Second District, Division 3, California.

March 27, 1956.

Hearing Denied May 23, 1956.

Action by taxpayer on behalf of city for alleged fraud of defendants in acquiring from city parcels of tax-deeded land at prices far below actual value. From judgments of the Superior Court of Los Angeles County, Bayard Rhone, J., the plaintiff appeals. The District Court of Appeal, Vallée, J., held that the complaint was sufficient to state a cause of action as to certain defendants and was insufficient as to other defendants and that it was not barred by limitations.

Judgment in accordance with the opinion.

Vacating opinion in 292 P.2d 604.

1. Pleading ⚿252(2)

Where an amended complaint is filed, the original complaint ceases to be the complaint and is entirely superseded by the amended complaint except for certain limited purposes.

2. Pleading ⚿251

In determining the sufficiency of a third amended complaint, it could not be aided or defeated by prior complaints or a proposed fourth complaint.

3. Appeal and Error ⚷917(1)

On appeal from a judgment sustaining a demurrer to the complaint, the allegations must be regarded as true and it must be assumed that plaintiff can prove all the facts as alleged.

4. Pleading ⚷34(1)

The court must in every stage of an action, disregard any defect in the pleadings not affecting the substantial rights of the parties. West's Ann.Code Civ.Proc. § 475.

5. Pleading ⚷34(1)

Pleadings must be reasonably interpreted and must be read as a whole, and each part must be given the meaning that it derives from the context wherein it appears.

6. Pleading ⚷193(5)

In determining whether a complaint is sufficient as against a demurrer on ground of insufficient facts, rule is, that if upon a consideration of all the facts stated, it appears that plaintiff is entitled to any relief, complaint will be held good, although facts may not be clearly stated or may be intermingled with a statement of the facts irrelevant to the cause of action, and although the plaintiff may demand relief to which he is not entitled under the facts alleged.

7. Pleading ⚷34(1)

In passing upon a sufficiency of a pleading its allegations must be liberally construed with a view to substantial justice between the parties.

8. Municipal Corporations ⚷63(1)

Where a thing is within the discretion of the municipal governing body, neither the state nor any private citizen can question the action or nonaction of such body by any judicial proceeding.

9. Municipal Corporations ⚷987

A citizen and taxpayer cannot maintain an action to protect the interest of a municipality when there is no immediate duty enjoined upon the governing body or the municipality to bring a similar action but they have discretion to refuse to bring it.

10. Municipal Corporations ⚷999

A taxpayer has a right to sue in a representative capacity and may sue in cases involving fraud, collusion, ultra vires or a failure of the governing body to perform a duty specifically enjoined.

11. Officers ⚷110

General policy is that public officers shall not be interested in any contract made in their official capacity in which they have a personal or financial interest.

12. Municipal Corporations ⚷123

Municipal officers may not use their official positions for their own benefit or for the benefit of anyone except the municipality itself.

13. Municipal Corporations ⚷231(1)

Municipal officers may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation and such contracts are void as against public policy.

14. Officers ⚷110

A public officer's interest in a contract need not be a financial one nor is it necessary to show actual fraud, dishonesty or loss to invalidate the transaction.

15. Officers ⚷110

The purpose of the statutes against public officers being interested in any contract made in their official capacity in which they have a personal or financial interest is to remove all indirect influence of an interested officer, as well as to discourage deliberate dishonesty, and it is not the character of the contract itself but the manner in which it is created that renders it violative of public policy. West's Ann.Gov. Code, § 1090–1092; West's Ann.Civ.Code, § 1667.

16. Municipal Corporations ⚷231(1)

Compton city charter provisions were not construable as not prohibiting the purchase of city property by an officer or city employee but as only prohibiting such from being interested in any contract, expense, price or consideration which is payable from the city treasury, and that the prohibition would reach only a sale to the city and not a sale by the city. St.1925, p.

1245, art. 26, § 6; St.1948, pp. 242, 259, §§ 601, 1202.

17. Officers 🔑110

Statutes prohibiting personal interest of public officers in public contracts are strictly enforced.

18. Municipal Corporations 🔑231(1)

Under the statute providing that city officers shall not be interested in any contract made by them in their official capacity, a person merely in an advisory position to a city is affected by the conflicts of interest rule. West's Ann.Gov.Code, §§ 1090.

19. Municipal Corporations 🔑219

Where defendant was employed by city as a special city attorney to rehabilitate tax deeded and special assessment frozen properties situated within the city, he could not buy the property in his own name and could not do so through a dummy and his contracts to purchase from the city and ultimate sales were contrary to public policy and void. West's Ann.Gov.Code, § 1090.

20. Municipal Corporations 🔑1000(5)

In taxpayer's action on behalf of city to recover for alleged fraud on city by which defendants allegedly acquired from the city parcels of tax-deeded land at prices far below their actual value, complaint sufficiently alleged a demand on the city counsel that legal action be filed.

21. Municipal Corporations 🔑999

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from city parcels of tax-deeded lands at prices far below their market value, where complaint showed a failure of the city council to perform a specifically enjoined duty by the charter to declare the transactions void and a cause of action in city was alleged and that the council failed to declare the transactions involved void, plaintiff as a taxpayer had capacity to maintain the action. Streets and Highways Code, §§ 500 et seq., 8500 et seq.; St.1925, p. 1245, art. 26, § 6; St.1948, pp. 242, 259, §§ 601, 1202.

22. Conspiracy 🔑1

Elements of an action for civil conspiracy are the formation of the conspiracy and damages resulting from an act or acts done in furtherance of the common design.

23. Conspiracy 🔑6

Where two or more persons are sued for a civil wrong, it is a civil wrong resulting in damages and not the conspiracy which constitutes a cause of action.

24. Torts 🔑22

Each participant in a wrongful act is responsible as a joint tort-feasor for all damages ensuing from the wrong regardless of whether he was a direct actor and regardless of the degree of his activity.

25. Torts 🔑22

A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him.

26. Conspiracy 🔑13

The act of one during a conspiracy, is the act of all if done in furtherance thereof, and a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.

27. Conspiracy 🔑19

A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interest of the alleged conspirators and other circumstances.

28. Fraud 🔑41

A cause of action based on fraud must aver a fraudulent representation, that the representation was false that it was known by defendant to be false, that it was made with intent to deceive the plaintiff, that plaintiff relied on representation and that plaintiff was damaged.

29. Municipal Corporations 🔑1000(5)

In taxpayer's action on behalf of city based on alleged fraud whereby defendants as employees of city and others acquired parcels of tax-deeded land at prices far below their market value complaint was sufficient to meet requirements of a pleading based upon fraud. West's Ann.Civ. Code, §§ 2219, 2231, 2233–2235.

30. Limitation of Actions 🔑179(2)

Under the statute providing that in an action for relief on the ground of fraud, the cause is not deemed to have accrued until discovery of the facts constituting the fraud, plaintiff to come within the exception must allege when the fraud was discovered the circumstances of discovery, what the discovery was, and why it was not discovered sooner. West's Ann.Code Civ. Proc. § 338, subd. 4.

31. Limitation of Actions ⚷100(11)

Negligence of plaintiff in failing to discover the falsity of a statement is no defense with respect to limitations when the representation was intentional rather than negligent, and the fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar recovery. West's Ann.Code Civ.Proc. § 338, subd. 4.

32. Limitation of Actions ⚷100(13)

The statute respecting the accrual of an action for relief on the ground of fraud commences to run only after one has notice of the circumstances sufficient to make a reasonably prudent person suspicious of fraud and thereby put him on inquiry. West's Ann.Code Civ.Proc. § 338, subd. 4.

33. Limitation of Actions ⚷100(13)

As respects discovery of fraud, means of knowledge are equivalent to knowledge, but such is true only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. West's Ann.Code Civ.Proc. § 338, subd. 4.

34. Limitation of Actions ⚷100(13)

Where there is a duty to investigate the alleged fraud, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation, but where there is no prior duty to investigate, the statute did not begin to run until plaintiff has notice or knowledge of facts sufficient to put a reasonable man on inquiry. West's Ann.Code Civ.Proc. § 338, subd. 4.

35. Limitation of Actions ⚷179(2)

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from the city parcels of tax-deeded land at prices far below actual value, complaint was not barred by limitations on the ground that it was filed more than three years after the last of the alleged sales, where complaint disclosed facts tending to discourage the making of any investigation as to the alleged fraud. West's Ann.Code Civ.Proc. § 338, subd. 4.

36. Limitation of Actions ⚷179(2)

In cases involving confidential relationships, the rule requiring allegations stating the circumstances which are relied upon by plaintiff as excusing prior discovery of fraud is relaxed.

37. Records ⚷19

Where fraud is involved public records are not constructive notice of the true facts to the defrauded party.

38. Contracts ⚷94(5)
Deeds ⚷70(2)

The purpose of the recording acts is to afford protection, not to those who make fraudulent misrepresentations, but to bona fide purchasers for value.

39. Notice ⚷15

When facts are susceptible to opposing inferences whether a party had notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and whether by prosecuting such an inquiry might have learned such fact are questions of fact.

40. Limitation of Actions ⚷179(2)

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from city many parcels of tax-deeded land priced far below market value, complaint was not barred by limitations though not filed for more than three years after the last of the alleged sales and though status of the tax deeded properties were matters of public record, where complaint sufficiently alleged that neither the city nor plaintiff learned anything to arouse their suspicions during the period between the completion of the transactions in 1948 and the alleged discovery of the fraud in 1953. West's Ann.Code Civ.Proc. § 338, subd. 4.

41. Pleading ⚷192(2)

Where uncertainties in a pleading appeared to be matters which lie within the knowledge of defendants a demurrer does not lie to such matters.

42. Municipal Corporations ⚿1000(5)

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from the city many parcels of tax-deeded lands at prices far below actual value counts of complaint for an accounting for unjust enrichment by the defendants and to have the defendants declared a trustee as to the properties and to be required to reconvey the same to the city were sufficient.

43. Parties ⚿53

Leave of court is required under the statute to add new parties defendants. West's Ann.Code Civ.Proc. § 473.

44. Parties ⚿65(1)

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from city parcels of tax-deeded land at prices far below market value where third amended complaint joined two new defendants who were not sued under fictitious names and no order was obtained permitting their joinder, such defendants' motion to strike their names as parties was properly granted. West's Ann.Code Civ.Proc. § 473.

45. Municipal Corporations ⚿1000(5)

In taxpayer's action on behalf of city for alleged fraud of defendants in acquiring from city many parcels of tax-deeded property at prices far below actual value where no facts were alleged that either of certain defendants conspired with any other defendant to defraud the city or that they profited in any way from the dealings had with the city demurrers of such defendants were properly sustained.

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Albert Vieri, Compton, and Walter Monarch, Los Angeles, for appellant.

Glen Behymer, Los Angeles, for respondents Samuel Berinstein, T. A. Rombotis, Elbert, Ltd., a corp., Luberco, Ltd., a corp., The Sterling Co., a corp.

Robt. E. Rosskopf, Beverly Hills, for respondents John F. Bender, Helen E. Bender, Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe and Ann Sipe.

VALLÉE, Justice.

Appeals by plaintiff, suing in a representative capacity as a taxpayer, from two judgments entered in an action based on defendants' alleged fraud on the city of Compton.

Plaintiff appeals from a judgment dismissing the action as against defendants Luberco, Ltd., and The Sterling Company following an order sustaining their demurrers to his second amended complaint without leave to amend. He also appeals from a later judgment dismissing the action in its entirety following an order sustaining general demurrers of defendants John F. Bender,[1] Helen Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, and Ann Sipe to his third amended and supplemental complaint without leave to amend, granting a motion of defendants Berinstein, Rombotis, Luberco, Ltd., and The Sterling Company to strike that complaint as to them, and the subsequent denial of a motion to vacate said orders and for leave to file a fourth amended and supplemental complaint. The appeals will be considered in the reverse order from that taken by plaintiff.

The appeal from the judgment on the third amended complaint.

The third amended complaint, referred to as the complaint, contains eight counts, all predicated on the common ground of fraud. It names as defendants John F. Bender, Helen Bender, Gizella Allen, Roy L. O. Adams, Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Ann Sipe, Frank R. Sipe, Elbert, Ltd., Samuel Berinstein, T. A. Rombotis, Luberco, Ltd., The Sterling Company, and city of Compton. Gizella Allen and Roy L. O. Adams are not parties on the appeal. The others, except city of Compton, demurred and moved to strike. City of Compton filed an answer in which it stated that the city council desired to remain "neutral" in the litigation and take no stand for or against plaintiff.

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[1] John F. Bender will sometimes be referred to as "Bender."

Plaintiff contends each count states facts sufficient to state a cause of action against all defendants.

[1, 2] There are inferences in the briefs that in determining the sufficiency of the third amended complaint we should look to the allegations of the prior complaints and to the proposed fourth amended complaint. Where an amended complaint is filed, the original complaint ceases to be the complaint in the action and it is entirely superseded by the amended complaint except for certain limited purposes. W. H. Marston Co. v. Kochritz, 80 Cal. App. 352, 251 P. 959; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 212 P.2d 591; see Neal v. Bank of America, etc., 93 Cal.App.2d 678, 681, 209 P.2d 825. In determining the sufficiency of the third amended complaint in the present case it cannot be aided or defeated by the prior complaints or the proposed fourth complaint.

Count I. The first count is for damages against all defendants on the ground of a conspiracy to defraud the city of Compton. The following facts are alleged:

1. Plaintiff is a citizen, resident, and taxpayer of the city of Compton and brings the suit in his representative capacity as a taxpayer. The city is a chartered municipal corporation. Plaintiff made demands on the city council to institute in the name of the city legal action against defendants and the city council refused to authorize or institute such action.

2. Defendant John Bender, an attorney at law, had entered into a series of contracts with the city council, culminating in a contract of January 11, 1944, whereby he was employed as special attorney for the city to clear the title to tax-deeded land situated within the jurisdiction of the city and to sell the land with merchantable title.

3. Defendants Elbert, Ltd., Luberco, Ltd., and The Sterling Company are California corporations engaged in the business of purchasing tax-deeded properties from the city and other municipalities. Defendants Berinstein and Rombotis own a controlling interest in each of the corporations and they are the officers and agents who represented the corporation at all times herein mentioned in their dealings with the other defendants. Plaintiff refers to Berinstein, Rombotis, and the corporate defendants as the "Masters"; for convenience we shall use this reference. While Bender was acting as special attorney for the city, he was, and is now, the personal attorney for the Masters.

4. Defendants Frank Sipe and Ann Sipe, husband and wife, were employees and agents of Bender, and from time to time during the period from 1944 to the present aided and assisted the Masters and Bender in the wrongful acts alleged.

5. Defendants John Alzola and his wife, Annette Marie Alzola, and Grayce W. Webster, were agents of the other defendants and acted as dummies for them. They enabled Bender to purchase tax-deeded land from the city without disclosing that he was in fact the buyer.

6. In the 1920's and the early 1930's the city council authorized the issuance of bonds under the Improvement Bond Acts of 1911 and 1915, Streets and Highways Code, §§ 5000 et seq., 8500 et seq. During the early 1930's about one-fourth of the land situated within the city was deeded to the state for taxes. A large part of this land was burdened by the bonds which had become delinquent as to principal and interest. By 1944 the state "was selling tax deeds" to cities for prices ranging from $5 to $25 a lot, but the actual fair market value of each lot was between $500 and $1000 with a merchantable title. Bender, in his official capacity, compiled lists of properties deeded to the state, selected certain parcels, and proceeded to obtain title reports and other information concerning the parcels at the expense of the city of Compton. He then negotiated the purchase of these lands on behalf of the city; and from time to time the city council, relying upon his expert advice, ratified his actions by resolutions and purchased the lands.

7. The count pleads in great detail numerous alleged fraudulent representations and transactions by defendants whereby the Masters, Bender, and Helen Bender acquired from the city, in the names of dummies and nominees, many parcels of

tax-deeded land at prices far below their actual value. It alleges the Masters induced Bender to represent and he did represent to the city: that the corporate defendants were the actual owners of bonds which were valid liens against each of the parcels sold to them, when in fact the liens were either invalid or nonexistent; that the sales were conducted at public auctions, when in fact they were conducted under private sales procedure and did not comply with the requirements of such; that it was in the best interest of the city to sell to the owners of the equity of redemption and to the owners of the bonds to the exclusion of all other bidders; that he (Bender) had investigated the ownership of bond liens on the properties.

8. Bender recommended to the city that certain lots in which the Masters were interested be sold without a merchantable title and for one-fifth of their actual value. He concealed the fact that the land could have been sold with a merchantable title without large expense and would have given the city a very large profit. For the purpose of concealing the fraud, he enticed other officers and employees of the city to purchase tax-deeded land from the city. In order to preserve the fantasy of the value of the alleged bonds claimed to be owned by defendants, Bender, until December 3, 1951, caused the city to pay principal and interest and penalties on bonds which were presumed extinguished on or after January 1, 1947 to corporate defendants and to himself. For the purpose of concealing the fraud he failed to keep any adequate records of his transactions and failed to make written reports of a comprehensive nature.

9. The representations were false, were known by defendants to be false, were made with the intention of defrauding the city, and were relied on by the city to its damage. They were made by Bender until the time of filing the complaint, and the overt acts of fraudulent concealment were carried out by defendants at frequent intervals from 1948 to the date of filing this suit.

10. Pursuant to his contract with the city, Bender received fees and costs from the city in connection with the fraudulent transactions. He also was paid fees by purchasers for clearing the title to property after they had bought the property from the city and for other alleged services.

11. The city had no information which would put it on notice of the existence of the wrongful course of conduct of defendants in the conspiracy until April 1953. The fraud was revealed to the city on April 14, 1953 by James G. Butler, who later became city attorney, when he presented to the city council copies of certain recorded deeds and demanded an investigation. On April 21, 1953 Butler presented to the city council evidence indicating that Bender at all times had acted as the agent of Elbert, Ltd., in dealing with the city while he was purporting to act as the attorney for the city.

12. The city council refused to enforce certain provisions of the city charter which enjoin it to declare the transactions involved void. The charter provisions are set forth in *haec verba*.[2]

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[2] From 1925 until March 11, 1948, section 6, article 26, of the city charter provided: "No member of the Council, or of any Board, and no officer or employe of the City shall be or become directly or indirectly interested in any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the City Treasury, nor shall either or any of them receive any gratuity or advantage from any contractor or person furnishing labor or material for the same, and any contract with the City, in which any such officer or employe is or becomes interested, shall be declared void by the Council." Stats.1925, c. 20, pp. 1212, 1245.

Since March 11, 1948, section 1202, article 12, of the charter provides: "No member of the City Council, officer or employee of the City, shall be financially interested, directly or indirectly, in any contract, sale or transaction to which the City is a party. * * * Any such contract or transaction in which there shall be such an interest shall become void at the election of the City, when so declared by resolution of the City Council. * * * If any member of the City Council, officer or employee of the City * * * shall so vote or participate, or be financially interested as afore-

13. The city council refused to authorize the city attorney to bring an action for redress in connection with the matters covered by the complaint, and the refusal was continued after repeated requests by the city attorney's office as well as after repeated presentations of evidence to the council in affidavits.

14. Plaintiff first became informed of the alleged conspiracy by reading newspaper accounts of the statements of Butler to the city council on and after April 14, 1953. On April 28, 1953 plaintiff demanded at a regular meeting of the city council that these suspicious circumstances be investigated and that a lawsuit be instituted for declaratory relief, for damages, for an accounting, and for other appropriate relief against defendants. The city council refused to act. On March 9, 1954 the city council reaffirmed its refusal to investigate the said matters and to authorize the prosecution of a lawsuit in the name of the city.

15. As a proximate result of the wrongful acts of defendants and each of them the city has been damaged in the sum of not less than $1,000,000, but the exact amount is capable of being ascertained only by an accounting.

The prayer is for judgment in favor of the city for $1,000,000 against all defendants other than Helen Bender.

General and special demurrers were filed by all defendants to the complaint and to each count. Berinstein, Rombotis, Luberco, Ltd., and The Sterling Company filed motions to strike the complaint. The motions were granted. The general demurrers of the other defendants were sustained without leave to amend.

[3–7] It seems necessary to repeat the rules which should govern a trial court in the consideration of a demurrer on the ground a pleading does not state facts sufficient to constitute a cause of action and which govern a reviewing court in considering an appeal from a judgment entered on the sustaining of a demurrer on that ground. On appeal from a judgment sustaining a demurrer to a complaint the allegations of the complaint must be regarded as true. It must be assumed that plaintiff can prove all the facts as alleged. Wirin v. Horrall, 85 Cal.App.2d 497, 500, 193 P.2d 470. "The court must, in every stage of an action, disregard any defect in the pleadings which does not affect the substantial rights of the parties. Code Civ. Proc., sec. 475. 'Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears.' Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 42, 172 P.2d 867, 872. All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief. Tristam v. Marques, 117 Cal.App. 393, 397, 3 P.2d 947. 'In determining whether or not the complaint is sufficient, as against the demurrer upon the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if, upon a consideration of all the facts stated, it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged.' Matteson v. Wagoner, 147 Cal. 739, 742, 82 P. 436, 438. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties. Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305; Gerritt v. Fullerton Union High School Dist., 24 Cal.App.2d 482, 486, 75 P.2d 627. 'While orderly procedure demands a reasonable enforcement of the rules of pleading, the basic principle of the code system in this state is that the administration of justice

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said, upon conviction thereof, he shall forfeit his office." Stats.1948, c. 11, pp. 236, 259.

Section 601, article 6, of the 1948 charter reads: "It shall be the duty of the City Council to enforce the provisions of the Charter." Stats.1948, c. 11, pp. 236, 242.

shall not be embarrassed by technicalities, strict rules of construction, or useless forms.' Buxbom v. Smith, 23 Cal.2d 535, 542, 145 P.2d 305, 308." Hardy v. San Fernando Valley Chamber of Commerce, 99 Cal.App.2d 572, 577, 222 P.2d 314, 317.

Defendants first say that plaintiff does not have the legal capacity to maintain the action and that he is not the real party in interest.

[8, 9] Generally, a municipality, through its governing body, has control of the property and general supervision over the ordinary business of the corporation. Where the thing in question is within the discretion of the governing body, neither the state nor any private citizen can question the action or nonaction of such body by any judicial proceeding. A citizen and taxpayer cannot maintain an action to protect the interests of the municipality when there is no immediate duty enjoined upon the governing body or the municipality to bring a similar action, but they have discretion to refuse to bring it. Dunn v. Long Beach Land & Water Co., 114 Cal. 605, 609, 46 P. 607.

[10] In this state it is thoroughly established that a taxpayer, under certain circumstances, has the right to sue in a representative capacity. Nickerson v. San Bernardino County, 179 Cal. 518, 177 P. 465; McConoughey v. City of San Diego, 128 Cal. 366, 60 P. 925; Warfield v. Anglo, etc., Bank, 202 Cal. 345, 260 P. 881; Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826; Mines v. Del Valle, 201 Cal. 273, 257 P. 530; Crowe v. Boyle, 184 Cal. 117, 193 P. 111. A taxpayer may sue in cases involving fraud, collusion, *ultra vires,* or a failure on the part of a governmental body to perform a duty specifically enjoined. Pratt v. Security Trust & Savings Bank, 15 Cal. App.2d 630, 636, 59 P.2d 862.

[11–15] The charter provisions of the city of Compton are in accord with the established policy of this state with respect to the subject to which they relate. (See Gov.Code, §§ 1090–1092; Civ.Code, § 1667.) It is the general policy of the state that public officers shall not be interested in any contract made in their official capacity in which they have a personal or financial interest. Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 597, 229 P. 1020. That policy affords aid in construing charter provisions on the same subject. Idem. Officers of a municipal corporation, like those of private corporations, are agents of the corporate body and may not use their official position for their own benefit, or for the benefit of anyone except the municipality itself. They may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation. People v. Sullivan, 113 Cal.App.2d 510, 523, 248 P.2d 520; 18 Cal.Jur. 978, § 253. Such contracts are held void as against public policy, both on the ground that the interest of the officer interferes with the unbiased discharge of his duty to the public and also that a contract in violation of an express statutory provision is void. City of Oakland v. California Const. Co., 15 Cal.2d 573, 576, 104 P.2d 30. The basic reason for the enactment of laws and charter provisions of this character is concisely stated in Stockton Plumbing & Supply Co., v. Wheeler, 68 Cal.App. 592, at page 601, 229 P. 1020, at page 1024, as follows:

> "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. * * * The personal interest of an officer in a contract made by him in his official capacity may be indirect only, still such interest would be sufficient to taint the contract with illegality. If his interest in the contract is such as would tend in any degree to influence him in making the contract, then the instrument is void because contrary to public policy, the policy of the law being that a public officer in the discharge of his duties as

> such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large."

The public officer's interest need not be a financial one; nor is it necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. The purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Miller v. City of Martinez, 28 Cal.App.2d 364, 369, 82 P.2d 519. It is not the character of the contract itself, but the manner in which it is created, that renders it violative of sound public policy.

[16, 17] Defendants Bender, Helen Bender, Webster, John and Marie Alzola, and Frank and Ann Sipe argue that the charter provision as it existed prior to 1948, when the alleged purchases were made, did not prohibit the purchase of city property by an officer or city employee but only prohibited an officer or employee from being interested in "any contract, work or business, or in the sale of any article, the expense, price or consideration of which is payable from the City Treasury." Their contention is that the purchase price of any property from the city would not be paid from the city treasury and such prohibition would reach only a sale *to* the city and not a sale *by* the city. The charter provision cannot be given such a narrow construction. The distinction is unsound since the evil is involved in both transactions. Statutes prohibiting personal interests of public officers in public contracts are strictly enforced. Moody v. Shuffleton, 203 Cal. 100, 104, 262 P. 1095. In Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519, 523, the contention was that " 'the statute permits only withholding, not recovery, of payment' " to an officer for supplies when he is interested in the transaction. It was held that the statute was merely a cumulative remedy which in no way restricted the recovery of money paid on such claims in view of the express language of the section making such transactions void and the broad principle of public policy which recognizes no equities or estoppels on the part of a participant. It is sufficient to say that even if the city of Compton had not adopted a provision relating to "conflicts of interest," Bender's conduct would be prohibited by section 1090 of the Government Code.

[18, 19] Section 1090 of the Government Code states that "city officers shall not be interested in any contract made by them in their official capacity." A person merely in an advisory position to a city is affected by the conflicts of interest rule. (See People v. Sullivan, 113 Cal.App.2d 510, 248 P.2d 520.) Bender was employed by the city of Compton as a special city attorney for the purpose of rehabilitating tax-deeded and special assessment frozen properties situated within the city. He was an officer and agent of the city and as such was in a position to advise the city council as to what action should be taken relative to the property involved. He could not buy the property in his own name and he could not do so through a dummy. The contracts to purchase from the city and the ultimate sales were contrary to public policy and are void. Edwards v. Estell, 48 Cal. 194; 12 Cal. Jur.2d 290, § 88.

[20, 21] Defendants appear to argue that no facts are alleged showing a demand on the city council that legal action be filed. The point has no merit. It is expressly alleged that on April 28, 1953 plaintiff demanded of the city council "that a lawsuit be instituted for declaratory relief, for damages, for an accounting, and for other appropriate relief against the defendants," and sufficient ultimate facts are alleged showing the facts averred in the complaint were brought to the attention of the council and that they were sufficient to warrant action by it.[3] The city is not contending the notice and demand were insufficient. In fact, in its answer it says the city council desires to remain "neutral." Plaintiff clearly alleges that he made demand upon the city council; and it, with sufficient knowledge of the alleged facts, refused to institute legal action. The charters of 1925 and of 1948 provide that the city council shall have the power to declare void a contract in which an officer or employee of the city is interested. Section 601 of the 1948 charter enjoins on the city council the duty of enforcing the charter. The facts show a failure of the city council to perform a specifically enjoined duty. A cause of action in the city is alleged. The council failed to declare the transactions involved void; plaintiff made a sufficient demand on the council to institute action; it refused; therefore, plaintiff as a taxpayer has the capacity to maintain the action. Miller v. McKinnon, 20 Cal.2d 83, 124 P.2d 34, 140 A.L.R. 570; Miller v. City of Martinez, 28 Cal.App.2d 364, 82 P.2d 519; Osburn v. Stone, 170 Cal. 480, 150 P. 367.

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[3] Paragraph LVII of Count I reads: "That on or about January 15, 1953, James G. Butler, an attorney and a resident of the City of Compton, sought information concerning the individual and separate personal wealth of the defendants Adams and Bender. That in connection therewith he hired an investigator at his personal expense, which investigation involved in excess of a hundred hours, and said investigation disclosed that Adams [the then city treas-

[22–27] Defendants next say the facts alleged are not sufficient to constitute a cause of action. Enough facts are alleged to show a conspiracy to defraud the city of Compton. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting from an act or acts done in furtherance of the common design. Where two or more persons are sued for a civil wrong, it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action. Each participant in the wrongful act is responsible as a joint tortfeasor for all damages ensuing from the wrong, regardless of whether he was a direct actor and regardless of the degree of his activity. California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511. A plaintiff is entitled to a joint recovery of damages against such defendants as he can show have united or cooperated in inflicting a wrong upon him. The act of one during a conspiracy is the act of all if done in furtherance thereof, and thus a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom. Mox Incorporated v. Woods, 202 Cal. 675, 678, 262 P. 302. A conspiracy may be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances. Globe Dairy Lunch Co. v. Joint Executive Board of Culinary Work-

urer] and Bender owned real estate as tenants in common. That properties originally sold by the City to Alzola and Webster, as described above, had later been transferred to the defendants Bender and Adams as co-tenants. This information lead to the suspicion that Grayce W. Webster and John M. Alzola at no time had been bona fide purchasers. That on April 14, 1953, James G. Butler presented to the City Council copies of certain recorded deeds which were the basis of this suspicion and demanded an investigation. From the failure of Adams to give any explanation, the inference followed that the suspicions were true, and thereafter Butler presented to the City Council, on or about April 21, 1953, evidence indicating that Bender at all times had acted as the agent of Elbert, Ltd. in dealing with the City, while he was purporting to act as the attorney for the City."

Paragraph LVIII reads: "That on April 28, 1953, the plaintiff demanded at the regular meeting of the City Council that these suspicious circumstances be investigated and that a lawsuit be instituted for declaratory relief, for damages, for an accounting, and for other appropriate relief against the defendants then known to the plaintiff. That the City Council refused to act at that date, and that on March 9, 1954, the City Council reaffirmed again its refusal to investigate the said matters and to authorize the prosecution of a lawsuit in the name of the City, and that the motion in which said reaffirmation of the stand of the City Council was preceeded [sic] by substantially the following statement: That the City Council desired to remain 'neutral' in the dispute between the City Attorney and Special City Attorney Bender; that the matters in dispute were so complex both as to law and the facts as to be incapable of adequate analysis by the members of the City Council, a lay body, and that the matter was already in the hands of the courts by reason of the taxpayer's suit, and that the matter should, therefore, be decided by the said courts since the courts were better equipped to deal with the factual and legal aspects of the charges made by the taxpayer."

ers, 117 Cal.App.2d 190, 193, 255 P.2d 94; California Auto Court Ass'n v. Cohn, 98 Cal.App.2d 145, 149, 219 P.2d 511; Anderson v. Thacher, 76 Cal.App.2d 50, 72, 172 P.2d 533. The facts alleged show that defendants Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, and Ann Sipe united and cooperated with each other to defraud the city; they acted in concert in doing so. (See Clark v. Lesher, 106 Cal.App.2d 403, 409, 235 P.2d 71.

[28, 29] As we have mentioned, the gravamen of the action is fraud. A cause of action based on fraud must aver a fraudulent representation; that the representation was false; that it was known by the defendant to be false; that it was made with intent to deceive the plaintiff; that the plaintiff relied on the representation; and that the plaintiff was damaged. Compas v. Escondido Mutual Water Co., 86 Cal.App.2d 407, 411, 194 P.2d 785; 23 Cal.Jur.2d 164, § 66. The allegations as to acquisition of property from the city by Bender, his associates, and clients present a prima facie case of fraud. Civ.Code, §§ 2219, 2231, 2233, 2234, 2235. The complaint is sufficient to meet the requirements of a pleading based on fraud.

[30–32] The next contention is that the action is barred by the statute of limitations. It is argued that none of the sales by the city occurred later than June 29, 1948 and that plaintiff's first complaint was not filed until April 29, 1953, more than three years after the last of the alleged sales. Plaintiff relies on subdivision 4 of section 338 of the Code of Civil Procedure which provides that in an action for relief on the ground of fraud the cause of action is not to be deemed to have accrued until discovery, by the aggrieved party, of the facts constituting the fraud. To come within this exception, a plaintiff must allege when the fraud was discovered, the circumstances of the discovery, what the discovery was, and why it was not discovered sooner. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437–438, 159 P.2d 958; Tognazzini v. Tognazzini, 125 Cal.App.2d 679, 687, 271 P.2d 77; Mortimer v. Loynes, 74 Cal.App.2d 160, 171, 168 P.2d 481. Negligence on the part of a plaintiff in failing to discover the falsity of a statement is no defense when the misrepresentation was intentional rather than negligent. Seeger v. Odell, 18 Cal.2d 409, 414, 115 P.2d 977, 136 A.L.R. 1291. The fact that an investigation would have revealed the falsity of the misrepresentation will not alone bar recovery. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437, 159 P.2d 958; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533; Stoll v. Selander, 81 Cal.App.2d 286, 292, 183 P.2d 935. The statute commences to run only after one has notice of circumstances sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry. "Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission." Tarke v. Bingham, 123 Cal. 163, 166, 55 P. 759, 760.

[33, 34] In many cases it has been said that means of knowledge are equivalent to knowledge. This is true only where there is a duty to inquire, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809. Where there is a duty to investigate, the plaintiff may be charged with knowledge of the facts which would have been disclosed by an investigation; but where there is no prior duty to investigate, the statute does not run until he has notice or knowledge of facts sufficient to put a reasonable man on inquiry. "In the absence of a duty to make inquiry, as pointed out above, the statute does not run merely because the means of discovery were available, and plaintiff is not compelled to disprove that such means existed. He need only establish facts sufficient to show that he made an actual discovery of hitherto unknown information within three years before the filing of the action. * * * The requirement that plaintiff show what information he received or what suspicious facts came to his

notice is imposed in order that the court may determine whether or not the discovery was made within the time alleged, that is, whether plaintiff actually learned something he did not know before." Hobart v. Hobart Estate Co., 26 Cal.2d 412, 442, 159 P.2d 958, 974.

[35] We cannot hold, as a matter of law, that any of the circumstances known to the city should have put a reasonably prudent person upon inquiry. The complaint discloses facts which may have tended to discourage the making of any investigation. Bender's representations were of such a nature as to lull the city into a sense of security or state of inaction—an important factor to be considered in determining whether the city was negligent in failing to investigate. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 439, 159 P.2d 958.

[36] In cases involving confidential relationships, the rule requiring allegations stating the circumstances which are relied upon by the plaintiff as excusing prior discovery of the fraud is relaxed. Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423. In Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, 973, the court points out that it is recognized that in cases involving a fiduciary relationship "facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required." (See also Rutherford v. Rideout Bank, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383; Lee v. Hensley, 103 Cal.App.2d 697, 704, 230 P.2d 159.) Bender was in a confidential relationship with the city.

[37, 38] Defendants argue that the status of the liens and the tax-deeded properties were matters of public record and that the city and plaintiff were charged with constructive notice. Where fraud is involved public records are not constructive notice of the true facts to the defrauded party. The purpose of the recording acts is to afford protection not to those who make fraudulent misrepresentations but to bona fide purchasers for value. Seeger v. Odell, 18 Cal.2d 409, 415, 115 P.2d 977, 136 A.L.R. 1291; Mills v. Hellinger, 100 Cal.App.2d 482, 487, 224 P.2d 34; Barder v. McClung, 93 Cal.App.2d 692, 697, 209 P.2d 808; Anderson v. Thacher, 76 Cal.App.2d 50, 70, 172 P.2d 533; Brown v. Oxtoby, 45 Cal.App.2d 702, 706, 114 P.2d 622. Plaintiff alleges Bender caused the records of the city to be kept improperly and inadequately and that he at all times refused to allow other officials to inspect his files and his records. Bender at no time rendered an accounting of his activities, except orally, and until the inception of the present litigation it was only done at secret and executive sessions. The city was not required to employ others to investigate matters of a technical nature which Bender, as an expert, was hired to do. Bender had full knowledge of the status of the liens and tax-deeded properties; the city had none. Plaintiff may show the city relied on representations of Bender as to matters which it did not investigate.

[39] When facts are susceptible to opposing inferences, whether a party had notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and whether by prosecuting such inquiry he might have learned such fact, are questions of fact. Tognazzini v. Tognazzini, 125 Cal.App.2d 679, 687, 271 P.2d 77. None of the facts alleged compel such conclusions as a matter of law. Under the circumstances alleged, it is difficult to see how the city could have been expected to make or cause to be made any investigation into the particular transactions; or how it can be charged with knowledge, or notice of facts, or circumstances which, if reasonably pursued, would have led to the discovery of the alleged fraud.

[40] The complaint alleges that the city had no prior knowledge that any fraud had been perpetrated. The pleading is sufficient to support the conclusion that neither the city nor plaintiff learned anything to arouse their suspicions during the period between the completion of the transactions in 1948 and the alleged discovery of the fraud in 1953.

Defendants argue that plaintiff has not pleaded facts relating to the claimed actual discovery of the fraud in 1953. The facts hereinbefore discussed clearly show the circumstances under which and when the alleged fraud of defendants was discovered. Within a month after plaintiff was first put on notice of the alleged fraud and had made demand on the city council to institute action, he commenced this action. Plaintiff has brought himself and the city within subdivision 4 of section 338 of the Code of Civil Procedure, and the action is not barred by the statute of limitations.

Counts II through VIII. These counts incorporate all of the allegations of the first count. Count II is for an accounting for unjust enrichment against all defendants. It alleges that Helen Bender was the wife of John F. Bender at the time properties of the city were conveyed to Bender and his wife. It is predicated on the alleged facts that they made large profits which they are not lawfully entitled to retain by reason of the fraudulent acts. Count III is to impress a trust against Webster and Bender for the alleged fraudulent conveyance of 8 lots by the city to Webster as a dummy of Bender, which lots were later conveyed to Bender by Webster. Counts IV and V are against Bender and John M. Alzola and Count VI is against Bender and Elbert, Ltd. These counts set forth separate specific transactions in which Alzola and Elbert, Ltd., acted as agents and dummies for Bender in purchasing at least 17 lots from the city for nominal considerations which they each later conveyed to Bender. With respect to these counts it is prayed that each defendant be required to account for the money improperly and illegally obtained, be declared a trustee as to the properties, and be required to reconvey the same; or if the properties have been conveyed, for judgment against them for the proceeds thereof. Count VII is against Bender only. It incorporates the specific transactions stated in counts III, IV, V, and VI, whereby Webster, Alzola, and Elbert, Ltd., acted as his agents and dummies in purchasing the designated lots from the city. It alleges that in connection with these transactions, and others, Bender received a fee of 25 per cent from the city and was reimbursed for costs out of the city treasury. The prayer is for judgment for $1,220 and such other and further sums as an accounting by Bender may show to be due the city. Count VIII is for declaratory relief against all defendants. Plaintiff seeks a declaration of the rights of Bender and the city to the contract of January 11, 1944, and of the validity of certain sales approved by 30 resolutions of the city council whereby the city sold approximately 200 lots to the corporate defendants, Webster, and Alzola. Each of these counts states facts sufficient to constitute a cause of action.

[41, 42] The third amended complaint is far from being a model pleading. While there are some uncertainties, they appear to be matters which lie within the knowledge of defendants. A demurrer does not lie to such matters. Turner v. Milstein, 103 Cal.App.2d 651, 658, 230 P.2d 25. The minute order sustaining the demurrers of defendants John F. Bender, Helen E. Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, and Ann Sipe to the third amended complaint without leave to amend also grants motions of those defendants to strike various parts of that complaint. The grounds of the motions were largely that the parts sought to be stricken are conclusions of law. The order granting the motions is reviewable on appeal from the judgment. No purpose would be served in reviewing the motions in detail. To do so would make this opinion interminable. We have examined them and are satisfied they were not well taken and that it was error to grant them. Accordingly, our summary of the third amended complaint is as it is pleaded.

Applying the pertinent rules we are of the opinion that a triable cause of action is pleaded in Count I as to defendants John F. Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank Sipe, and Ann Sipe; in Count II as to said defendants and Helen Bender; in Count III as to defendants John F. Bender and Grayce W. Webster; in Counts IV and V as to defendants John F. Bender and John M. Alzola; in Count VI as to defendants John F. Bender and Elbert, Ltd.; in Count VII as to defendant John F. Bender; and in Count VIII as to defendants John F. Bender, Helen Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank Sipe, and Ann Sipe.

The Case Against Berinstein and Rombotis

[43, 44] The third amended complaint designates as defendants all of those who were so named in the original and first two amended complaints and joins two new defendants, Berinstein and Rombotis. These two defendants were not sued under fictitious names. No order of court was obtained permitting their joinder. Berinstein and Rombotis moved to strike the complaint from the file and to strike therefrom all references to them as parties defendant on the ground they were not proper parties defendant as no leave of court had been granted permitting their joinder. The motions were granted. No claim is made that the motions were not well grounded. Leave of court is required under section 473 of the Code of Civil Procedure to add new parties defendant. Thomasian v. Superior Court, 122 Cal.App. 2d 322, 335, 265 P.2d 165; see Worley v. Spreckels Bros. Commercial Co., 163 Cal. 60, 73, 124 P. 697; Schaad v. Barceloux, 42 Cal.App. 337, 183 P. 716; Harvey v. Meigs, 17 Cal.App. 353, 119 P. 941. There was no error in granting the motion of Berinstein and Rombotis to strike the third amended and supplemental complaint from the files and all references to them therefrom.

The Case Against Luberco, Ltd., and The Sterling Company

The demurrers of these defendants to the second amended complaint were sustained without leave to amend and judgment in their favor was entered. Thereafter plaintiff, without leave of court, named them as defendants in the third amended complaint. On motion all references to them in that complaint were stricken. On the appeal from the judgment on the third amended complaint plaintiff concedes these parties should not have been named defendants in that complaint without leave of court. Plaintiff also appeals from the judgment entered on the sustaining of the demurrers of Luberco, Ltd., and The Sterling Company to the second amended complaint without leave to amend. On that appeal he contends that certain counts of the second amended complaint state facts sufficient to constitute a cause of action against those defendants.

[45] The second amended complaint contained 30 counts. Apparently in 8 of the 30 counts an attempt was made to state a cause of action against either Luberco, Ltd., or The Sterling Company, or both. No purpose would be served in reviewing these counts in detail. No facts are alleged of any wrongdoing on the part of either of these defendants. No facts are alleged to the effect that either of them conspired with any other defendant to defraud the city of Compton, nor that either of them profited in any way from any dealings it may have had with the city.

Luberco, Ltd., and The Sterling Company were not named as defendants in the original complaint. They were first named in the first amended complaint. Their demurrers to that complaint were sustained with leave to amend. No facts sufficient to state a cause of action against either of them were alleged in the next pleading—the second amended complaint. There is no showing that the court abused its discretion in sustaining the demurrers of Luberco, Ltd., and The Sterling Company to the second amended complaint without leave to amend.

The judgments as to defendants Luberco, Ltd., and The Sterling Company and the judgment as to defendants Berinstein and Rombotis are affirmed. The judgment as to defendant Helen Bender with respect to Counts I, and III to VII, both inclusive, is affirmed, and with respect to Counts II and VIII it is reversed. The judgment as to defendants John F. Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, and Ann Sipe with respect to Counts I, II, and VIII is reversed. The judgment as to defendants John F. Bender and Grayce W. Webster with respect to Count III is reversed; as to all other defendants it is affirmed. The judgment as to defendants John F. Bender and John M. Alzola with respect to Counts IV and V is reversed;

as to all other defendants it is affirmed. The judgment as to defendants John F. Bender and Elbert, Ltd., with respect to Count VI is reversed; as to all other defendants it is affirmed. The judgment as to defendant John F. Bender with respect to Count VII is reversed; as to all other defendants it is affirmed. In each instance that a judgment is reversed it is with directions to overrule the demurrer. Plaintiff shall bear the cost of the clerk's transcript on the appeal of Luberco, Ltd., and The Sterling Company from the judgment on the order sustaining their demurrers to the second amended complaint. Plaintiff shall bear one-tenth of the costs on appeal from the judgment on the third amended complaint; defendants John F. Bender, Elbert, Ltd., Grayce W. Webster, John M. Alzola, Annette Marie Alzola, Frank R. Sipe, and Ann Sipe shall bear nine-tenths thereof.

SHINN, P. J., and WOOD, J., concur.

140 Cal.App.2d 497

Charles H. WHEELER, Plaintiff and Appellant,

v.

Hortense H. OPPENHEIMER, Executrix of the Estate of Bella Heller, Deceased, Defendant and Respondent.

Civ. 21515.

District Court of Appeal, Second District, Division 3, California.

April 4, 1956.

Action by purchaser against vendor's executrix for damages sustained by purchaser. The Superior Court, Los Angeles County, Bayard Rhone, J., sustained demurrer and dismissed complaint, and purchaser appealed. The District Court of Appeal, Vallée, J., held that allegation that vendor's executrix acted in bad faith in refusing to convey to purchaser was a conclusion of law, not an allegation of ultimate fact, and did not tender any issue, in absence of allegation from which it might be inferred that executrix, without any just cause or excuse, refused to convey.

Judgment affirmed.

1. Appeal and Error 🔑102, 103

Order sustaining demurrer and order for dismissal after failure to amend were nonappealable.

2. Vendor and Purchaser 🔑345

Provision in contract for sale of realty, that, if vendor did not complete sale, she would pay all accrued costs and expenses and was only to be liable for such costs and expenses was not intended to prescribe a definite liability, for example, liquidated damages, but was a limitation on the maximum possible recovery for actual loss or damage alleged and shown by evidence and was valid. West's Ann.Civ.Code, §§ 1670, 1671, 3306.

3. Pleading 🔑8(3)

Allegation that vendor's executrix acted in bad faith in refusing to convey to purchaser was a conclusion of law, not an allegation of ultimate fact, and did not tend to any issue, in absence of allegation from which it might be inferred that executrix, without any just cause or excuse, refused to convey.

Clyde P. Harrell, Jr., Woodland Hills, for appellant.

Leland & Plattner and N. Stanley Leland, Los Angeles, for respondent.

VALLÉE, Justice.

[1] Appeal by plaintiff from a judgment of dismissal entered on an order sustaining a demurrer to the second amended complaint with leave to amend. Plaintiff declined to amend. Plaintiff also appeals from the order sustaining the demurrer and the order for dismissal after he failed to amend. These orders are nonappealable and the appeals therefrom will be dismissed. Berri v. Superior Court, 43 Cal.2d 856, 860, 279 P.2d 8.

The second amended complaint alleges: Plaintiff is a licensed building contractor.

Bella Heller, now deceased, was a resident of the County of Los Angeles. Prior to July 11, 1951 plaintiff caused a residence to be constructed on described realty. After completion of the residence Bella Heller was indebted to plaintiff in the sum of $5,102.37. To evidence the indebtedness the deceased executed to plaintiff her promissory note dated July 11, 1951 for $5,102.37. On November 11, 1953 plaintiff and the deceased entered into a contract in writing whereby the deceased agreed to sell and plaintiff agreed to buy the property on which the residence had been constructed for $42,500. A copy of the contract is a part of the complaint as an exhibit. As additional compensation for the execution of the contract, plaintiff agreed with the deceased that he would cancel the indebtedness evidenced by the note on which $3,750 then remained unpaid. Plaintiff has performed all conditions of the contract on his part to be performed; and is ready, willing, and able to complete the contract in accordance with its terms and conditions; and hereby offers to surrender the note for cancellation.

The second amended complaint alleges further: Bella Heller died November 13, 1953 and defendant Oppenheimer is the executrix of her will. On June 18, 1954 plaintiff caused to be filed with defendant a claim against the estate for $16,700. The claim was based on the damage sustained by plaintiff and not on the indebtedness evidenced by the note. A copy of the claim is part of the complaint as an exhibit. On information and belief, that defendant knew of the existence of the note and knew that part of the consideration for the contract was the cancellation of the note. On March 18, 1954 defendant refused to carry out the valid provisions of the contract and refused to convey the property, and in doing so acted in bad faith. On that date the reasonable market value of the property was $65,000. On July 2, 1954 defendant denied plaintiff's claim. Plaintiff sustained damage in the sum of $16,700.

The contract of November 11, 1953 contains this provision:

> "If Seller does not complete sale it is agreed that she will pay all accured [sic] Costs and expenses, Seller only to be liable for such costs and expenses."

The demurrer was sustained on the ground that by reason of this provision the only liability of the deceased was to repay to plaintiff his costs and expenses, none of which was alleged. Plaintiff contends the quoted provision is for liquidated damages and that it is void under sections 1670[1] and 1671[2] of the Civil Code. Defendant contends it is merely a limitation of liability.

[2] We think the provision was not intended to prescribe a definite liability, i. e., liquidated damages, but is a limitation on the maximum possible recovery for actual loss or damage alleged and shown by evidence. It imposes a limitation within which damages might be proved. The validity of the condition is not open to doubt.

The Restatement says:

> "An agreement limiting the amount of damages recoverable for breach is not an agreement to pay either liquidated damages or a penalty. Except in the case of a certain public service contracts, the contracting parties can by agreement limit their liability in damages to a specified amount, either at the time of making their principal contract, or subsequently thereto. Such a contract does not purport to make an estimate of the harm caused by a breach; nor is its purpose to operate in terrorem to induce performance."

(Rest., Contracts, § 339, Comment g.) It is said that "A limitation in a contract on the amount which may be recovered for breach thereof is not a provision for liquidated damages." 25 C.J.S., Damages, § 113 a, p. 682. Similar contractual limitations of liability have frequently been upheld. (Limitation of liability of warehousemen: Hischemoeller v. National Ice, etc., Storage Co., 46 Cal.2d 318, 294 P.2d 433; Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259, 54 L.R.A. 774. Limitation on liability of contract highway carrier: Gardner v. Rich Mfg. Co., 68 Cal.App.2d 725, 158 P.2d 23; cf. Gardner v. Basich Bros. Construction Co., 44 Cal.2d 191, 281 P.2d 521. Limitation of liability for defective articles sold: United Iron Works v. Standard Brass Casting Co., 98 Cal.App. 517, 277 P. 183; Artukovich v. Pacific States, etc., Pipe Co., 78 Cal.App.2d 1, 176 P.2d 962. Limitation of liability of carrier for breach of obligation to deliver freight: Pierce v. Southern Pac. Co., 120 Cal. 156, 47 P. 874, 52 P. 302, 40 L.R.A. 350. Limitation of liability for mistake in listing name in phone directory: Riaboff v. Pacific Telephone & Telegraph Co., 39 Cal.App. Supp.2d 775, 102 P.2d 465. Limitation in a lease of liability for damage caused by fire: Stephens v. Southern Pac. Co., 109 Cal. 86, 41 P. 783, 29 L.R.A. 751. Limitation of liability on baggage check for loss of checked baggage: Cunningham v. International Committee of Y.M.C.A., 51 Cal.App. 487, 197 P. 140. Limitation on liability of telegraph company for failure to send or error in sending a telegram or telegraphic money order: Hart v. Western Union Tel. Co., 66 Cal. 579, 6 P. 637; Redington v. Pacific Postal Telegraph Cable Co., 107 Cal. 317, 40 P. 432; Coit v. Western Union Tel. Co., 130 Cal. 657, 63 P. 83, 53 L.R.A. 678. Limitation of liability in insurance policy: Dietlin v. Missouri State Life Ins. Co., 126 Cal.App. 15, 14 P.2d 331, 15 P.2d 188.

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[1] Section 1670 reads: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

[2] Section 1671 reads: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

The limitation of liability does not differ essentially from the measure of damages fixed by section 3306 of the Civil Code which says that the detriment caused by breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers with interest thereon, but adding thereto, in case of bad faith, the difference between the contract price and the value of the property at the time of the breach, and the expenses incurred in preparing to enter upon the land.

[3] The allegation that the executrix acted in "bad faith" in refusing to convey does not help the cause of action attempted to be alleged. The allegation is not one of an ultimate fact; it is a conclusion of law which tendered no issue. Faulkner v. California Toll Bridge Authority, 40 Cal. 2d 317, 329, 253 P.2d 659; Vallindras v. Massachusetts, etc., Ins. Co., 42 Cal.2d 149, 151, 265 P.2d 907; Aurrecoechea v. Sinclair, 60 Cal. 532, 548. Cf. Shaw v. Union Escrow, etc., Co., 53 Cal.App. 66, 70, 200 P. 25; Moore v. Fredericks, 24 Cal.App. 536, 539, 141 P. 1049. "Many authorities hold that the question of 'bad faith' is a factual one. Hamaker v. Bryan, 178 Cal. 128, 172 P. 391; 25 Cal.Jur. p. 817, sec. 265. It has likewise been held that a vendor is chargeable with bad faith, within the meaning of sec. 3306 of the Civil Code where, without just cause or excuse, he refuses to perform the contract, or where, through his own negligence, he has put it out of his power to perform. But this is not true of one who contracts to convey but is unable to do so, notwithstanding his best efforts." Engasser v. Jones, 88 Cal.App.2d 171, 177, 198 P.2d 546, 549. No facts are alleged from which it might be inferred that defendant without any just cause or excuse refused to convey. For aught that appears defendant, as executrix, may have had compelling reasons for refusing; or she may have exercised bad judgment, which is not bad faith. Estate of Baird, 135 Cal.App.2d 343, 351, 287 P.2d 372. We do not decide whether the claim filed by plaintiff was sufficient to permit a recovery on the note.

The appeals from the order sustaining the demurrer to the second amended complaint and from the order for dismissal are dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

140 Cal.App.2d 475

Annie Laurie Ross MARSHALL, Plaintiff and Appellant,

v.

Patricia Lucille MARSHALL, also known as Patricia Lucille Doty, Barbara Joyce Marshall, also known as Barbara Joyce Schmidt, Deborah Joan Marshall, also known as Deborah Joan Stillman, George Marshall, John Doe I and John Doe II, Defendants,

Patricia Lucille Marshall, also known as Patricia Lucille Doty, Barbara Joyce Marshall, also known as Barbara Joyce Schmidt and Deborah Joan Marshall, also known as Deborah Joan Stillman, Respondents.

Civ. 21251.

District Court of Appeal, Second District,
Division 1, California.
April 4, 1956.

Action to quiet title. The Superior Court, Los Angeles County, Caryl M. Sheldon, J., decreed that the defendants were each the owner of an undivided interest in the property, subject only to a life estate in the plaintiff. The plaintiff appealed. The District Court of Appeal, Nourse, J. pro tem., held that evidence was sufficient to sustain the trial court's finding of delivery of a deed from the plaintiff and failed to overcome the presumption of good and sufficient consideration therefor.

Affirmed.

1. Deeds 🔑195

It is presumed that there is a good and sufficient consideration for a deed. West's Ann.Civ.Code, § 1614; West's Ann.Code Civ.Proc. § 1963, subd. 39.

2. Deeds 🔑195

In action to quiet title, burden was upon plaintiff to overcome presumption that there had been good and sufficient consideration for her execution and delivery of deed. West's Ann.Civ.Code, § 1614; West's Ann.Code Civ.Proc. § 1963, subd. 39.

3. Deeds 🔑210

In action to quiet title, plaintiff's evidence failed to overcome presumption that there had been good and sufficient consideration for her execution and delivery of deed. West's Ann.Civ.Code, § 1614; West's Ann.Code Civ.Proc. § 1963, subd. 39.

4. Deeds 🔑208(1)

In action to quiet title, evidence sustained trial court's finding of plaintiff's delivery of deed.

5. Deeds 🔑56(2)

Whether there has been delivery of a deed is primarily a question of intent, and any words and acts which might manifest an intent of grantor that deed shall be completely executed and that title shall pass to grantees, and which put title beyond grantor's control, are sufficient to constitute a valid delivery.

6. Gifts 🔑24

Where deed was one of gift, an acceptance by grantees was essential to completion of delivery.

7. Deeds 🔑57

Where estate which deed created in grantees was estate in joint tenancy, delivery to one or more of the grantees was a delivery to all.

8. Deeds 🔑65, 194(4)

Where two grantees learned of grant prior to time grantor sought to revoke it and did not reject gift made by it, this constituted acceptance by them, and where grant was beneficial to all grantees, acceptance by other grantees could be presumed.

9. Witnesses 🔑205, 206

Oral communications between attorney and client are not privileged if made in presence of a stranger, and written communications are not privileged if facts show that client did not intend that their contents be kept in confidence by attorney. West's Ann.Code Civ.Proc. § 1881, subd. 2.

10. Witnesses 🔑206

Where conversations between attorney and client were had in presence of client's son, and where contents of letters exchanged between client and persons who were defendants in her subsequent action to quiet title were discussed by attorney and client in the presence of client's son, the conversation and letters were not privileged but were admissible in the action to quiet title. West's Ann.Code Civ.Proc. § 1881, subd. 2.

11. Witnesses ⚷202

Fact of execution of deed by grantor before attorney, as notary public, and her instructions to attorney to record it, were not "privileged communications" excludable as evidence, whether or not any one else was present at time of execution of deed or at time she gave instructions to record. West's Ann.Code Civ.Proc. § 1881, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Privileged Communications".

12. Quieting Title ⚷42

Under circumstances shown by record of quiet title action, trial court did not abuse discretion in granting defendants motion to amend answer so as to deny complaint allegations that deed was executed without consideration and was not delivered.

◆

William J. Tiernan, James R. Montgomery, Los Angeles, for appellant.

Frank A. Mouritsen, Los Angeles, for respondents.

NOURSE, Justice pro tem.

By her complaint, plaintiff seeks to quiet title to certain real property. She appeals from a judgment decreeing that the defendants are each the owner of an undivided one-fifth interest in the property, subject only to a life estate in her.

The following facts are supported by substantial evidence: In April, 1951, plaintiff signed a grant deed conveying to her five granddaughters, including the three defendants, the property in question, but reserved to herself a life estate therein. The deed was executed in the presence of her son and her attorney who, as a notary, took her acknowledgment. At that time she instructed her attorney to record the deed but not to tell the grantees of its execution. The deed was recorded and after recordation was retained by the attorney until sometime in the year 1954, when at plaintiff's request he returned it to her.

In discussions with her son and her attorney, plaintiff stated that she wanted her five granddaughters to have the property and wanted to avoid the trouble and expense incident to having it administered upon as a part of her estate.

At the time of the execution of the deed there was in existence and unrevoked a will by which plaintiff devised the property described in the deed to her five grandchildren.

After the deed was returned to plaintiff she, through her present attorney, requested the grantees to reconvey the property to her. A year or more before the request for a reconveyance was made, two of the defendants learned of the execution and recordation of the deed but neither rejected the grant made to them by it.

No valuable consideration was received by plaintiff and she denied having any love or affection for the grantees at the time of the execution of the deed, and in fact denied its execution. There was, however, substantial evidence proving that plaintiff in fact had a great deal of love and affection for the grantees and that that love and affection induced her to execute and deliver the deed.

At the close of the evidence the court permitted defendants to amend their answer to conform to proof and so as to deny the allegations of paragraph VI of the complaint as to lack of consideration and want of delivery.

The trial court found that the plaintiff executed the deed with the intent of presently conveying the property in question to the grantees; that the consideration for the deed was her love and affection for the grantees; and that there was a delivery and acceptance of the deed.

Plaintiff makes four assignments of error: (1) That the finding that there was a consideration for the deed is contrary to and unsupported by the evidence; (2) that the finding that there was a delivery and acceptance is unsupported by evidence; (3) that the trial court erred in receiving the testimony of plaintiff's former attorney, and letters exchanged between plaintiff and her attorney; (4) that the trial court erred in permitting defendants to amend their answer.

Plaintiff asserts that inasmuch as it was admitted that no valuable consideration was given by the grantees or received by her and as she testified that at the time the deed was executed she had no love or affection for any of the grantees, the finding that there was a consideration is contrary to the evidence. The record does not support this contention.

[1] It is presumed that there is a good and sufficient consideration for a deed. Civ.Code, sec. 1614; Code Civ.Proc., sec. 1963, subd. 39; Willis v. Holback, 33 Cal.App.2d 145, 91 P.2d 140; Estate of Hobart, 82 Cal.App.2d 502, 509, 187 P.2d 105; Banducci v. Banducci, 63 Cal.App.2d 600, 604, 147 P.2d 73; Albertson v. Schmidt, 128 Cal.App. 344, 347, 17 P.2d 158.

[2, 3] The burden was upon the plaintiff to overcome this presumption. The only evidence she offered was her own testimony that she had no love or affection for the grantees. The trial court, however, was fully justified in rejecting this testimony. At the same time that she testified that she had no love or affection for the grantees she denied executing the deed; yet the fact that she did knowingly execute it and direct its recordation was established by the testimony of her son and her attorney. In order to believe plaintiff the court would have to believe that her own attorney tricker her into signing the deed and did so not for his own benefit but for the benefit of the grantees who had no knowledge of the deed. Further than this, there was testimony from which the court could well infer that the plaintiff did bear a great deal of love and affection for the grantees and that that was the inducing cause of her executing the deed. The evidence showed that she had paid in large part for the education of at least two of the defendants and had, by her will, which was unrejected at the time the deed was executed, given the grantees practically the whole of her estate, and had stated in a letter that that was her "heart's desire."

[4, 5] The finding of delivery is likewise supported by substantial evidence. Whether there has been a delivery is a question of fact. Delivery is primarily a question of intent. Any words and acts which might manifest an intent on the part of the grantor that a deed shall be completely executed and that title shall pass to the grantees and which put the title beyond the grantor's control are sufficient to constitute a valid delivery. McCully v. McArthur, 187 Cal. 194, 198–199, 201 P. 323; Lavely v. Nonemaker, 212 Cal. 380, 387, 298 P. 976.

The evidence shows that the plaintiff had by words manifested her intent to vest title in the grantees and had directed the recording of the instrument after a complete explanation to her of the effect of her acts. This evidence was sufficient to uphold the court's finding that the deed was delivered.

[6] The deed being, in fact, one of gift, an acceptance by the grantees was essential to completion of the delivery.

[7, 8] The estate created in the grantees was one in joint tenancy, and a delivery to one or more of them was a delivery to all. Smith v. Lombard, 201 Cal. 518, 526, 258 P. 55. At least two of the grantees learned of the grant prior to the time plaintiff sought to revoke it and did not reject the gift made by it. This constituted acceptance by them, and as the grant was beneficial to all the grantees, the acceptance by the other three may be presumed. DeLivillain v. Evans, 39 Cal. 120, 122–123; Estate of Kalt, 16 Cal.2d 807, 813, 108 P.2d 401, 133 A.L.R. 1424; Herman v. Mortensen, 72 Cal.App.2d 413, 419, 164 P.2d 551.

Defendants called as a witness the attorney who had prepared the deed and who acted as a notary in taking plaintiff's acknowledgment of its execution and who then recorded the deed at her request. He testified to conversations with plaintiff concerning the deed and concerning her will. He produced letters received by him from plaintiff and other letters written by him to the plaintiff relative to the deed and the disposition of her property by will. His testimony and the above-mentioned documents were received in evidence over plaintiff's timely objections that the conversations and the documents were privileged communications between attorney and client and therefore inadmissible under section 1881, subdivision 2, Code of Civil Procedure.

[9] Not all communications between attorney and client are privileged. Oral communications are not privileged if made in the presence of a stranger, and written communications are not privileged if the facts show that the client did not intend that their contents be kept in confidence by the attorney. Ver Bryck v. Luby, 67 Cal.App.2d 842, 155 P.2d 706; Seeger v. Odell, 64 Cal.App.2d 397, 148 P.2d 901; Carleton v. Bonham, 60 Cal.App. 725, 732, 733, 214 P. 503.

[10] There was substantial evidence that the conversations between the witness and the plaintiff were had in the presence of the plaintiff's son, and evidence that the contents of the letters exchanged between the plaintiff and the defendants were discussed by the witness and the plaintiff in the presence of the son. This being true, the court did not err in receiving the evidence in question.

[11] The fact of the execution of the deed by plaintiff before the witness, as a notary public, and her instructions to the witness to record it, were neither of them privileged communications even though no one else had been present at the time of the execution of the deed or at the time she gave her instructions relative to recordation. Messersmith v. Smith, 62 Cal.App. 446, 217 P. 105; Brandt v. Brandt, 85 Cal.App. 720, 727, 260 P. 342.

[12] At the close of the evidence, counsel for defendants was given leave to amend their answer so as to deny the allegations of paragraph VI of the complaint that the deed was executed without consideration and that there had been no delivery of it.

The failure of counsel for defendants to include in the answer a denial of the allegations of paragraph VI of the complaint was undoubtedly an inadvertence induced by the form of the complaint. Paragraph V ends at the bottom of page 2 of the complaint. Below that, and without any written matter following, appears the Roman Numeral VI. The text of paragraph VI commences on line 1 of page 3 without any paragraph number preceding it. Defendants' counsel claimed that in preparing the answer he overlooked the paragraph number at the bottom of page 2, and believed that the denial of the allegations of paragraph V included the allegations at the top of page 3. That this was an inadvertent and excusable mistake seems apparent.

A great deal of the evidence given at the trial was devoted to the issues of consideration and delivery, and under the circumstances here it would have been an abuse of discretion to deny the defendants' request to amend their answer.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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140 Cal.App.2d 378

Vivian FREE, Plaintiff and Appellant,

v.

Ray FURR and Bette Furr, Defendants and Respondents.

Civ. 5317.

District Court of Appeal, Fourth District, California.

March 30, 1956.

Hearing Denied May 23, 1956.

Action for injuries sustained in fall on defendants' stairs while plaintiff was leaving after social visit. The Superior Court, Kern County, W. L. Bradshaw, J., rendered judgment n.o.v. for defendants, and plaintiff appealed. The District Court of Appeal, Conley, J. pro tem., held that evidence as to whether defendants had been guilty of any active negligence, apart from condition of premises, was insufficient to support verdict for plaintiff.

Judgment affirmed.

1. Appeal and Error 🔑109

An appeal lies from order denying a motion for judgment n.o.v., but not from an order granting such motion. West's Ann.Code Civ.Proc. § 963.

2. Appeal and Error 🔑347(2)

Where trial court granted defendants' motion for judgment n.o.v., and subsequently rendered judgment, time for filing appeal ran from date of judgment, rather than from date motion was granted. West's Ann.Code Civ.Proc. § 963.

3. Judgment 🔑199(3.9)

Technique to employ in passing on a motion for judgment n.o.v. is identical with that required on a motion for nonsuit or directed verdict.

4. Trial 🔑142

Trial court may not take case from jury unless, as a matter of law, no other reasonable conclusion is deducible from evidence, and unless reviewing court would reverse or trial court set aside a contrary verdict.

5. Trial 🔑178

Defendant's motion for directed verdict is in the nature of a demurrer to evidence and concedes as true plaintiff's evidence, with all reasonable inferences deducible therefrom.

6. Trial 🔑139(1)

Fact that court might be justified in granting a new trial would not justify directed verdict on same evidence.

7. Trial 🔑171

Right of court to direct verdict is same as to grant nonsuit.

8. Trial 🔑142

Verdict for defendant may be directed only when, disregarding conflicting evidence and giving plaintiff's evidence all value to which it is legally entitled, including every legitimate inference deducible therefrom, verdict for plaintiff would not be sufficiently supported by substantial evidence.

9. New Trial 🔑69

If, in court's opinion, evidence is unreliable, it is court's duty to grant new trial.

10. New Trial 🔑72

Court may grant new trial even where there is substantial evidence to sustain verdict, if court believes that evidence preponderates against verdict.

11. Appeal and Error 🔑934(1)

On appeal from judgment for defendants n.o.v., plaintiff was given benefit, not only of all direct evidence supporting her claim, but also of all inferences that might legitimately be drawn in her favor from any of testimony produced by either party.

12. Negligence 🔑32(2.2, 2.3)

It is purpose for which a person is on premises of another that is test of whether he is an invitee or a mere licensee.

13. Negligence 🔑32(2.13)

A social guest is a licensee.

14. Negligence 🔑32(2.13)

Where plaintiff paid defendant a social call, bringing a present, and conducted only social affairs, plaintiff was a mere "licensee", even though, while departing, she agreed to convey a message for defendants.

See publication Words and Phrases, for other judicial constructions and definitions of "Licensee".

15. Negligence 🔑32(1)

A licensee must take premises as he finds them insofar as any alleged defective condition thereof is concerned, but, if owners know that licensee is present, they must not be guilty of negligent conduct.

16. Negligence 🔑32(1)

That visit was paid at night, increasing the hazard involved in use of premises, did not increase licensee's right or enlarge licensor's duties with respect to condition of premises.

17. Negligence 🔑134(5)

In action for injuries sustained in fall on defendant's stairs while plaintiff was leaving after social visit, evidence as to whether defendants had been guilty of any active negligence, apart from condition of premises, was insufficient to support verdict for plaintiff.

18. Appeal and Error 🔑438

The trial court retained jurisdiction to rule on a motion for new trial even after filing of an appeal.

19. New Trial 🔑155

Period within which a motion for new trial must be determined or denied runs from date of service of notice of entry of judgment or, if none, from date of filing of notice of intention to move for new trial.

20. Appeal and Error 🔑433
New Trial 🔑155

Where trial court erroneously failed to rule on plaintiff's motion for new trial, plaintiff's only remedy was to apply to District Court of Appeal for writ of mandate, and where this was not done, motion was denied by operation of law after expiration of statutory period, and District Court of Appeal could not reinstate or revive motion.

21. Appeal and Error 🔑870(6)

On appeal from a judgment, denial of a motion for a new trial may be considered.

22. Appeal and Error 🔑110

An order denying a motion for new trial is not appealable. West's Ann.Code Civ.Proc. § 963, subd. 2.

23. Appeal and Error 🔑870(6)

Where there is an appeal from a judgment, denial of a motion for new trial may be reviewed, even though denial was by operation of law.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

CONLEY, Justice pro tem.

The plaintiff, Vivian Free, sued Ray Furr and his wife, Bette Furr, for damages resulting from personal injuries sustained by her when, after a night visit at their home, she fell on the concrete stairway leading from the premises to the street level. She alleged that, unknown to her, defendants negligently permitted the steps to be in a broken, unlighted and unsafe condition, with loose pieces of concrete material thereon. Although she sustained fractures of the right wrist and left elbow, a severe cut and blow to her chin and additional physical injuries, and the special damages alone totaled $1,802.71, the jury brought in a verdict for only $2,000. Plaintiff filed a cost bill within five days after the verdict. Code Civ.Proc., Sec. 1033.

Defendants, after due notice, made a motion for judgment notwithstanding the verdict, Code Civ.Proc., Sec. 629, which was granted, the judgment thereon being filed and entered on March 23, 1955. No notice of the entry of the judgment having been served, plaintiff filed a notice of intention to move for a new trial on May 18, 1955, and on May 19, a notice of appeal from the judgment. When the motion for new trial came on for argument on June 1, 1955, the defendants objected to a hearing "on the ground that time expired for hearing said motion". The court sustained the objection and refused to rule on the motion for a new trial.

Appellant urges on this appeal that the jury's verdict is sustained by substantial evidence and that the judgment notwithstanding the verdict, therefore, must be set aside; that plaintiff's judgment for costs should be reinstated; and that the trial court's refusal to hear her motion for a new trial was erroneous.

[1, 2] At the outset, we can quickly dispose of the suggestion of respondents that the appeal was not effectively lodged because the notice of appeal was filed more than sixty days after the entry of the minute order granting the motion for judgment notwithstanding the verdict, although admittedly less than sixty days after the signing and entry of the judgment itself. Section 963 of the Code of Civil Procedure authorizes an appeal from a final judgment. The same section of the code permits an appeal from an order denying a motion for judgment notwithstanding the verdict but not from an order granting such a motion. Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 107 P.2d 55. This statutory distinction makes it obvious that the present appeal must be and is from the judgment itself. The filing of the notice of appeal was timely and effective.

[3–10] The proper technique for a trial judge to employ in passing on a motion for judgment notwithstanding the verdict being identical with that required on a motion for nonsuit or directed verdict, In re Estate of Green, 25 Cal.2d 535, 546, 154 P.2d 692, is well described in Hunt v. United Bank & Trust Co., 210 Cal. 108, 117–118, 291 P. 184, 188:

> "Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision. Umsted v. Scofield Eng. [Const.] Co., 203 Cal. 224, 263 P. 799. Such a motion is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 247 P. 597. Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict on the same evidence. In re Estate of Caspar, 172 Cal. 147, 155 P. 631. The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. The right of a court to direct a verdict is the same as the right of a court to grant a nonsuit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. Newson v. Hawley, 205 Cal. 188, 270 P. 364. If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict."

The Supreme Court in In re Estate of Lances, 216 Cal. 397, 401, 14 P.2d 768, 769, after quoting from the opinion in the Hunt case, comments:

> "In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same at that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict."

[11] As we proceed to determine the question as to whether there is substantial evidence to establish plaintiff's case, Hall v. Osell, 102 Cal.App.2d 849, 228 P.2d 293, we shall apply the foregoing rule and give the plaintiff the benefit, not only of all direct evidence supporting her claim, but also of all inferences that might legitimately be drawn in her favor from any of the testimony produced by either party.

[12–14] The plaintiff, Vivian Free, and the defendant, Bette Furr, were friends and neighbors, residing in the city of Taft. During business hours, plaintiff was co-manager of a laundry and dry cleaning establishment and the Furrs were regular customers. On the night of the accident, Mrs. Free went to visit Mrs. Furr, taking a piece of cake as a present. She was expected and was welcome as arrangements had been made that afternoon for the visit. The ladies had stopped their cars in the street to exchange greetings and Mrs. Furr "remarked about the cake. She remarked she would like some and I said I would bring it up and she said she would be waiting for me." In the past there had been two or three visits at the Furr home for purely social reasons. On this occasion the plaintiff remained only about ten or fifteen minutes and the talk was wholly neighborly and social in character, except that when Mrs. Free started to go home, Mrs. Furr asked her to send her laundry driver to the Furr home on the following day as she had "a lot" of dry cleaning to be done and "that would save her a telephone call." Mrs. Free readily assented to the request. She testified, however, that she did not go visiting on this occasion for the purpose of transacting any business and that the talk about dry cleaning was purely an afterthought and accommodation to Mrs. Furr. As it is the purpose for which a person is on the premises of another that is the test of whether he is an invitee or mere licensee, Popejoy v. Hannon, 37 Cal.2d 159, 169, 231 P.2d 484, and as a social guest is only a licensee, Ashley v. Jones, 126 Cal.App.2d 328, 332, 271 P.2d 918; Comeau v. Comeau, 285 Mass. 578, 189 N.E. 588, 92 A.L.R. 1002; 38 Am.Jur., p. 778, we necessarily reach the conclusion that the plaintiff was a mere gratuitous licensee at the time of her injury, and not a business visitor or invitee.

[15] The general rule defining the duty owed by the owner of premises to a licensee has been frequently stated to be only to refrain from inflicting wanton or wilful injury. While that stringent rule has been modified to permit a recovery for active conduct constituting negligence, it is still the law of California that a licensee must take the premises as he finds them insofar as any alleged defective condition thereof is concerned. Palmquist v. Mercer, 43 Cal.2d 92, 102, 272 P.2d 26; Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221; Demmon v. Smith, 58 Cal.App.2d 425, 432, 136 P.2d 660; Saba v. Jacobs, 130 Cal.App.2d 717, 718, 279 P.2d 826. If, however, the owners of the premises know, as they did in this case, that the licensee is present, they must not be guilty of negligent active conduct as distinguished from condition of the premises which results in injury to the licensee. Oettinger v. Stewart, supra, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221; Davis v. Silverwood, 116 Cal.App.2d 39, 41, 253 P.2d 83.

Can it be said that there was active conduct amounting to negligence on the part of the defendants? Let us examine the record. The Furr home, as is shown by the picutres in evidence, is at a considerable elevation above the level of the dead-end street upon which the defendants' home is located. A person leaving the home first steps upon a platform by the service porch, then goes down several steps to a sidewalk, which has two downward steps along its course, and finally reaches the top of the garage stairway, consisting of nine steep and narrow steps, leading down to the street level. There is no handrailing. The stairs are made of concrete and the top step where Mrs. Free lost her footing was somewhat roughened and cracked. While there is an electric light near the top of this last flight of steps, it was not on when the plaintiff fell. Mr. Furr told the attending doctor after the accident that he had intended to put a handrail on the stairs for some time.

Mrs. Free left the Furr house by the rear entrance, carrying the empty cake plate. At the top of the garage flight, she testified, "I took my first step down with my right foot and came in contact with a small piece of gravel that immediately started my foot rolling. * * * I have large feet and my footstep started to roll and I immediately started to fall and I fell sort of sideways on both knees, grasping for something to hang onto because in a split second you can tell there's going to be a bad fall, and I got down on these knees and plunged headfirst to the bottom of the steps." On cross-examination, the plaintiff was asked: "As you stepped off with your right foot, your foot apparently got on top of some little pebble?", and she answered affirmatively.

With respect to plaintiff's injuries, it is sufficient to note that they were severe and that if plaintiff was entitled to recover at all, she might well have been awarded damages substantially in excess of the $2,000 verdict.

[16] The fact that the darkness of the night increased the hazard involved in using the premises did not increase the licensee's rights or enlarge the licensor's duties with respect to the condition of the premises. Reardon v. Thompson, 149 Mass.

267, 21 N.E. 369; Habina v. Twin City General Electric Co., 150 Mich. 41, 113 N.W. 586, 13 L.R.A,N.S., 1126; Elliman v. Gombar, 86 Ohio App. 352, 91 N.E.2d 801; 65 C.J.S., Negligence, § 38.

It seems clear that the injury to plaintiff resulted wholly from the presence of a pebble or a small piece of gravel on one of the steps, coupled with the absence of a handrail. The absence of a handrail was a passive condition. There was no evidence that the defendants knew, or should have known, that the pebble was there. No active conduct or negligence on the part of the defendants was shown by the evidence. The conditions shown were wholly passive and, under the law, the plaintiff was obliged to accept the premises as she found them.

Of the three cases cited by plaintiff in support of her claim that there may have been active conduct constituting negligence, Herold v. P. H. Mathews Paint House, 39 Cal.App. 489, 179 P. 414, holds that an implied invitation to a woman licensee in raising the gate of a freight elevator, coupled with a failure to warn her that the elevator was not at that floor, might be considered to constitute some evidence of active negligence. The "duty to warn of unusual dangers" in Fernandez v. Consolidated Fisheries, Inc., 98 Cal.App.2d 91, 96, 219 P.2d 73, 76, refers to situations in the nature of a trap. Ashley v. Jones, supra, 126 Cal.App.2d 328, 271 P.2d 918. And in Laidlaw v. Perozzi, 130 Cal.App.2d 169, 278 P.2d 523, the defendant had committed an overt act by previously unfastening the bolt on the door through which the plaintiff fell.

[17] That there exist differences of opinion as to the wisdom of the stringent and rigid rules above referred to with reference to the rights of a social guest or licensee may be conceded, Rest., Torts, 342; Fernandez v. Consolidated Fisheries, Inc., supra, 98 Cal.App.2d 91, 96, 219 P.2d 73; concurring opinion of Carter, J. in Palmquist v. Mercer, supra, 43 Cal.2d 92, 93, 105, 272 P.2d 26, but under the doctrine of *stare decisis,* this court must adhere to these prevailing rules of law. Accordingly, we hold that there is no substantial evidence upon which the verdict in favor of the plaintiff can be justified and that the trial judge correctly granted defendants' motion for judgment notwithstanding the verdict.

The foregoing conclusion automatically disposes of appellant's contention that the trial court's disallowance of costs to plaintiff should be disapproved. Plaintiff cannot recover costs on a judgment for defendants.

[18–20] After the entry of the judgment notwithstanding the verdict, the plaintiff filed a notice of intention to move for a new trial. When the motion came on for hearing, counsel for defendants objected to it being heard on the claim that the time for ruling on it had expired. The court sustained this objection. The holding was clearly erroneous for, notwithstanding the filing of an appeal, the court retained jurisdiction to rule on the motion for a new trial. Hatfield v. Levy Brothers, 18 Cal.2d 798, 807, 117 P.2d 841, and as the 60-day period within which a motion for new trial must be determined or deemed denied runs from the date of service of the notice of entry of judgment, or if none, as in this case, from the date of filing of the notice of intention to move for a new trial, the court should have decided the motion on its merits. Plaintiff's only remedy, however, was to apply to this court for a writ of mandate ordering the trial judge to proceed to hear the motion for, notwithstanding the erroneous ruling, the time within which a motion for new trial could be granted expired under the specific provisions of section 660 of the Code of Civil Procedure sixty days after May 18, 1955. There is nothing which this court can now do to reinstate or revive the motion in the court below.

[21–23] The denial by operation of law of the motion for new trial is reviewable on this appeal. For while an order denying a motion for new trial is not appealable, Code Civ.Proc., Sec. 963(2); Hamasaki v. Flotho, 39 Cal.2d 602, 608, 248 P.2d 910, the propriety of the ruling may be reviewed upon an appeal from the judgment, Litvinuk v. Litvinuk, 27 Cal.2d 38, 42, 162 P.2d 8, and this is true even though the motion for new trial was denied merely by operation of law, as in this case. Caldwell v. Caldwell, 80 Cal.App.2d 378, 384, 182 P.2d 258; Bramble v. McEwan, 40 Cal.App.2d 400, 416, 104 P.2d 1054.

Our attention has not been called by appellant to any adverse evidentiary ruling or other alleged error committed during the progress of the trial and in view of our conclusion concerning the nature and effect of the evidence considered as a whole, we find no ground to order a reversal of the judgment.

Accordingly, the judgment is affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Harley O. TEETS, as Warden of the State Prison at San Quentin, California, The People of the State of California, Petitioners,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF MARIN, The Honorable Carlos R. Freitas, Judge thereof, Respondents,

Lawrence Gene Dotson, the Real Party In Interest.*

Civ. 17082.

District Court of Appeal, First District, Division 2, California.

March 29, 1956.

Rehearing Denied April 27, 1956.

Hearing Granted May 23, 1956.

Prohibition proceeding to restrain the Superior Court of Marin County from entertaining a habeas corpus proceeding on petition charging illegal conviction and detention. The District Court of Appeal, Nourse, P. J., held that where defendant had an appeal pending in the District Court of Appeal from his judgment of conviction and in such appeal defendant attacked failure to appoint counsel for his appearance in Juvenile Court, even though such objection was not raised in the lower court or made a part of its record, Superior Court was without jurisdiction to entertain habeas corpus proceedings to consider the same objection raised on the appeal.

Peremptory writ of prohibition granted.

1. Habeas Corpus 🔑4

Generally a writ of habeas corpus will not be granted if alleged errors urged by a petitioner have been or could be appealed to a higher court.

2. Habeas Corpus 🔑4

That an appeal is available does not preclude resort to habeas corpus to assert a denial of a fundamental right.

3. Habeas Corpus 🔑3

While habeas corpus is available under certain circumstances to raise a denial of counsel, those circumstances must be such that they could not be presented in any other manner.

4. Habeas Corpus 🔑4

Where defendant had an appeal pending in District Court of Appeal from his judgment of conviction and in such appeal he attacked failure to appoint counsel for his appearance in juvenile court, even though such objection was not raised in the lower court or made a part of its record, Superior Court was without jurisdiction to entertain habeas corpus proceedings to consider the same objection raised on the appeal.

5. Infants 🔑16.9

A minor is not entitled to have counsel assigned in a juvenile court proceeding as a matter of right, and without his request.

6. Habeas Corpus 🔑4

Where defendant had an appeal pending in District Court of Appeal from judgment of conviction, and in such appeal attacked the judgment on the ground that he had but 15 minutes before trial to consult with assigned counsel, but record showed no request for a longer period was made and there was no showing that the time was limited by the court over objection of the defendant or otherwise, Superior

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* Opinion vacated 301 P.2d 581.

Court had no jurisdiction to entertain habeas corpus proceedings to consider the same objection raised on the appeal.

7. Prohibition ⚷10(2), 13

While District Court of Appeal cannot prohibit issuance of a writ of habeas corpus once the writ has been issued, it does have authority to restrain further proceedings in a matter if a court in issuing the writ exceeds its jurisdiction.

◆

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for petitioner.

Donald D. Connors, Jr., J. Stewart Harrison, San Francisco, for real party in interest.

NOURSE, Presiding Justice.

On October 17, 1954, Dotson and another were interrupted by Francisco Herrera while they were in the act of ransacking his home. At gun point, Herrera and his party of two men and two women were herded into a back bedroom, where the women were barricaded into a closet and the men bound and gagged. All were forced to empty their pockets and to give over the valuables on their persons, and after restraining the group, petitioner and his accomplice continued to ransack and loot the home. Herrera who had been bound and gagged with bits of material strangled to death before members of the party could extricate themselves and summon aid.

On October 24, 1954, Dotson, his teenage bride and his companion in crime, were apprehended in Reno, Nevada and brought back to California. On November 5, 1954, the defendants were arraigned before the Superior Court of San Francisco but when it was learned that Dotson was a minor of 18 years, proceedings were suspended and he was ordered taken before the Juvenile Court for possible proceedings under the Juvenile Court Law. He had been indicted on October 28th previously for violations of section 187 of the Penal Code (murder), section 459 of the Penal Code (burglary) and section 211 of the Penal Code (robbery). At the hearing before the Juvenile Court, the judge ordered that the cause be retransferred to the Superior Court under the general law.

Defendant was duly tried and, on February 2, 1955, was found guilty of murder and sentenced to life imprisonment. On February 8, 1955, he filed a notice of appeal from this judgment and this appeal has now been docketed in and is pending in the District Court of Appeal.

Dotson assigns as error the fact that at the time he was taken before the Juvenile Court, he was not represented by counsel and that he did not have any knowledge of the "felony-murder" rule or its implications. He contends that counsel was not provided him until shortly before his trial in the Superior Court and then he only conversed with this counsel for fifteen minutes prior to the time he actually stood trial.

On October 27, 1955, while in jail and while the judgment of conviction was pending on appeal before the District Court of Appeal, defendant petitioned the Superior Court of Marin County for a writ of habeas corpus maintaining that he was being illegally detained and assigning as grounds to sustain this contention the identical instances of purported denial of counsel, that were the basis of his attack upon the judgment below. The Superior Court of Marin County issued such a writ and ordered the warden of the State prison to appear on January 20, 1956 to show cause why this defendant should not be released and to defend the charges of illegal detention that had been raised in the petition for writ of habeas corpus.

The attorney general, representing the state, seeks by this petition for prohibition to restrain the Superior Court of Marin County from entertaining these proceedings, and the issues thus presented in determining whether or not to issue such relief are:

1. Whether a Superior Court may issue a writ of habeas corpus and hold a hearing on the charge of illegal conviction and

detention on the petition of a party, who has, by appeal, directly attacked the judgment wherein he was convicted, on the same grounds.

2. Whether an Appellate Court may prohibit the hearing, once the Superior Court has determined there shall be such hearing in view of the fact that jurisdiction to issue habeas corpus is given concurrently to both Superior Court Judges and Appellate Court Justices.

In France v. Superior Court, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869, petitioners sought a writ of prohibition to restrain the Superior Court from ordering them sent to the penitentiary pursuant to a judgment of conviction which they maintained had been nullified by the issuance of a writ of habeas corpus. They had been arrested, charged, tried and convicted (by a Superior Court) of a crime of burglary with explosives. The judgment was appealed and affirmed, but prior to the going down of the remittitur, the court held in In re Schiaffino, 70 Cal.App. 65, 232 P. 719, that the crime of burglary with explosives was only a misdemeanor. The Superior Court, following the rule of the Schiaffino case, pursuant to their writ of habeas corpus, ordered that the parties be discharged as the Superior Court was without jurisdiction to try them and hence the judgment and sentence were void. Factually, the parties were never released from custody for the district attorney had reinstituted misdemeanor charges against them and when the order of release under the habeas corpus writ reached the sheriff, he was also detaining petitioners under a warrant of arrest. In the meantime, the Schiaffino case was overruled and the crime of burglary with explosives was properly declared to be a felony and the district attorney filed a motion for an order of court directing that the original judgment be carried out and the petitioners ordered incarcerated at San Quentin. Petitioners opposed this motion on grounds that the order of the Superior Court in habeas corpus had the effect of discharging them from custody for the crime charged in the original trial. Respondent argued that such order was void on grounds that the Superior Court had no jurisdiction to issue such writ since the action was then on appeal to an Appellate Court and pending such appeal, the Superior Court had no jurisdiction in the matter. The court so held saying at pages 131–132 of 201 Cal., at page 819 of 255 P.:

"But we think there is sufficient to be found in the foregoing authorities to support this court in holding that a trial court, after an appeal from a judgment of conviction rendered by it in a criminal action has been perfected, is without authority to discharge through *habeas corpus* proceedings the appellant during the pendency of said appeal, for any error, defect, or other infirmity appearing or existing in the proceedings taken in said action, which was or might have been legally presented to said appellate court on said appeal. There is nothing to be found in this state, nor for that matter in the courts of any other state to which our attention has been called or of which we have any knowledge, contrary to such a rule of procedure. We have not overlooked the provision of the Constitution of the state * * * investing the superior courts with power to issue writs of '*habeas corpus* on petition by or on behalf of any person in actual custody in the respective counties,' nor the provisions of the Constitution, conferring upon the Supreme Court and the District Court of Appeal power to issue like writs. It may be conceded that the superior courts of the state have concurrent jurisdiction with the appellate courts in *habeas corpus* proceedings, but this does not mean that they have the power to interfere with the appellate jurisdiction of either of said last-named courts in matters pending before said appellate courts or to overrule or set aside a judgment rendered therein."

Respondent concedes the correctness of the France case, supra, and the point that habeas corpus may not be employed as an alternative to an appeal, but, he argues "that principle of law is not involved in this case; the rule of law involved here is an exception thereto and provides that, irrespective of an appeal, resort may be had to habeas corpus if the matters alleged in support thereof are outside the record on appeal and not susceptible of inclusion therein." He argues that the order remanding the real party in interest to the Superior Court appears as Exhibit "C" to the attorney general's petition and that order is silent with respect to the appearance of counsel for the accused and that an appellate court will not presume error in a lower court's proceedings for it must be affirmatively shown. People v. Jocelyn, 29 Cal. 562; People v. La Marr, 115 Cal.App. 138, 1 P.2d 27; People v. King, 27 Cal. 507; 4 Cal.Jur.2d, Appeal and Error, § 455, pp. 281–282; 3 Am.Jur., Appeal and Error, § 572 (pp. 213–214) and People v. Gonzales, 69 Cal.App. 609, 231 P. 1014. He argues that in considering these contentions in this fashion no violence is done to the appellate court's jurisdiction.

[1, 2] Generally a writ of habeas corpus will not be granted if the alleged errors urged by the petitioner have been or could be appealed to a higher court. In re Seeley, 29 Cal.2d 294, 296, 176 P.2d 24. But this rule is not inflexible for even though an appeal is available this does not preclude resort to habeas corpus to assert a denial of a fundamental right. See discussion in In re Bell, 19 Cal.2d 488, 122 P.2d 22 wherein petitioners sought to assert the invalidity of a statute.

California has however taken a more narrow approach than some sister states and the federal courts where petitioner asserts the denial of the right to counsel. In In re Gutierrez, 1934, 1 Cal.App.2d 281, 36 P.2d 712, it was determined that where a petitioner had been convicted of vagrancy in a justice court which had inter alia denied him the right to counsel, he had failed to state sufficient grounds to justify relief in habeas corpus, since this writ could be employed only to assert the lack of jurisdiction by a court, and this objection was not jurisdictional.

A decade later in In re Connor, 1940, 16 Cal.2d 701, 108 P.2d 10, writ of certiorari denied by the U. S. Supreme Court 1941, Connor v. People of State of California, 313 U.S. 542, 61 S.Ct. 844, 85 L.Ed. 1510, the Gutierrez case, supra, was approved. Petitioner therein did not file his application until six years after his conviction. He alleged that from the time of arraignment through conviction the trial court had never informed him that he was entitled to be represented by counsel or given him an opportunity to procure qualified legal aid. The record belied his contentions showing that he was so informed and was offered the opportunity but he had spurned it. The court moreover pointed out that while he had made a motion to vacate the judgment of conviction and had subsequently appealed it to a higher court he had never raised this purported ground of error before. The court stated at page 705 of 16 Cal.2d, at page 13 of 108 P.2d:

> "The point could have been urged by petitioner on an appeal from the judgment, but none was taken. It could also have been urged in the proceedings to vacate the judgment instituted in 1933 and 1934, but it was not, either in the trial court or on appeal. [Citation.] It is not a good ground for discharge in this proceeding. In this state a defendant is not permitted to try out his contentions piecemeal by successive proceedings attacking the validity of the judgment against him."

The court summarized by stating at page 706 of 16 Cal.2d at page 13 of 108 P.2d:

> "Therefore, where the alleged denial of the right was not asserted on an appeal from a judgment of conviction, or, as here, on an appeal from an order denying a motion to set aside the conviction, it will be presumed—under the presumption of validity and regularity which attends every final judgment—that the requirements as to counsel were met."

The later cases which have considered the problem of denial of counsel and the manner in which it may be asserted, have not impeached the language of the Connor case, supra. In In re Egan, 24 Cal.2d 323, 337, 149 P.2d 693, the court went no further than to state that assuming a petitioner could show deprivation of counsel, he would have to also show that an unfair trial resulted. The court there determined that a reading of the record showed that petitioner had not sustained the burden of showing unfairness. In People v. Adamson, 34 Cal. 2d 320, 210 P.2d 13, 16, the court determined that petitioner had erroneously applied for a writ of error coram nobis and that habeas corpus was the proper remedy to effect a collateral attack on a judgment of conviction obtained in violation of fundamental rights. The court stated that habeas corpus can be used to advance the error in the denial of the right to counsel "at least where no other remedy is available."

The most recent expression from the Supreme Court, In re James, 38 Cal.2d 302, 240 P.2d 596, determined that where a defendant was not informed of his right to counsel at the outset but was so later in the proceedings and subsequently pleaded guilty, his plea did not amount to a waiver of the right and this objection could be raised on habeas corpus. However having pleaded guilty, his judgment could not be appealed, and it would seem that under the circumstances his only opportunity to raise the objection was by habeas corpus.

[3] The end result of this analysis seems to indicate that while habeas corpus is available under certain circumstances to raise a denial of counsel, those circumstances must be such that they could not be presented in any other manner. If this is not so, the "piecemeal trial" of the case referred to by the court in the Connor case, above, could be achieved in many instances.

[4] As we have said above, respondent admits that habeas corpus may not be employed as an alternative to an appeal, but he seeks to bring himself within exceptional circumstances. But the reason for his plight is his own failure to raise the objection in the court below so that it could have been made a part of the record. The opportunity to raise the objection having existed and been waived, respondent cannot bring himself within the spirit of the exception to the rule. In re Connor, 16 Cal.2d 701, 108 P.2d 10.

In answer to the two grounds assigned by the defendant for a writ of habeas corpus, we conclude:

[5] (1) The minor was not entitled to have counsel assigned in the Juvenile Court proceeding as a matter of right, and without his request. In re O'Day, 83 Cal.App. 2d 339, 189 P.2d 525; People ex rel. Weber v. Fifield, 136 Cal.App.2d 741, 289 P.2d 303. These cases dealt with minors brought before the Juvenile Court by verified petition pursuant to Welfare and Institutions Code section 721 et seq. However where a minor charged with crime has been certified to the Juvenile Court pursuant to section 826 of that code "Except as otherwise provided in this article, the proceedings in the juvenile court * * * shall be the same as in the case of a verified petition." Welf. & Inst. Code, sec. 829. His right to counsel not being "otherwise provided" in the article would seem to be no different. If the minor had requested counsel and his request had been refused, it would present a somewhat different case. But we can decide that question when it properly arises.

[6] (2). That the minor had but fifteen minutes before his trial in the Superior Court to consult with his assigned counsel. The point presents a legal absurdity. No request for a longer period was made, no showing that fifteen minutes was not a sufficient time for the consultation, no showing that the limitation came from the act of counsel or of that of the defendant, and, particularly, there is no showing that the time was limited by the court over the objection of defendant, or otherwise.

The same reasoning may be applied to the alleged error in the representation by the public defender's office.

If, at the time of the trial defendant believed that he should have had more time to consult with his counsel he could have requested a continuance. If that were not granted he could have raised the point on a motion for new trial or in arrest of judgment. There is no indication in the record in this proceeding that defendant's counsel needed or requested further time to prepare for trial, and there is nothing in the record showing that further time for the trial would have served defendant any useful purpose.

[7] While we cannot prohibit the issuance of a writ of habeas corpus once the

writ has issued, this court still has authority to restrain further proceedings in the matter, if the court in issuing the writ exceeded its jurisdiction. Under the circumstances of this case the court lacked jurisdiction to issue the writ and to entertain proceedings to consider objections which should have been raised on appeal.

Let a peremptory writ of prohibition issue.

DOOLING and KAUFMAN, JJ., concur.

WEST KEY NUMBER SYSTEM

140 Cal.App.2d 245

LEWIS MANUFACTURING COMPANY, a copartnership, Petitioner,

v.

The SUPERIOR COURT of the State of California in and for LOS ANGELES COUNTY, Respondent.

Civ. 21464.

District Court of Appeal, Second District, Division 3, California.
March 26, 1956.

Original prohibition proceeding. The District Court of Appeal, Parker Wood, J., held that a foreign partnership which manufactured, outside of state, safety belts and engine housings and had in state a sales representative which solicited substantial business in state, with permanence and continuity, and was paid substantial commissions for services and had local responsibility for fitting engine housings, was doing business in state within statute permitting service of process against such a foreign partnership upon secretary of state.

Writ denied and alternative writ discharged.

1. Stipulations 🔑14(2)

Where service of process was quashed pursuant to stipulation that plaintiffs could issue or attempt service of process at later date, and more than year thereafter alleged second service was made but original summons was not filed until after second alleged service, plaintiffs were not required, in order to have such second service be valid, to have another summons issued.

2. Partnership 🔑200, 219(1)

A partnership may be sued in partnership or firm name and judgment may be rendered against partnership in partnership name. West's Ann.Code Civ.Proc. § 388.

3. Partnership 🔑204

Statute providing for service of process against foreign partnership doing business in state does not contemplate service as basis for personal liability of partner. West's Ann.Corp.Code, § 15700.

4. Constitutional Law 🔑309(3)

Where foreign partnership manufactured, outside of state, safety belts and engine housings and had in state a sales representative which solicited substantial business with permanence and continuity, and which had local responsibility fitting engine housings, and portion of business pertaining to safety belts for use in California was subject to state regulation, service of process, in accordance with statute, on secretary of state, in action against such partnership for death allegedly resulting from defective safety belt sold in state, did not deprive partnership of due process of law. West's Ann.Corp.Code, § 15700; West's Code Civ.Proc. § 388.

5. Partnership 🔑204

In action against foreign partnership which manufactured safety belts, to recover for death of workman allegedly resulting from defective belt, wherein service was made on secretary of state, evidence on motion to quash service warranted trial court's finding that belt was sold in state while partnership was doing business in state and that action arose out of business done in state. West's Ann.Code Civ.Proc. § 388; West's Ann.Corp.Code, § 15700.

John Barry, La Jolla, for petitioner.

Miller, Jones & Tollefson and Philip F. Jones, San Fernando, for Real Parties in Interest.

PARKER WOOD, Justice.

Petition for writ of prohibition, based upon alleged invalidity of service of summons on a foreign partnership (service under section 15700, Corporations Code).

The petition alleges: That petitioner, Lewis Manufacturing Company, is a copartnership which was created by written agreement on June 1, 1952, by C. T. Lewis, Maurine Lewis, Charles Lewis, and Mary Lewis, who reside in Oklahoma, and no one of whom has lived in California. Prior to organizing such partnership, C. T. Lewis, as sole owner, conducted the business under the name of "Lewis Manufacturing Co.," in which no other person owned any interest. Petitioner, upon its organization, acquired the business of C. T. Lewis and since such date continued to operate as the Lewis Manufacturing Company. C. T. Lewis, while sole owner of the business, did no business in California. On May 19, 1954, Goldie J. Edison (surviving wife of E. L. Edison), and the five children and the mother of E. L. Edison, instituted an action in the Superior Court of Los Angeles County, California, against petitioner and North & Judd Manufacturing Co., a corporation, seeking to recover damages sustained by reason of the "wrongful death of their decedent, Edward L. Edison, charged to have occurred" on December 15, 1953, "while he was employed by Kee and Simpson in Ventura County, working on an oil derrick using a safety belt," and by reason of alleged defects in the belt decedent fell and was fatally injured. The complaint alleged that petitioner and North & Judd manufactured the belt. In said cause, service upon petitioner was had under section 15700 of the Corporations Code by causing a summons with copy of complaint, and statement of last known address of petitioner, to be served on the Secretary of State on June 28, 1954. Petitioner moved to quash the service on the ground that petitioner was not subject to constructive service and had not been doing business in this state. The motion was granted on July 28, 1954, and the order provided: "It is ordered that the motion to quash service of summons * * * is granted, and the same is subject to the right and privilege of the plaintiffs to issue process at a subsequent date." On August 8, 1955, the plaintiffs in said action caused to be served on the Secretary of State a summons, copy of complaint, and affidavit of last known address of petitioner "which was mailed to your petitioner." Petitioner filed its motion to quash said service on the ground that petitioner was not subject to constructive service and had not been doing business in California. An affidavit of C. T. Lewis and the deposition of Ed Plauger (Plaugher) were introduced in evidence. The proof established that petitioner had never maintained any office, warehouse or stock of materials in this state, all persons and business establishments in California that handle petitioner's products "were and are independent of and have no financial interest in the partnership; petitioner has no control or financial interest in any business establishment in California; and all persons or business establishments that purchase petitioner's products are free to purchase competitive products of other manufacturers. Petitioner has never had a salesman in California; has never done any manufacturing, selling or purchasing in California; has never had a bank account, paid taxes, maintained a mailing address, rented any property or maintained an agent here for the purpose of collecting accounts. Petitioner has never had a telephone listing or a listing in any directory in California, and has never owned any property in California. For the past five years Plaugher and Company, as jobber or commission agent, has effected some sales in California of petitioner's products. All sales have been limited to supply houses, and no sales have been made direct to the user of the products. The total volume of sales in California has been less than one per cent of its total sales. It has not advertised in California and does not attempt to solicit any business in California other than by mailing its catalogue and price list to firms who have purchased its products. Its sales in California have not been sufficient to justify the expense of a part time salaried employee or the expense of sending a salesman on one trip to California. For petitioner's fiscal year ending May 31, 1953, sales in California amounted to $3,216.68 or 1.051 per cent of petitioner's total sales. For its fiscal year ending May 31, 1955, sales in California amounted to $2,975.85 or .924 per cent of its total sales. Petitioner has not maintained an office, warehouse or stock of material in California. All persons in California who handle petitioner's products are independent. Plaugher was engaged in selling oil field supplies and he sells the products of many concerns. His total commissions in 1953 from such concerns amounted to $38,000, and less than $600 of that amount was received from petitioner. Plaugher's business card has the name of his "concern" and its address on one side of the card, and on the other side of it there are the names of petitioner and 10 other concerns whose products he sells. The belt which allegedly caused the accident was sold by "C. T. Lewis" on April 8, 1952 to the Bethlehem Supply Company, which company sold the belt on June 13, 1952, to Kee and Simpson Drilling Company, the employer of decedent. Such sale occurred about two months before petitioner, the partnership, was formed. Petitioner has not obligated itself to be responsible for any of the debts or liabilities of C. T. Lewis. After the first motion to quash service of summons was sustained (on stipulation), the cause proceeded to trial against North & Judd. A verdict for plaintiff was returned, and a motion for a new trial was granted. On October 14, 1955, the superior court denied petitioner's motion (second motion) to vacate the service of summons. Said court has no jurisdiction over petitioner for the reason that petitioner was not doing business in California, "did not come into existence or transact business anywhere prior to June 1, 1952 and after the alleged defective belt was sold and is not subject to constructive service."

The answer to the petition, by the real parties in interest (plaintiffs in the action for damages), alleges that "petitioner copartnership" was not created on June 1, 1952 but was created, at least as to Charles T. and Maurine Lewis, in 1949, and that said persons have been copartners doing business under the name of Lewis Manufacturing Company from 1949 to the present time. Petitioner, as a copartnership, was doing business in California within the meaning of section 15700 of the Corporations Code since 1949. The order granting the first motion to quash service of summons, referred to in the petition herein, was granted upon stipulation of the parties. Ed W. Plaugher, doing business under the name of Ed W. Plaugher and Associates, has been the authorized representative of petitioner in California for at least the past five years. As such representative he has solicited supply houses to purchase petitioner's products and has carried on a continuous program of solicitations and sales talks in California on behalf of petitioner. He has listed himself on his business card as a manufacturer's representative for several firms, one of which is petitioner. He has occasionally received orders from buyers of petitioner's products and he has forwarded the orders to petitioner for direct delivery to the buyer. He is not a jobber as alleged in the petition, and he does not buy direct from petitioner for resale to his own customers. He has kept on hand, in California, a small supply of petitioner's products which are treated by him as a consignment belonging to petitioner. He keeps said supply on hand for delivery to California purchasers in case of emergency. He, on behalf of petitioner, has taken dimensions for canvas engine houses, sold by petitioner, when the same have been ordered by California purchasers, and he has forwarded the orders to petitioner for delivery to the purchasers. After such delivery Plaugher supervises the erection of said houses. In return for his services on behalf of petitioner, he has received a commission of 10 per cent on all sales of petitioner's products in California. For the year 1953 petitioner's receipts from the sale of its products in California amounted to approximately $6,000. The belt, referred to in the petition herein, was not sold by C. T. Lewis but was sold by petitioner. Petitioner was doing business in California and was existing as a copartnership at the time of the accrual of the cause of action involved in this proceeding and up to the present time. Petitioner has continuously done business in California within the meaning of section 15700 of the Corporations Code from 1949 to the present time. The belt was sold by petitioner, a copartnership, at the time it was doing business in California.

[1] Petitioner contends that the "first summons having been quashed," and the real parties in interest (plaintiffs in the damage action) having been given the privilege of issuing process at a subsequent date, they (plaintiffs) were required to have another summons issued within a year from date of that order. It was the "service" of the summons (not the summons) that was quashed on July 28, 1954, in the first proceeding to quash service of summons. It was more than a year thereafter that the alleged second service was made, namely, August 8, 1955. The summons (original) was not filed until after the alleged second service. The summons was issued on May 19, 1954, and it was filed September 27, 1955. It is true that said order of July 28, 1954, stated that the motion to quash service of summons was sustained subject to the right of plaintiffs "to issue process at a subsequent date." The recitals therein, preceding the order, contained the words: "The plaintiffs announced that they did not have at this time sufficient proof to show that the defendant * * * was * * * doing business in * * * California, and are willing that the motion be sustained upon the understanding that the plaintiffs have the right *to issue or attempt service* * * * at a later date * * *." (Italics added.) That recital, when considered with the circumstance that it was a stipulation to quash service of summons, indicates that said portion of the order was intended to mean that the order was subject to plaintiffs' right "to serve process." Of course, plaintiffs could not issue process. Plaintiffs were not required to have another summons issued.

Petitioner contends that its business activities in California did not "rise to the level" of doing business in California within the meaning of section 15700 of the Corporations Code.[1] Whether petitioner was doing business in California so as to be amenable to California process is primarily a factual determination. See Estwing Mfg. Co. v. Superior Court, 128 Cal.

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[1] Corporations Code, § 15700. "Every partnership, other than a commercial or banking partnership established and transacting business in a place without the United States, which is domiciled without this State and has no regular place of business within this State, shall, within forty days from the time it commences to do business in this State, file in the office of the Secretary of State a designation of some person residing within the State upon whom process issued by authority of or under any law of this State may be served. A copy of such designation, duly certified by the Secretary of State, is sufficient evidence of such appointment.

"Such process may be served on the person so designated, or, in the event that no such person is designated, then on the Secretary of State or a deputy secretary of state, together with a statement of the last-known address of the partnership, if known, or if no address of the partnership is known, a statement that the address of the partnership is unknown. If the address of the partnership is known, the Secretary of State shall immediately give notice of such service upon him or upon his deputy to the partnership by telegraph, and forward a copy of the process to it by registered mail, at the address given in the statement.

"Service on the person designated or service on the Secretary of State or on a deputy secretary of state and notice of service by telegraph and forwarding a copy of the process by registered mail pursuant to this section is a valid service on the partnership. Where the address of the partnership is in fact unknown to the person seeking to serve the process, service on the partnership is complete when the process is served upon the Secretary of State."

App.2d 259, 261, 275 P.2d 146. An extended discussion with reference to the meaning of the expression "doing business in this state," as applied to a foreign corporation, is in Kneeland v. Ethicon Suture Laboratories, 118 Cal.App.2d 211, 257 P.2d 727. In West Publishing Co. v. Superior Court, 20 Cal.2d 720, at page 727, 128 P.2d 777, at page 780, it was said in quoting from other cases: "'A foreign corporation is amenable to process * * * if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there.'" "'If in fact it (the corporation) is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of our courts.'" "'But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here.'" In Fielding v. Superior Court, 111 Cal.App.2d 490, at page 494, 244 P.2d 968, at page 970, it was said: "The essence of doing business is that the corporation is present within the state sufficiently to constitute it just and equitable that it be amenable to process within the state." In Sales Affiliates, Inc., v. Superior Ct., 96 Cal.App.2d 134, at page 136, 214 P.2d 541, at page 542, it was said: "If the representation which petitioner maintained in the state gave it in a practical sense, and to a substantial degree, the benefits and advantages it would have enjoyed by operating through its own office or paid sales force, it was clearly doing business in the state so as to be amenable to civil process."

In the affidavit of C. T. Lewis, filed in support of the motion to quash service of summons, it is stated: that for approximately 18 years he has been in the business of selling oil field supplies and equipment; he has traded under the name of Lewis Manufacturing Co. since he started in business; said company's office and warehouse are located in Oklahoma and it has no other office or warehouse; its sales are limited to wholesale and retail dealers; most of its sales in California are handled by Edward W. Plaugher; he (C. T. Lewis) started dealing with Plaugher about 1949; he and Plaugher made an informal oral arrangement whereby Lewis was to pay Plaugher a commission on sales in California of Lewis' products; all orders of the products are subject to acceptance by the company in Oklahoma; Plaugher is and has been at all times an independent contractor; Lewis Manufacturing Company and Lewis have no control over Plaugher's business activities and no financial interest in his business; there was nothing in their agreement to prevent Plaugher from dealing with any other manufacturer even if the products were in competition with Lewis Manufacturing Co; Plaugher does not carry a full supply of the products of Lewis Manufacturing Co; he keeps only a few pieces to fill emergency orders and use as samples, and the value of said stock is less than $20; Lewis Manufacturing Co. does not maintain any stock of materials in California; it has never had a salesman residing or employed in California; it has never done any manufacturing, selling or purchasing in California; it has never had a bank account, a mailing address, or telephone or directory listing, in California; it owns no property, has never rented property and pays no taxes in California; it has done no advertising in California and does not attempt to solicit business therein other than to mail its catalogue and price lists to firms who have purchased its products; the total volume of its sales in California is less than one per cent of its total sales; during the fiscal year ending May 31, 1954, its total sales in California amounted to $3,216.68, or 1.051 per cent of its total 31, 1955, its total sales in California amounted to $2,975.85, or 0.924 per cent of amounted ot $2,975.85, or 0.924 per cent of its total sales; and its total sales in California for June, July and August, 1955, amounted to $768.10, or 0.876 per cent of its total sales.

The deposition of Ed W. Plaugher, filed in the superior court in opposition to the motion to quash service of summons, states that Plaugher's first discussion regarding the products of the Lewis Manufacturing Company was in 1948 or 1949 with E. L. Oliver, who was a salesman for that company; Oliver asked Plaugher if he would like to look after the belts in California and see if he could get certain companies interested; after that conversation Plaugher began calling on oil equipment supply houses in California; Plaugher first met C. T. Lewis in 1948 or 1949 and at that time Plaugher was already soliciting business for him in California; they entered into an oral arrangement whereby Plaugher was to receive a commission of 10 per cent on the gross sales of any goods which Lewis sold and shipped into California, regardless of whether Plaugher got the account or whether it was an account that Lewis had prior to the time Plaugher tried to sell the goods; in accordance with that agreement Plaugher has continued to solicit business for the Lewis Manufacturing Company; after Plaugher began to solicit business in California for the Lewis Company, Lewis sent him commissions on anything that was sold and shipped into California, regardless of whether the order came directly from Plaugher or was a direct order from a supply house in California to Lewis in Oklahoma; that arrangement has continued from 1948 or 1949 to the present time; in 1953 he received $600 as commissions; in 1954 he received $71.45 as commissions; in 1955 (from April to time of taking deposition in September) he received $260; on occasions he received orders for the Lewis Company products from supply houses, and he forwarded them to the company; he never collected any money due to the company; all the billing is done by the company; his activities on behalf of Lewis have been to solicit orders and stimulate business in California; he would call on supply companies and ask them to put in the Lewis line of belts or other products; and he would explain the features of the belt; he (Plaugher) has three employees in his organization; he and his employees have solicited and obtained orders for canvas engine houses that Lewis manufactures; in taking the orders for the engine houses, he made the measurements and sent them with the order, and after the houses had been shipped here he would see that they were erected properly; Lewis catalogues and discount sheets are mailed directly from Oklahoma to the supply companies, but he (Plaugher) has a few for emergencies; he has a very small stock of belts in his office, which stock is for an emergency; he did not pay for the belts but he treated them as a consignment belonging to Lewis Manufacturing Company; Lewis did not pay him a salary or any part of his expenses; and Plaugher does not make sales reports to Lewis.

The evidence shows that the representative of the Lewis Manufacturing Company, by agreement with the company, solicited, stimulated and obtained business in California for the company; that the company obtained a substantial amount of business through such representative; that the representation was not carried on occasionally or casually but was carried on with "permanence and continuity"; that the representative had some responsibility for the conduct of local transactions of the company, namely, fitting the canvas engine houses over engines; and that the agent was paid substantial commissions for his services. Under the evidence herein the business activities of petitioner in California constituted doing business in this state within the meaning of section 15700 of the Corporations Code. As stated in Kneeland v. Ethicon Suture Laboratories, supra, 118 Cal.App.2d 211, 228, 257 P.2d 727, 738, the activities constituted doing business in this state, "to the extent that assumption of jurisdiction over it is consistent with due process; that there is afforded to both parties a greater amount of justice by allowing suit in this state rather than requiring it elsewhere."

Petitioner contends that, in order to secure service on a foreign partnership under the provisions of said section 15700, the cause of action must arise out of business done in this state; and that the claim, in the action referred to herein, is not connected with any business the petitioner did here. Petitioner argues that the burden is upon the plaintiffs in said action to show that petitioner was doing business in California, and that the cause of action arose out of the business petitioner was doing in California. This contention pertains to an issue which may arise if and when petitioner answers the complaint. The issues presented upon petitioner's motion to quash service of summons do not require a determination of the merits of the action on the subject of negligence. The evidence upon the motion to quash service was sufficient to warrant the trial court in finding, preliminarily for the purposes of the motion, that the belt which allegedly caused the accident was sold in California while petitioner was doing business in California.

Petitioner contends further that if section 15700 of the Corporations Code is construed to authorize service on a partnership domiciled outside the state the section is unconstitutional. It argues that a foreign partnership has the right to do business in this state or any state and that such partnership, unlike a corporation, is not required to obtain the consent of a state to do business therein; that since a state cannot prohibit a foreign partnership from doing business in that state, it cannot make the foreign partnership subject to civil process in that state (in which the partnership is not domiciled). Petitioner relies upon Flexner v. Farson, 1919, 248 U.S. 289, 39 S.Ct. 97, 63 L.Ed. 250, and asserts that said case settles the question and holds that a foreign partnership is not subject to civil process in a state in which the partnership is not domiciled. That case, which is factually distinguishable from the present one, is not to be regarded as holding that a foreign partnership is not subject to civil process in a state in which it is not domiciled. In that case an action was brought in Illinois upon a judgment which had been rendered in Kentucky. The Illinois complaint alleged: that the transaction which was the basis for the Kentucky judgment took place in Kentucky where the defendants were doing business as partners through W. Flexner who was their agent; that the defendants were nonresidents of Kentucky and that service of summons in the Kentucky action was made upon W. Flexner, in accordance with a Kentucky statute authorizing service to be made in that way. In the Illinois action, the answer alleged: that the defendants named in the Kentucky action did not reside in Kentucky, were not served with process, and did not appear; that W. Flexner (upon whom summons was served in Kentucky) was not the agent of defendants at the time of service of summons upon him; that the Kentucky statute was unconstitutional; the Kentucky court had no jurisdiction and its judgment was void. In the Illinois action, the plaintiff demurred to the answer. After the demurrer was overruled, the plaintiff stood upon the demurrer, and judgment was entered for defendants. The Supreme Court of Illinois affirmed the judgment. 268 Ill. 435, 109 N.E. 327. In the United States Supreme Court, upon review of the Illinois judgment, it was argued that the answer (in the Illinois action) tacitly admitted that W. Flexner was agent (in Kentucky) of the partners and that under the Kentucky statute he was agent of the partners to receive service in actions arising out of business done in Kentucky; that the defendants (partners) by doing business in Kentucky consented to be bound by service under the Kentucky statute. The United States Supreme Court said therein at page 293 of 248 U.S., at page 98 of 39 S.Ct.: "The analogy of suits against insurance companies based upon such service is invoked. [Citation.] But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. [Citations.] The State [Kentucky] had no power to exclude the defendants, and on that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case."

In an annotation in 94 L.Ed. it is said at page 1176: "Upon its face the decision in the Flexner Case (U.S.) supra, would seem to be conclusive against a state's power to authorize substituted service upon nonresident individuals, even though they do business within the state. However, there are various reasons supporting the belief that the decision can be given no such effect. The state statute involved failed to limit the actions in which process may be served to those arising out of transactions within the state. Moreover, it was admitted that the person served was not in fact the agent of the partnership. Finally, the decision is inconsistent with the basic legal theories expressed in more recent decisions of the Supreme Court. Thus, in International Shoe Co. v. [State of] Washington (1945) 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057, the court stated that 'due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contracts [contacts] with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' While the proposition so stated is, as regards jurisdiction over individuals, only a dictum, it has been pointed out that there seems no reason that a continuous course of business conducted by the agents of a nonresident individual should not be considered the equivalent of such 'minimum contacts.' It has also been pointed out that the Flexner Case, in which an opposite view was taken on the ground that a state can exclude a foreign corporation, but cannot exclude individuals from doing business within its borders, can no longer be an authority on that question, because this case rests on the doctrine of 'implied consent' and this doctrine has been expressly discarded in the International Shoe Co. Case.

"In accord with the more recent view is Henry L. Doherty & Co. v. Goodman (1935) 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097, involving an action for damages based upon an alleged illegal sale of securities, where it was held that the constitutional rights of a nonresident defendant, who had a local office in the state for the sale of such securities—a business subjected in the state to special regulation—were not violated by service of process, under a state statute permitting such service, on an agent or clerk employed in his office. The case of Flexner v. Farson (1919) 248 U.S. 289, 39 S.Ct. 97, 63 L.Ed. 250, supra, was distinguished on the ground that in the latter case the service was made upon one not then an agent for the defendant."

In Davidson v. Henry L. Doherty & Co., 214 Iowa 739, at pages 747, 748, 241 N.W. 700, at page 703, 91 A.L.R. 1308, in distinguishing the Flexner case, it was said: "It is important that we consider the facts in that case. * * * It was sought [therein] to obtain judgment against the *individual partners* who were nonresidents of the state, by service upon a purported agent of said *partnership.* It also appeared that the only person so served was *not* the agent of the partnership *at the time of service.*" The defendant, in the Davidson case, was a resident of New York and conducted business therein as an individual under a trade name. He also had an office in Iowa (for the sale of shares of stock). Service of process was made upon defendant's agent in Iowa pursuant to a statute of that state which provided that when a corporation, company or individual has an office for the transaction of business in any county other than that in which the principal resides, service may be made on any agent or clerk employed in said office in actions growing out of or connected with business of that office. It was held therein that such statute was applicable to individual nonresidents and that it was constitutional.

The case of Henry L. Doherty & Co. v. Goodman, supra, was referred to in 23 California Law Review 482 in an article by Professor McBaine on the subject of "Service Upon a Non-Resident." On page 484 it was said: "Can he [Doherty, a resident of New York] by virtue of the statute [of Iowa] be commanded to appear in an Iowa court, when he has done business in that state, in a suit arising out of such business when the summons is served upon his agent? Is such service due process of law? Is it within the competence of the Iowa court? Flexner v. Farson was distinguished. The Supreme Court of the United States, in making affirmative answers to these questions, employed the analogy of service authorized by statutes upon non-resident motorists." It was also said therein at page 485: "In view of recent decisions of the Supreme Court of the United States it is perhaps not saying too much to assert that the state has the power to some extent to regulate any business transacted within its borders. [Nebbia v. People of State of New York (1934), 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940.] The opinion in the principal case [Henry L. Doherty & Co. v. Goodman] makes no express choice of the police power theory; consent theory; or imposition of reasonable conditions theory. Seemingly it impliedly approves the view that a state, constitutionally, may forbid a natural person to do certain acts within its borders and, in the absence of actual consent to the jurisdiction of its courts of actions arising out of such business, may provide that process may be served upon his agent."

In Restatement of the Law of Judgments it is said at page 114, section 24: "A court in a State in which a partnership or other unincorporated association is subject to be sued in the firm or common name acquires by proper service of process jurisdiction over it as to causes of action arising out of business done by the association in the State." It was also said therein at page 115: "Even though the partnership or association does business within the State, the courts of the State acquire jurisdiction over it only as to causes of action arising out of the business done in the State. * * * A court cannot exercise jurisdiction over a partnership or association unless there is such service of process as is reasonably calculated to give it notice of the action and an opportunity to be heard * * *. Service upon one of the partners or upon an agent in charge of the business is sufficient. * * * A judgment rendered against a partnership * * * in accordance with the rule stated in this Section is a binding adjudication as to the liability of the partnership or association with respect to its assets in other States as well as to its assets in the State in which it is rendered."

[2, 3] Section 388 of the Code of Civil Procedure provides: "When two or more persons, associated in any business, transact such business under a common name * * * the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability." It thus appears that in California a partnership may be sued in the partnership or firm name and that judgment may be rendered against the partnership in the partnership name. Section 15700 of the Corporations Code refers to service of process on the partnership only and does not contemplate service as a basis for personal liability of the partners.

It could be inferred from the deposition of Plaugher that, pursuant to safety regulations of the state of California, the safety belts of petitioner were approved by the state. He testified that "for quite some period of time I did not solicit belts, safety belts for the simple reason that they were not at that time supposed to be State approved and no store would want to stock them." Safety belts used in California in connection with work on derricks must be of a type approved by the Division of Industrial Safety of California. (Administrative Code, § 6580, subdivision (b), title 8.)

[4, 5] Section 15700 of the Corporations Code is based upon section 2472 of the Civil Code which was enacted in 1909. In other words, the substance of said section 15700 has been a statutory provision since 1909. Service of summons under the provisions of section 15700 of the Corporations Code did not deprive petitioner of

due process of law. Petitioner was doing business in this state within the meaning of said section. The evidence was sufficient to warrant a preliminary finding, for the purposes of the motion, that the cause of action arose out of business done in this state. The portion of the business, pertaining to safety belts for use in California, was subject to regulation by California, in that, the approval of the belts by the state was required. Petitioner had "contacts" with this state to the extent that, as stated in International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 161 A.L.R. 1057, "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Section 15700 of the Corporations Code is not unconstitutional.

The petition for a writ of prohibition is denied. The alternative writ of prohibition is discharged.

SHINN, P. J., and VALLÉE, J., concur.

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140 Cal.App.2d 967

Carl W. MOORE, etc., Plaintiff and Appellant,
v.
FIDELITY AND CASUALTY COMPANY OF NEW YORK, etc., Defendant and Respondent.
Civ. A. 8850.

Appellate Department, Superior Court,
Los Angeles County, California.
March 21, 1956.

Action by insured against insurer on liability policy for amount insured was required to pay as damages, legal fees, and costs for property damage suffered by third person and growing out of operation of insured's business. The Municipal Court, Los Angeles Judicial District, Morton L. Barker, J., entered judgment for insurer, and insured appealed. The Superior Court, Appellate Department, Kauffman, J., held that, under liability policy, which provided that insurer would pay, on behalf of insured, all sums which insured should become legally obligated to pay as damages because of injury or destruction of property, including loss of use thereof, caused by accident and arising out of ownership, maintenance, or use of premises for self-service laundry purposes, claim by adjoining tenant against insured for water damages allegedly caused when lint from self-service laundry clogged drains was claim caused by "accident" within policy.

Judgment reversed with directions.

1. Insurance ⚷514½

Under liability policy which provided protection for property damage suffered by third persons from operation of insured's self-service laundry business and which provided that insurer would defend any suit against insured alleging such injury, sickness, disease, or destruction and seeking damages on account thereof, even if such suit was groundless, false, or fraudulent, insurer had duty to defend insured in action against insured by adjoining tenant for rain damage allegedly caused when lint from insured's self-service laundry clogged drains.

2. Insurance ⚷434

Under liability policy, which provided that insurer would pay, on behalf of insured, all sums which insured should become legally obligated to pay as damages because of injury or destruction of property, including loss of use thereof, caused by accident and arising out of ownership, maintenance, or use of insured premises for self-service laundry purposes, claim by adjoining tenant against insured for water damages allegedly caused when lint from self-service laundry clogged drains was claim caused by "accident" within policy.

See publication Words and Phrases, for other judicial constructions and definitions of "Accident".

3. Insurance ⚷146(1)

In absence of plain and unequivocal exceptions, insurance contracts are construed to intend that which the insured is likely to understand.

4. Insurance ⚷434

Under liability policy in which insurer agrees to pay sums for which insured should become legally obligated because of loss caused by "accident" and arising out of ownership, maintenance, or use of insured premises for stated purposes, proper test as to whether an "accident" has occurred is whether insured's negligent operation resulted in an event which was unexpected or unforeseen by person injured.

5. Insurance ⚷434, 514½

Under liability policy in which insurer agrees to pay damages caused by accident and arising out of ownership, maintenance, or use of insured premises for stated purposes if insured's negligent operation results in an event which was unexpected or unforeseen by person injured, such insured person's claim is one covered by the policy, and insurer is obligated to defend such claim.

6. Insurance ⚷146(1, 3)

The understanding of an ordinary person is standard used in construing a contract of insurance, and any ambiguity in language must be resolved against insurer.

7. Insurance ⚷146(3)

Exceptions and exclusions are construed strictly against insurer and liberally in favor of insured.

Hanna & Morton and John H. Blake, Los Angeles, for appellant.

Betts, Ely & Loomis, Los Angeles, for respondent.

KAUFFMAN, Judge.

This is an appeal by plaintiff from a judgment in favor of defendant, entered in an action upon an insurance policy wherein plaintiff was the insured and defendant the insurance company which provided for liability for property damage suffered by third persons and growing out of the operation of plaintiff's business. No disputed questions of fact are involved.

The appellant owned and operated a laundromat business. Appellant entered into an insurance contract with respondent which provided among other things as follows: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of the use thereof, caused by accident and arising out of the ownership, maintenance or use of premises for the purposes stated in the declarations, or operations necessary or incidental thereto."

The use of the premises was declared to be that of a laundromat or self-service laundry and a premium was computed and paid for the coverage specified. The policy further provided, "the company (defendant) shall defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent" etc.

During the time the insurance was in effect, the appellant herein was sued by an adjoining tenant (Shuls) who alleged in his complaint "that appellant in the operation of the driers used in his business permitted lint to be blown upon the roof of the building occupied by said Shuls and that lint was deposited in drains which became clogged and that on January 19, 1954 when a rain occurred, water leaked into Shuls' premises as the result of the negligence of appellant in permitting lint to escape and clog the drains," and prayed for damages. The complaint also alleged that appellant was notified of these facts and agreed to install a lint catcher, but later failed to do so.

Appellant delivered complaint to respondent and requested it to defend, but respondent refused to defend on the ground that the claim was not a peril covered by the insurance policy.

It is admitted that as a result of this suit appellant was required to pay $1,430.84 as damages and $400 as legal fees, and $69.20 costs, all of which were found by the trial court below to be necessary and reasonable.

The court concluded from the facts above found that the damages to Shuls, although appellant was obligated to pay, were not caused by accident, and further concluded that respondent was under no obligation to defend the appellant in the Shuls case.

We will first discuss the question, Was the respondent (Insurance Co.) required to defend appellant in the action for damages to personal property brought by Shuls against appellant? It is stated in Lamb v. Belt Casualty Co., 1935, 3 Cal.App.2d 624, at page 630, 40 P.2d 311, at page 314: In determining whether or not respondent was bound to defend, "the language of its contract must first be looked to, and next the allegations of the complaints in each action for damages against the insured." The complaint herein clearly alleges damages from an alleged negligent operation of the driers used in the business conducted by appellant, causing lint to be blown upon the roof of the building occupied by the Shuls, and that lint was deposited in drains which became clogged and when rain occurred water leaked into Shuls' premises as a proximate result of appellant's negligence, etc.

The policy provided that the Insurance Company would pay as follows: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury or destruction of property, including the loss of use thereof caused by accident and arising out of the ownership, maintenance or use of the premises for the purposes stated in the declarations, or operations necessary or incident thereto."

[1] It is clear that the operation of the drier which caused lint to be deposited on the roof and in drains was a necessary operation in the laundromat business. In the recent case of Ritchie v. Anchor Casualty Co., 1955, 135 Cal.App.2d 245, at page 250, 286 P.2d 1000, at page 1003, it was also held, "that the insurer's obligation to defend is measured by the terms of the insurance policy and the pleading of the claimant who sues the insured", citing the Lamb v. Belt Casualty Co. case. We have concluded that there was a duty under the policy and under the facts stated in the pleading served on the insured to defend appellant in the action for damages filed against him. The second question presented is whether or not the contract of insurance, the pertinent provisions of which have heretofore been quoted, covered the claim for damages against appellant by reason of his negligent operation of the drier as set forth in the complaint against him.

[2] It is claimed by respondent, and held by the trial court, that this claim under the complaint by Shuls for damages against appellant was not caused by accident, and hence was not covered by the policy. We are unable to agree with this conclusion of law.

The latest expression of the appellate courts of California concerning the definition of the word "accident" is found in Ritchie v. Anchor Casualty Co., supra. In that case the insured purchased a policy of insurance which provided by endorsement to the policy that the policy was extended to cover "the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof caused by accident and arising out of" the condition of the goods distributed by the insured if the accident occurred after the insured had parted with possession. The language quoted is strikingly similar to the language which imposes liability on the insured in the case at bar and which has been heretofore quoted. In each case the insured agreed to pay for damages because of injury to or destruction of property caused by accident. The insured in the Ritchie case sold peanut oil to the Post Trading Company. The buyer refused to pay, claiming that the oil was rancid and that it had suffered damage through its use. The insured was asked to defend, and the insurer refused to defend on the ground that the action was not covered by the policy. The trial judge found that the allegations of the cross-complaint did not allege an "accident." The insured appealed and the District Court of Appeal reversed the judgment. After finding that the insured's liability to defend depended upon the wording of the insurance contract and the allegations of the pleading, a point which we have already discussed and for which we cited as authority this case, the court proceeded to consider whether the cross-complaint in question alleged an accident. The cross-complaint was based upon five causes of action, two of which alleged an express warranty and three of which alleged an implied warranty of fitness. The court then held that the pleading did factually allege an accident, even though that word was not used, commenting that the draftsman of a complaint is not interested in the question of coverage which may later arise between the insurer and the insured. The court went on to say, 135 Cal.App.2d at page 251, 286 P.2d at page 1003, of the opinion, we quote: "He chooses such theory as best serves his purpose; if it be breach of contract rather than negligent performance of contract, he chooses the former; if it be negligence rather than warranty he alleges negligence; if he happens to choose warranty it may be an express one or one implied. And when the question later arises under an insurance policy as to what the facts alleged in the complaint do spell,—for instance, whether they aver an accident,—the complaint must be taken by its four corners and the facts arrayed in a complete pattern without regard to niceties of pleading or differentiation between different counts of a single complaint. And the ultimate question is whether the facts alleged do fairly apprise the insurer that plaintiff is suing the insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under the terms of the policy."

The court then stated, "It is settled that 'in case of doubt such doubt ought to be resolved in the insured's favor,'" quoting in this connection Boyle v. National Cas. Co., D.C.Mun.App., 84 A.2d 614, 616; Lee v. Aetna Casualty & Surety Co., 2 Cir., 178 F.2d 750; and Pow-Well Plumbing & Heating v. Merchants Mut. Cas. Co., 195 Misc. 251, 89 N.Y.S.2d 469.

[3–5] The court then stated that allegations that the insured manufactured the oil knowing the intended use; that previous purchases of oil from the insured had been satisfactory; that the oil was used in preparation of food products; that it was not fit for the intended use; that it was used without knowledge that it was rancid; that its condition was not discovered until after use; that the use caused damage, all alleged an accident within the law applying to insurance policies worded like the one under discussion. The court then cited Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 P. 762, quoting from the decision at length to the effect that an accident includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event. The court in the Richards case quoted with approval language from Ripley v. Railway Passengers Assur. Company, Fed.Cas.No.11,854, 2 Bigelow's Life & Acc. Ins. Cas. 738, to the effect that any event brought about by design is not truly an accident because that which has accomplished the intention and design is a foreseen and foreknown result. Yet the contract should not be so interpreted since, if it happened unexpectedly to the person damaged, it is to him a casualty. This is the common and popular conception of the word "accident" and since insurance policies are issued to all sorts of people who do not nicely weigh the meanings of words the court is called upon to interpret terminology as such people regard it. To the average person that which occurs unexpectedly is called an accident. Insurance contracts, in the absence of plain and unequivocal exceptions are construed to intend that which the insured is likely to understand. The court then cites as having accepted this construction of the meaning of the word "accident" the following California cases: Rock v. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, L.R.A. 1916E, 1196; Price v. Occidental Life Ins. Co., 169 Cal. 800, 802, 147 P. 1175; Olinsky v. Railway Mail Ass'n, 182 Cal. 669, 671, 189 P. 835, 14 A.L.R. 784; Ogilvie v. Aetna Life Ins. Co., 189 Cal. 406, 411–412, 209 P. 26, 26 A.L.R. 116. The Supreme Court in a recent case has defined "'caused by accident'" as follows, in Zuckerman v. Underwriters at Lloyd's, 42 Cal.2d 406, 473, 267 P.2d 777, 784: "'Accident' has been defined as 'a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured.' Rock v. Travelers' Ins. Co., 172 Cal. 462, 465, 156 P. 1029, 1030, L.R.A.1916E, 1196; Richards v. Travelers Ins. Co., 89 Cal. 170, 175, 26 P. 762." The proper test is, did the insured operate negligently which resulted in an event which was unexpected or unforeseen by the person injured? If such a state of affairs appears from the pleading served upon the insured, considering all the facts stated in the complaint with doubts resolved against the insurance company, then a claim has been alleged which is covered by the policy and the insurer is obligated to defend. The most recent expression of the California Supreme Court requiring the court to construe ambiguities in favor of the insured and against the insurer is found in Arenson v. National Automobile & Cas. Ins. Co., 45 Cal.2d 81, 286 P.2d 816, 818, wherein it is stated:

[6, 7] "The understanding of an ordinary person is the standard used in construing a contract of insurance, and any ambiguity in language must be resolved against the insurer. Ransom v. Penn. Mut. Life Ins. Co., 43 Cal.2d 420, 424–425, 274 P.2d 633. It is also the rule that exceptions and exclusions are construed strictly against the insurer and liberally in favor of the insured. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424–425, 213 P. 42, 26 A.L.R. 123; Pacific Heating & Ventilating Co. v. Williamsburg [City Fire Ins. Co.], 158 Cal. 367, 369–370, 111 P. 4."

The judgment for defendant is reversed, and judgment should be entered by the trial court for plaintiff as prayed.

SWAIN, Acting P. J., and PATROSSO, J., concur.

46 Cal.2d 386

John CLARK, Plaintiff, Cross-Defendant, and Appellant,

v.

C. C. CUIN, Defendant, Cross-Complainant, and Respondent.

No. L. A. 23392.

Supreme Court of California.
In Bank.
April 10, 1956.

Action to quiet title. The Superior Court, Imperial County, L. J. Mouser, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Schauer, J., held that assignee of judgment creditor who had obtained judgment against debtor after execution sale, under a different judgment, of debtor's realty had a statutory right to redeem land from purchaser at execution sale.

Judgment affirmed.

Opinion, 286 P.2d 390, vacated.

1. Execution 🔑293

A lien of a judgment which is entered prior to date of execution sale under a different judgment qualifies the holder of the former judgment lien to be a redemptioner. West's Ann.Code Civ.Proc. § 701.

2. Execution 🔑293

A judgment creditor whose judgment is taken subsequent to execution sale of property under a different judgment may become a redemptioner, irrespective of whether interest remaining in judgment debtor after execution is regarded as legal or equitable. West's Ann.Code Civ.Proc. § 701.

3. Execution 🔑293

Assignee of judgment creditor who had obtained judgment against debtor after execution sale, under a different judgment, of debtor's realty had a statutory right to redeem land from purchaser at execution sale. West's Ann.Code Civ.Proc. §§ 701–705, 701, subd. 2, 702, 703, 704, 705.

4. Execution 🔑293

That purchaser at execution sale, after junior judgment creditor took statutory steps to effect a redemption, tendered judgment creditor the amount owing on creditor's judgment did not defeat creditor's rights as a redemptioner. West's Ann.Code Civ.Proc. §§ 701, 703.

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Dickenson, Sattinger & McKee, Dickenson & Sattinger and C. Wesley Dickenson, El Centro, for appellant.

Charles F. Sturdevant, Jr., El Centro, for respondent.

SCHAUER, Justice.

In this quiet-title action defendant cross-complained and judgment was rendered in his favor, quieting his title as against plaintiff to some 80 acres of land in Imperial County. Plaintiff appeals. We have concluded that plaintiff's various contentions are without merit and that the judgment should be affirmed.

According to the record, most of the facts are stipulated and the others appear to be undisputed. The land involved was acquired by the Imperial Horsemen's Association, a corporation (hereinafter called the association), in 1948. On November 18, 1949, the firm of Bratton and Sturges filed suit against the association and attached the land. Seven days later, on November 25, one Reams filed suit against the association and attached the same land. A judgment totaling $4,470.09 was entered in favor of Bratton and Sturges in May, 1950. A writ of execution was then issued on such judgment and the attached land was sold at execution sale on October 20, 1950, to plaintiff John Clark for the sum of $4,700. A certificate of sale was issued to Clark and recorded in Imperial County in November, 1950.

In April, 1951, a judgment in the sum of $679.63 was entered in favor of Reams and against the association, and an abstract thereof recorded in Imperial County.

On October 1, 1951, Reams assigned his judgment to the defendant herein, C. C. Cuin; the assignment recites a consideration of $650 paid to Reams. On October 11, 1951, Cuin, in order to effect a redemption of the land theretofore sold to Clark on the execution sale (see Code Civ.Proc. §§

701–705[1]), delivered to Constable Keating, the selling officer at the sale at which Clark purchased the land, the following documents: A certified copy of the judgment entered in favor of Reams; a copy of the assignment of such judgment to Cuin, verified by Cuin's affidavit and showing the amount then actually due on the judgment; and a notice of redemption and cashier's check in the sum of $5,076 payable to Keating as constable.[2]

Notice of redemption was thereafter served on the sheriff of Imperial County and was recorded on October 13, 1951. On October 11, 1951, Constable Keating executed and delivered to Cuin a certificate of redemption, which was recorded October 13, 1951. (See Code Civ.Proc. § 703.)

Within a day or two following delivery by Cuin to Constable Keating on October 11, 1951, of the various redemption documents, including the cashier's check, the constable telephoned to Clark and told him that Cuin "as a creditor had redeemed the property that had been sold to him under execution and that he had put up sufficient funds with me to pay the amount that Mr. Clark had paid, plus the legal rate of interest * * * [Clark answered in substance] that it was O.K. with him that all he wanted was his money, and I said, 'Well, I have it here for you, Mr. Clark, do you want me to mail it to you or do you want to come after it?' and I don't remember what Mr. Clark said * * * [but] the substance of the conversation [was] that he would be in El Centro and pick it up." Clark did not call at the constable's office for the money and "several days" later Constable Keating, after first writing a check payable to Clark on his constable's bank account, went to Clark's home in Calipatria and personally tendered the check to him. During the conversation Constable Keating told Clark that "I had the check and asked him if he cared to accept the check, and he said he did not, for me to see his attorney, and I asked him who his attorney was and he said, 'Wesley Dickenson.'" The constable also told Clark the amount of the check and showed it to him, and Clark made no objection to the amount of the check or to the fact that the tender was in the form of a check, and did not demand any specific sum of money. Clark himself confirmed the above testimony of Constable Keating.

Pursuant to Clark's request, Constable Keating thereafter, on "Probably the same day," offered the check to Clark's attorney, Dickenson, who "took the check and looked at it, took the check number off of it, made notes from it, then handed it back to me." At the time of trial of this quiet-title suit the constable was still holding the funds he had tendered to Clark.

On October 18, 1951, the law firm of Dickenson and Cline tendered to Cuin the sum of $707.38 in payment of the Reams judgment which had been assigned to Cuin, and Cuin refused the tender. On October 19, 1951, Dickenson and Cline deposited that amount to Cuin's bank account in El Centro (Imperial County), and a duplicate deposit slip was mailed to him on the same date. Cuin transferred the funds to the trust account of his attorneys. Thereafter the association (the Reams-Cuin judgment debtor) filed a motion to compel entry of satisfaction of the Reams (Cuin) judgment and in August, 1952, the superior court made its order directing the clerk to enter satisfaction of such judgment. On appeal by Cuin the order was affirmed. (Reams v. Imperial Horsemen's Ass'n (1953), 119 Cal. App.2d 714, 716, 260 P.2d 125.)

On December 24, 1951,[3] Constable Keating executed and delivered a deed to the land to Cuin; the deed was recorded the same date. Thereafter Cuin ascertained from the tax assessor's office the amount of unpaid taxes against the land and paid all of such taxes, commencing with those for the year (1948) in which the association had purchased the land and continuing to the year (1952) in which the present suit was tried; such taxes totaled some $986.88.

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[1] Section 702 of the Code of Civil Procedure permits redemption within twelve months after the execution sale.

[2] Plaintiff raises no question as to the correctness or sufficiency of the redemption steps, as taken by Cuin. (See Code Civ.Proc. §§ 702, 704, 705.)

[3] This was after expiration of the 60 days within which a second redemptioner may redeem from the first redemptioner. (See Code Civ.Proc. § 703.)

Plaintiff-appellant, as the purchaser at the execution sale, first contends that Cuin, as holder of a judgment rendered after the execution sale, was not entitled under the provisions of section 701 of the Code of Civil Procedure to redeem the land from plaintiff. That section provides that redemption may be made "by the following persons, or their successors in interest:

"1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

"2. A creditor having a lien by judgment or mortgage on the property sold, * * * subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

[1] Plaintiff concedes that the lien of a judgment which is entered prior to the date of execution sale under another or different judgment will qualify the holder of such judgment lien to be a redemptioner. He argues, however, that a purchaser at an execution sale receives "legal," rather than "equitable," title to the property sold, subject only to any statutory right of redemption, and that therefore the nature of the interest in the land which remains in the judgment debtor during the redemption period is not such as may be subjected to the lien of a judgment creditor who becomes such subsequent to the first execution sale. In other words, it is plaintiff's position that under subdivision 2 of section 701 the only judgment creditor who may qualify as a redemptioner is one whose judgment lien is subsequent in priority to the lien on which the property was sold, but whose lien came into existence at a time preceding the date of the execution sale, and that a creditor whose judgment is entered after the execution sale cannot by means of such judgment secure a lien on the property sold, so as to permit redemption under the terms of subdivision 2 of section 701, just quoted.

A similar issue was presented in the case of Stetson v. Sheehan (1921), 52 Cal.App. 353, 359–362, 200 P. 387, upon facts substantially parallel to those in the present case, and it was held, in a well reasoned and strongly documented opinion authored for the court by Mr. Justice Richards (later a distinguished member of this court) that the subsequent judgment creditor had the right to redeem the property from the exetion sale. There one Rich recovered judgment against a realty company and certain land of the judgment debtor was then sold under execution to one Jordan, who thereupon transferred his rights in the land to Stetson. Rich subsequently filed another action against the realty company, recovered a second judgment, and within the statutory time took the required steps to redeem the land from Stetson. After expiration of the time for any further redemption the sheriff, Sheehan, issued his sheriff's deed to Rich. Stetson sued both the sheriff and Rich, seeking to quiet title against the latter and to compel the sheriff to deed the land to Stetson. On appeal the judgment rendered in Stetson's favor by the trial court was reversed. The discussion of the contentions advanced, and the ruling on appeal, is in material substance as follows (at pages 359–362 of 52 Cal.App. at page 390 of 200 P.): "The remaining question * * * has reference to whatever rights, as a judgment creditor of the Moss Beach Realty Company, * * * Rich acquired by said recordation of the transcript [abstract] of his judgment in San Mateo County with relation to the property of said corporation in said county which had already been sold under execution to the predecessor in interest of the plaintiff herein. It is the contention of the respondent [Stetson] herein that said Rich did not become invested with any right to redeem said property from said prior execution sale by the doing of the aforesaid acts. This contention is based, in part at least, upon the respondent's construction of the provisions of section 674 of the Code of Civil Procedure having relation to the effect of the filing for record of the transcript of a judgment in a county wherein the judgment *creditor* [debtor] has an interest in real property. * * * The respondent * * * argues that the judgment so filed * * * becomes thereby a lien upon the real property of the judgment debtor which is 'owned by him at the time, or which he may afterward, and before the lien expires, acquire'; and that in the instant case the judgment debtor did not own the real estate to which it is sought to have said judgment lien attach, for the reason that all of the said judgment debtor's right, title, and interest in said property had been theretofore sold at said execution sale.

"We think that this is altogether too narrow a construction to place upon the provisions * * * of the code in so far as they purport to create a lien upon the real property or an interest therein of a judgment debtor. The same precise language is employed in section 671 of the Code of Civil Procedure, in relation generally to judgment liens; and to hold that a judgment creditor filing his transcript of judgment in another county did not thereby acquire a lien upon such of the real property of the judgment debtor as had theretofore been sold at an execution sale but which was still subject to redemption, would be to hold in effect that no judgment creditor having such subsequent judgment could acquire such a lien or become a redemptioner of property which had been subjected to such prior execution sale but which was still open to redemption. To so hold would be to nullify the provisions of subdivision 2 of section 701 relating to the redemption of real property from execution sale. * * * [T]he supreme court has in numerous cases expressly recognized the rights of judgment creditors becoming such after execution sales to redeem the property of the judgment debtor from such sales. The following are some of these cases: Bennett v. Wilson [1898], 122 Cal. 509, 55 P. 390; Id., [1901], 133 Cal. 379, 65 P. 880; Woods v. Kellerman [1906], 3 Cal.App. 422, 89 P. 358; McMillan v. Richards [1853], 9 Cal. 365. * * * It is our conclusion, therefore, that the junior judgment creditor Rich had the right to redeem the property in question * * * [and] a right to demand and receive from the sheriff the deed to the premises which was issued to him * * *." The judgment was reversed with directions to enter judgment in accordance with the holding. This court denied a hearing. (See Cole v. Rush (1955), 45 Cal.2d 345, 289 P. 2d 450.)

Subsequent cases recognizing and seemingly following, without expressly so holding, the rule so carefully elucidated in the Stetson case, are Corporation of America v. Eustace (1932), 217 Cal. 102, 105, 108, 17 P.2d 723 [subsequent judgment creditor held to have a right to redeem from prior mortgage foreclosure sale]; Lawler v. Gleason (1955), 130 Cal.App.2d 390, 397, 279 P.2d 70; and Allen v. McGee (1942), 54 Cal.App.2d 476, 484, 129 P.2d 143.

[2, 3] Helvey v. Bank of America (1941), 43 Cal.App.2d 532, 111 P.2d 390, relied upon by plaintiff, turns upon the effect of statutes concerning tax deeds to the state, and its attempted distinction of the Stetson case with the remark that (43 Cal. App.2d at page 537, 111 P.2d at page 393), "In that case, it is clear that the vested title was in the judgment debtor at the time of the recordation of the lien [abstract of the second judgment]," is untenable and of no persuasive effect. The real purport of the Stetson opinion, as is clear from the portions thereof quoted hereinabove, is that whether the interest remaining in the judgment debtor after the execution sale be regarded as "legal" or as "equitable" in nature,[4] it is nevertheless such an interest as may be reached by a subsequent judgment creditor who seeks to become a redemptioner under section 701.[5] Such holding is the firmly established law of this state.

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[4] See Noble v. Beach (1942), 21 Cal.2d 91, 130 P.2d 426; Shintaffer v. Bank of Italy (1932), 216 Cal. 243, 247, 13 P.2d 668; Elbert, Ltd. v. McKenna (1953), 116 Cal.App.2d 480, 483, 254 P.2d 107; Truelsen v. Nelson (1941), 42 Cal.App. 2d 750, 755, 109 P.2d 996.

[5] See also section 700 of the Code of Civil Procedure: "Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; and in

Furthermore, in view of the contentions made by plaintiff on this appeal, it may be added that the holding not only accords with the plain intent of the statute as evidenced by the language thereof, but also is fair and equitable in that it affords to creditors of the judgment debtor, who have recovered judgment based necessarily upon the establishment of a legally supportable claim against the debtor, rights to the debtor's interest in property sold under execution which judgment creditor rights are at least on a par with those of purchasers who acquired the property at a distress, i. e., execution, sale. It follows that Cuin, as the junior judgment creditor of the association, had the statutory right to redeem the land from plaintiff, the execution sale purchaser. Various other cases also relied upon by plaintiff involve factual situations differing to such an extent from the present case that no useful purpose would be served by discussing them. (See Robinson v. Thornton (1893), 102 Cal. 675, 34 P. 120; People ex rel. Ford v. Irwin (1859), 14 Cal. 428; Haskins v. Certified Escrow & Mtg. Co. (1950), 96 Cal.App.2d 688, 216 P.2d 90.)

[4] Plaintiff next contends that even if Cuin qualified as a redemptioner on the date (October 11, 1951), on which he took the statutory steps to effect a redemption, nevertheless the subsequent tender to Cuin (on October 18, 1951), of the amount owing on the Reams judgment, and the entry of satisfaction of such judgment, in some fashion operated to retroactively dissolve away Cuin's rights as a redemptioner. Such contention is without merit. The most that can be said of the result of such payment of the Reams judgment (seemingly carried out on behalf of the association rather than of the execution sale purchaser, plaintiff herein, although both the association and plaintiff are advised by the same counsel), is that the amount required to be paid to Cuin by a second redemptioner would be to that extent diminished. (See Code Civ. Proc. § 703; Lawler v. Gleason (1955), supra, 130 Cal.App.2d 390, 399, 279 P.2d 70; Allen v. McGee (1942), supra, 54 Cal.App.2d 476, 485, 129 P.2d 143.) As already above indicated, Cuin paid out $5,076 to effect redemption from Clark, as well as some $986 in taxes levied against the property, and his rights cannot, either under the statute or equitably, be defeated by the mere tender or payment of only the amount of the judgment lien ($707.38 total) held by him at the time he redeemed. Under the terms of section 701 either the association or plaintiff could have redeemed from Cuin by following the prescribed statutory steps, and no theory is suggested for permitting the statute to be circumvented in the manner here attempted by plaintiff Clark.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

46 Cal.2d 375

Christine J. ALBERTSON, also known as Mrs. Lee Albertson, Plaintiff and Appellant,

v.

Joseph RABOFF, Defendant and Respondent.

L. A. 23159.

Supreme Court of California.
In Bank.
April 10, 1956.
As Modified May 1, 1956.

Action for disparagement of title and malicious prosecution. The Superior Court of Los Angeles County, Louis H. Burke, J., rendered judgment of dismissal and plaintiff appealed. The Supreme Court, Traynor, J., held that recordation of lis pendens notice was privileged but complaint

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case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor on or at any time after the day the attachment was levied upon such property."

stated cause of action for malicious prosecution.

Reversed.

Opinion, 287 P.2d 145, vacated.

1. Judgment ⚷217

Portion of judgment which made award of money to plaintiff was severable from portion which determined that plaintiff had no interest in or lien upon defendant's realty, and where no appeal was taken from latter part of the judgment, it became final sixty days after date thereof. West's Ann. Rules on Appeal, rule 2(a).

2. Abatement and Revival ⚷16

A complaint for disparagement of title, based on defendant's prior action claiming interest in plaintiff's realty and recording notice of lis pendens, was not premature where filed after time for appeal had expired as to that portion of judgment in prior action which determined that defendant had no interest in plaintiff's realty, though plaintiff had appealed from that portion of such judgment which made a money award to defendant. West's Ann.Rules on Appeal, rule 2(a).

3. Libel and Slander ⚷136

Though gravamen of action for disparagement of title is different from that of action for personal defamation, substantially the same privileges are recognized in relation to both torts in absence of statute.

4. Libel and Slander ⚷136

The rule that publications made in course of judicial proceeding are absolutely privileged is applicable to action for disparagement of title. West's Ann.Civ.Code, § 47, and subd. 2; West's Ann.Code Civ. Proc. § 409.

5. Lis Pendens ⚷18

The sole purpose of recording a notice of lis pendens is to secure the same result as actual notice by giving constructive notice of pendency of proceeding. West's Ann.Code Civ.Proc. §§ 409, 1908, subd. 2.

6. Lis Pendens ⚷22(1)

Notice of lis pendens is purely incidental to action wherein it is filed, refers specifically to such action and has no existence apart from it. West's Ann.Code Civ.Proc. § 1908, subd. 2.

7. Libel and Slander ⚷136

The recordation of a notice of lis pendens is in effect a republication of the pleadings and hence is clothed with absolute privilege in action for disparagement of title. West's Ann.Code Civ.Proc. §§ 409, 1908, subd. 2.

8. Libel and Slander ⚷136

In action for disparagement of title, absolute privilege applies to any publication, such as recordation of notice of lis pendens, that is required or permitted by law in course of judicial proceeding to achieve objects of the litigation, even though publication is made outside the courtroom and no function of court or its officers is invoked. West's Ann.Code Civ. Proc. §§ 409, 1908, subd. 2.

9. Libel and Slander ⚷38(1)

The absolute privilege of publications in judicial proceedings is not limited to pleadings, oral or written evidence, or publications in open court or in briefs or affidavits, but attaches if publication has a reasonable relation to the action and is permitted by law. West's Ann.Civ.Code, § 47, and subd. 2; West's Ann.Code Civ.Proc. § 409.

10. Malicious Prosecution ⚷39

Absolute privilege of communication for purposes of defamation action does not prevent it being an element of action for malicious prosecution in a proper case. West's Ann.Civ.Code, § 47, and subd. 2; West's Ann.Code Civ.Proc. § 409.

11. Malicious Prosecution ⚷36

Where portion only of judgment in former action was appealed from, unappealed from portion became final and constituted "termination" of that separable part of proceeding for purposes of action for malicious prosecution.

See publication Words and Phrases, for other judicial constructions and definitions of "Termination".

12. Malicious Prosecution ⚷49

Since "probable cause" requires reasonable belief in validity of claim asserted, and allegations that action was prosecuted with knowledge of falsity of claim are a sufficient statement, in action for malicious prosecution, of lack of probable cause.

13. Malicious Prosecution ⚷50

In action for malicious prosecution, allegations that defendant asserted claim to property with knowledge of its falsity sufficiently pleaded malice, in addition to express allegation of malice.

14. Malicious Prosecution ⚷27

"Malice" required in action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when proceedings are instituted primarily for an improper purpose.

See publication Words and Phrases, for other judicial constructions and definitions of "Malice".

15. Appeal and Error ⚷1201(6)

Where judgment dismissing action for malicious prosecution was reversed, plaintiff would have opportunity to amend complaint to allege expressly the malicious purpose of defendant in claiming interest in her property.

16. Judgment ⚷728

Where money judgment against wife was based on findings that wife was personally liable for balance of original loan, and was affirmed on theory that wife had entered into binding contract to discharge husband's debt, findings with respect to intent to create a lien on wife's property by I.O.U. were unnecessary to the judgment, and could not be attacked by wife where she was prevailing party as to cause of action based on I.O.U., and hence were not res judicata in wife's action for malicious prosecution on theory that they established probable cause to assert claim based on I.O.U.

17. Malicious Prosecution ⚷25(3)

Even if defendant in malicious prosecution action had probable cause to assert, in former action, claim to plaintiff's wife property based on I.O.U., recovery for malicious prosecution was not defeated where former action also asserted claim based on theory of fraudulent conveyance, with respect to which there was no finding as to husband's insolvency.

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Charles Murstein and Albert E. Wheatcroft, Los Angeles, for appellant.

Paul R. Hutchinson and C. L. Gardner, Los Angeles, for respondent.

TRAYNOR, Justice.

In 1948 defendant brought an action against plaintiff in which he sought a money judgment and either a lien on real property owned by plaintiff or a judgment declaring that her title was obtained from her husband without consideration and in fraud of creditors. Defendant recorded a notice of pendency of this action in the county recorder's office of the county in which the real property is located. After a trial of the action, judgment was entered in favor of plaintiff on defendant's claims of a lien on or an interest in plaintiff's real property. Defendant did not appeal. Plaintiff appealed only from that part of the judgment awarding money to defendant, and that part of the judgment was affirmed. Raboff v. Albertson, 122 Cal.App.2d 555, 265 P.2d 139.

In the present action, plaintiff alleges that defendant knew at the time of filing his complaint in the prior action that he had no right to a lien on or an interest in her real property, that he nevertheless knowingly and maliciously asserted false claims thereto, and that by recording a notice of *lis pendens* he disparaged her title to her damage. The court sustained defendant's objection to the introduction of evidence on the ground that the complaint did not state a cause of action, see Perry v. Futch, 119 Cal.App.2d 556, 559, 259 P.2d 971, and entered a judgment of dismissal. Plaintiff appeals.

[1,2] Defendant contends that plaintiff's complaint herein was filed while her appeal from the judgment in the prior action was still pending and was therefore premature. In the prior action plaintiff appealed only from the part of the judgment that made an award of money to de-

fendant. That part of the judgment was severable from the part that determined that defendant had no interest in or right to a lien upon plaintiff's real property. No appeal was taken from the latter part of the judgment, and it became final 60 days after the date thereof. Rules on Appeal, rule 2(a); American Enterprise, Inc. v. Van Winkle, 39 Cal.2d 210, 216, 246 P.2d 935; G. Ganahl Lbr. Co. v. Weinsveig, 168 Cal. 664, 667, 143 P. 1025; Whalen v. Smith, 163 Cal. 360, 362–363, 125 P. 904. Plaintiff's complaint herein was filed after the time for appeal had expired and was therefore not premature.

[3, 4] Defendant contends that the recordation of a notice of *lis pendens* is absolutely privileged and that therefore no cause of action for disparagement of title is stated. Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, Coley v. Hecker, 206 Cal. 22, 27, 272 P. 1045; Smith v. Stuthman, 79 Cal. App.2d 708, 709, 181 P.2d 123, substantially the same privileges are recognized in relation to both torts in the absence of statute. See Rest., Torts, §§ 585 et seq., 635 et seq.; Prosser, Torts, 2d Ed., 767. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code. Thus, subdivision 2 of section 47 states the long-established rule that publications made in the course of a judicial proceeding are absolutely privileged, Gosewisch v. Doran, 161 Cal. 511, 513–515, 119 P. 656; Donnell v. Linforth, 11 Cal.App.2d 25, 28–29, 52 P.2d 937; Moore v. United States Fid. & Guaranty Co., 122 Cal.App. 205, 210, 9 P.2d 562; Rest., Torts, §§ 635–639, and the question presented therefore is whether a notice of *lis pendens* recorded as authorized by section 409 of the Code of Civil Procedure[1] is a publication in the course of a judicial proceeding.

[5–7] Any one with actual notice of the pendency of the proceeding who acquires an interest in the property takes subject to any judgment that may be rendered therein. Code Civ.Proc. § 1908(2). The sole purpose of recording a notice of *lis pendens* is to secure the same result by giving constructive notice of the pendency of the proceeding. Its effectiveness depends entirely on the action of which it is a part and to which it calls attention. It "is purely incidental to the action wherein it is filed. It refers specifically to such action, and has no existence apart from it." Garcia v. Pinhero, 22 Cal.App.2d 194, 197, 70 P.2d 675, 676. Since "the effect of a *lis pendens* is to give constructive notice of all the facts apparent upon the face of the pleadings, and of those other facts of which the facts so stated necessarily put a purchaser on inquiry * * *." Harris v. Whittier Building & Loan Association, 18 Cal.App.2d 260, 266, 63 P.2d 840, 842, the recordation of a notice of *lis pendens* is in effect a republication of the pleadings. The disparagement of title arises, therefore, from the recordation of the notice of *lis pendens* as well as from the pleadings. The publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of *lis pendens* is similarly privileged.

The recording of such a notice is expressly authorized by section 409 of the Code of Civil Procedure, which not only identifies the persons who may record the notice and specifies the place of recordation and the time it may be made, but specifies that it may be done "in an action." The Legislature apparently regarded the recordation authorized in section 409 of the Code of Civil Procedure as being made "in [a] judicial proceeding" within the meaning of section 47 of the Civil Code, for any publication "in an action" is unquestionably "in [a] judicial proceeding." We do not rest our opinion, however, on the narrow ground that the word "in" is used in both sections or that the use of that word is of decisive significance, but on the obvious purpose of section 47 to afford litigants the utmost freedom of access to the courts to secure and defend their rights without fear of being harassed by actions for defamation. See Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum.L.Rev. 463, 469. It would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets any one know that he has brought it, see Thompson v. White, 70 Cal. 135, 136, 11 P. 564, particularly when he is expressly authorized by statute to let all the world know that he has brought it. Furthermore, subdivision 4 of section 47 of the Civil Code extends the privilege to reports of judicial proceedings in public journals. It cannot reasonably be held that the Legislature meant to accord such journals a greater immunity for giving actual notice of a proceeding to their numerous readers than that accorded litigants for giving the constructive notice thereof that the Legislature has authorized them to give.

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[1] "In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

Relying on West Investment Co. v. Moorhead, 120 Cal.App.2d 837, 840–841, 262 P.2d 322, 324, 39 A.L.R.2d 833, plaintiff contends that the recordation of a notice of *lis pendens* is merely a "private act undertaken dehors the judicial proceeding for the purpose of calling to the attention of all the world the pendency of litigation affecting the designated real property" and is not "in" a judicial proceeding for "[N]o function of the court or its officers is invoked; no machinery associated with the judicial process is set in motion." By stressing the word "in" this contention would limit the privilege to the pleadings and the subsequent communications of the judge, counsel, jurors, parties, and witnesses in the actual course of the proceeding. Since we do not believe that the privilege is so limited, West Investment Co. v. Moorhead, supra, is disapproved.

[8, 9] It is our opinion that the privilege applies to any publication, such as the recordation of a notice of *lis pendens,* that is required, e. g., Code Civ.Proc. § 749, or permitted, e. g., Code Civ.Proc. § 409, by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked. See 53 C.J.S., Libel and Slander, § 104, p. 168. Thus, it is not limited to the pleadings, the oral or written evidence, to publications in open court or in briefs or affidavits. If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches. See Rest., Torts, § 587; Youmans v. Smith, 153 N.Y. 214, 220, 47 N.E. 265; Kraushaar v. Lavin, Sup., 39 N.Y.S.2d 880, 882–883; Zirn v. Cullom, 187 Misc. 241, 63 N.Y.S.2d 439, 440–441; Inselberg v. Trosty, 190 Misc. 507, 77 N.Y.S.2d 457, 458; cf. 39 A.L.R.2d 840–861. It therefore attaches to the recordation of a notice of *lis pendens,* for such a publication is permitted by law, and like other documents that may be filed in an action, it has a reasonable relation thereto and it is immaterial that it is recorded with the County Recorder instead of being filed with the County Clerk.

Gudger v. Manton, 21 Cal.2d 537, 134 P.2d 217, on which the court in West Investment Co. v. Moorhead, supra, 120 Cal.App.2d 837, 262 P.2d 322, relied, involved an action for slander of title for the wrongful recordation and levy of a writ of execution against the property of a person who was not a party to the action. The original judgment was obtained against the wife for a premarital tort. The writ of execution, however, was recorded and levied against her husband's separate property and had no reasonable relation to the action against the wife. The statement in the opinion in that case that "The levy of a writ of execution is not an act in the course of a judicial proceeding", 21 Cal.2d at page 545, 134 P.2d at page 222, was unnecessary to the decision therein and is disapproved.

Coley v. Hecker, 206 Cal. 22, 272 P. 1045, on which the court in the West Investment Co. case, supra, also relied, involved an action for slander of title in which the plaintiff alleged that after he had taken an appeal from the judgment of the San Francisco Superior Court and filed a stay bond approved by the court, defendant maliciously filed an abstract of judgment with the County Recorder of San Joaquin County for the purpose of slandering the title of plaintiff's lands in that county. The defendant sought a change of venue, but the court held that slander of title is an injury to real property and the venue of an action therefor was in the county where the property is situated. Thus, the issue in that case was simply one of venue and it was unnecessary to consider the question of privilege.

[10] Plaintiff contends that her complaint states a cause of action for malicious prosecution. It may be noted at the outset that the fact a communication may be absolutely privileged for the purposes of a defamation action does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts that underlies the absolute privilege applicable in defamation actions is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied. See Jaffe v. Stone, 18 Cal.2d 146, 159–160, 114 P.2d 335, 135 A.L.R. 775; Metzenbaum v. Metzenbaum, 121 Cal.App.2d 64, 68, 262 P.2d 596; 3 Restatement, Torts, p. 380, Introductory note; Veeder, Absolute Immunity in Defamation; Judicial Proceedings, 9 Columb.L.Rev. 463, 470.

[11] As indicated above, that part of the judgment in the former action that determined that defendant had no interest in or a right to a lien upon plaintiff's real property is now final and constitutes a termination of that separable part of the proceeding favorable to plaintiff.

Plaintiff also alleges that "defendant herein well knew of the fact that he * * was making unfounded and untrue statements as to the transfer and conveyance of said real property or any part or portion thereof, but that thereafter and notwithstanding the notice by plaintiff's attorney hereinabove mentioned, the defendant persisted in filing amended complaints * *, in all of which, he, the said defendant, continued to assert claims falsely and maliciously in and to the aforementioned real property," and that "at the times herein mentioned, the defendant herein well knew that he * * * had no right, title, estate or interest in or to the aforementioned real property or any part or portion thereof. * * *"

[12] Since probable cause requires a reasonable belief in the validity of the claim asserted, Franzen v. Shenk, 192 Cal. 572, 578, 221 P. 932; Vann v. McCreary, 77 Cal. 434, 19 P. 826; see Restatement, Torts, § 662, comment c, § 675, comment d, the allegations that the action was prosecuted with knowledge of the falsity of the claim are a sufficient statement of lack of probable cause. See Pulvermacher v. Los Angeles Co-Ordinating Committee for Aid to Jewish Refugees, 61 Cal.App.2d 704, 707, 143 P.2d 974; United States Fidelity & Guaranty Co. v. Miller, 218 Ala. 158, 117 So. 668, 669; Spaids v. Barrett, 57 Ill. 289, 294–295; Annotation, 14 A.L.R.2d 264, 298–299.

[13–15] The requirement of malice is also sufficiently pleaded. Not only is the existence of malice expressly alleged, but the allegations that a claim to the property was asserted with knowledge of its falsity also meets that requirement. The malice required in an action for malicious prosecution is not limited to actual hostility or ill will toward plaintiff but exists when the proceedings are instituted primarily for an improper purpose. See Singleton v. Perry, 45 Cal.2d 489, 289 P.2d 794; Prosser on Torts, 2d Ed., p. 666; cf., Brewer v. Second Baptist Church, 32 Cal.2d 791, 797, 197 P.2d 713. It has been pointed out that the "principal situations in which the civil proceedings are initiated for an improper purpose are those in which (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." Restatement, Torts, § 676, comment b; see also § 668, comment e. Clearly a person who attempts to establish a claim to property knowing of its falsity can only be motivated by an improper purpose. Plaintiff contends, also, that she has in effect alleged that defendant's purpose in falsely asserting an interest in the property and filing the *lis pendens* was to secure the benefit of an attachment to secure the payment of the money judgment without incurring the burdens thereof. There are no express allegations of this purpose, however, and it is unnecessary to decide whether evidence of such a purpose could be offered under a general allegation of a malicious motive. Since the judgment must be reversed, plaintiff will have an opportunity if she so wishes to amend her complaint expressly to allege that defendant's purpose in falsely claiming an interest in her property was to enable him improperly to secure the benefits of a *lis pendens* pending his securing of the money judgment.

Plaintiff incorporated by reference and made a part of her complaint the findings of fact and conclusions of law and the judgment in the former proceeding. Defendant contends that these findings of fact conclusively establish that he had probable cause for claiming an interest in plaintiff's property and that therefore the allegations of the complaint to the contrary must be disregarded. The findings in the former action recite that defendant lent plaintiff's husband $7,500 to enable him to purchase the real property involved in this action. Title was taken by plaintiff and her husband as joint tenants, and plaintiff succeeded to his interest on his death about sixteen months later. In the meantime defendant asked plaintiff's husband to give him some evidence of the loan, and the latter delivered an instrument stating: "I O U $7,500.00. Lee Albertson. August 5th, 1946 on my house." It was the intent and understanding of defendant and plaintiff's husband that the purpose of this writing was to encumber the property with a lien in plaintiff's favor to secure the payment of the loan. The trial court found, however, that "said I.O.U. is insufficient to create a lien on said real property."

In addition to asserting an interest in the property based on the I.O.U., defendant alleged that the original creation of the joint tenancy constituted a fraud on plaintiff's husband's creditors on the ground that plaintiff's husband was insolvent at that time. The trial court found that the creation of the joint tenancy was not an assignment of property by plaintiff's husband within the meaning of the law governing fraudulent conveyances and therefore refrained from finding whether or not plaintiff's husband was insolvent at the time the joint tenancy was created.

The money judgment against plaintiff was based on findings that plaintiff was personally liable for the balance of the original loan and was affirmed on the theory that she had entered into a binding contract with defendant to discharge her husband's debt. Raboff v. Albertson, 122 Cal. App.2d 555, 265 P.2d 139.

[16] It may be conceded that the findings with respect to the intent of defendant and plaintiff's husband to create a lien on the property by the I.O.U. would be sufficient to establish probable cause for the institution of proceedings to enforce the lien and establish defendant's good faith with respect thereto, if they constitute a binding adjudication of the facts found. With respect to defendant's claim of a lien based on the I.O.U., however, the only finding necessary to sustain the trial court's judgment adverse to defendant was the finding that the writing was insufficient to create a lien. The findings with respect to the intent and understanding of defendant and plaintiff's husband were unnecessary to the judgment, and since defendant was the

prevailing party as to the cause of action based on the I.O.U., she could not have attacked the unnecessary findings adverse to her on appeal. Under these circumstances the findings are not res judicata, Chapman v. Hughes, 134 Cal. 641, 654–655, 58 P. 298, 60 P. 974, 66 P. 982; Natural Soda Products Co. v. City of Los Angeles, 109 Cal.App.2d 440, 445–446, 240 P.2d 993; see 3 Witkin, California Procedure, p. 1953, and cannot overcome plaintiff's express allegation that defendant "well knew that he * * * had no right, title, estate or interest in or to the aforementioned real property. * * *"

[17] Even if it were assumed, however, that defendant had probable cause to assert a claim to the property based on the I.O.U., it would not follow that plaintiff has failed to state a cause of action. In the former action defendant also asserted a claim to the property based on the theory of a fraudulent conveyance, and with respect to this cause of action there was no finding whether or not plaintiff's husband was insolvent at the time the joint tenancy was created. Thus, there is nothing in the findings in the former action contrary to plaintiff's allegations that defendant asserted a claim based on an alleged fraudulent conveyance with knowledge of the falsity of the facts necessary to sustain it. In Singleton v. Perry, 45 Cal.2d 489, 289 P.2d 794, 800, we held that a defendant cannot escape liability for the malicious prosecution of an unjustified charge by joining with it a justified charge, and that in such a case, the plaintiff does not have the burden of "showing that her damage was specifically attributable to the malicious prosecution as opposed to the prosecution which * * * was not malicious."

Since the complaint states a cause of action for malicious prosecution it was error to sustain defendant's objection to the introduction of evidence.

The judgment is reversed. Each side to bear its own costs on appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE, and McCOMB, JJ., concur.

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140 Cal.App.2d 728

Aubrey R. MILLER, Plaintiff and Appellant,

v.

F. M. W. DRILLING CO., a copartnership, Frank Frost, James McKay, and Marion J. Weller, Partners, associated in business under the common name and style of F. M. W. Drilling Co., Carl C. Weller, an individual, First Doe, Second Doe, Third Doe, and Black & White Company, a corporation, Defendants and Respondents.

Civ. 5305.

District Court of Appeal, Fourth District, California.

April 13, 1956.

Proceeding upon motion by nonresident defendants to vacate and set aside default judgment against partnership of which the moving defendants were partners, and upon their motion to recall execution. The Superior Court, Fresno County, Edward L. Kellas, J., granted the relief sought and an appeal was taken. The District Court of Appeal, Barnard, P. J., held that, under circumstances of the case, the trial court did not abuse its discretion in granting the relief sought.

Affirmed.

1. Judgment ⚷139

Vacating of default judgment is a matter in which trial court has a wide discretion, which should be exercised in interest of seeing that justice is done, and this is particularly true where a prompt application for relief is made. West's Ann.Code Civ.Proc. § 473.

2. Appeal and Error ⚷957(1)

Trial court's action in granting relief from default judgment may be disturbed only where an abuse of discretion clearly appears. West's Ann.Code Civ.Proc. § 473.

3. Judgment ⚷138(3)

Where two members of partnership resided out of state and were not served with summons and had no notice of action pending against the partnership, and where default judgment included recovery for, inter alia, alleged reasonable value of materials and services, and where the two partners moved promptly to set the judgment aside, trial court did not abuse discretion in setting it aside and recalling execution. West's Ann.Code Civ.Proc. § 473.

4. Judgment ⚷131

Authority of clerk to enter judgment on default is limited to cases where there is a contract and where it appears from contract itself that definite or liquidated amount of money is to be paid, or where such sum can be ascertained by merely mathematical computation, and clerk has no such power where taking of any evidence is necessary. West's Ann.Code Civ.Proc. § 585.

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Donald R. Franson, Fresno, for appellant.

A. W. Carlson, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an appeal from an order granting a motion to vacate and set aside a default judgment as against the defendants F. M. W. Drilling Co., a partnership, and Frank Frost and James McKay as partners, and granting a motion to recall an execution.

The complaint in the action was filed on December 28, 1954. It alleged that Frank Frost, James McKay and Marion J. Weller were partners doing business as F. M. W. Drilling Co.; that Carl C. Weller was the manager of this partnership; that on June 1, 1954, plaintiff was employed on behalf of the partnership by Carl C. Weller to construct a certain oil drilling derrick; that the partnership and each of the partners thus promised to pay the plaintiff $500 per month as wages; that he worked 4½ months; and that a balance of $1,650 as such wages was unpaid and due to him. It was further alleged that the defendants hired from the plaintiff a 300 Amp. arc welder which was used for 1,200 hours for their benefit; that $3 per hour is a reasonable rental for this use, and $3,600 became due to the plaintiff as such rental; that defendants hired from the plaintiff a truck, and $300 is a reasonable sum for the hire of said truck; that plaintiff also furnished to the defendants various materials used in the construction of said rig; that the defendants promised to pay what said materials were reasonably worth at the time they were furnished; and that said materials were then reasonably worth $1,700. The prayer was for $7,250, with interest at 6% from October 16, 1954.

Summons was served on Marion J. Weller in Fresno County on December 29, 1954. On December 30, 1954, counsel for plaintiff wrote to Marion J. Weller stating that he was mailing the complaint and summons to Frost and McKay (at what address is not stated), and asking her to contact them and advise them that she had been served and that the partnership was being held responsible, and stating that this mailing, "together with notice from you, a copartner", will be sufficient to put Frost and McKay on notice of the action. The default of the F. M. W. Drilling Co., a copartnership, and Marion J. Weller was entered by the clerk on January 14, 1955. Also on January 14, the clerk entered a default judgment adjudging and decreeing that the plaintiff recover from the F. M. W. Drilling Co., a copartnership, and Frank Frost, James McKay and Marion J. Weller as copartners therein, the sum of $7,358.75. This was the amount sued for plus interest at 6% to date of judgment.

On January 21, 1955, the F. M. W. Drilling Co., Frank Frost and J. C. McKay filed notice of a motion to relieve them from default and to set aside and vacate the judgment as to them, on the ground of inadvertence, surprise or excusable neglect. A notice of motion to quash and recall the execution which had been issued was filed on January 24. On January 28 an answer was filed denying the material allegations of the complaint, and particularly those relating to the amount of services and materials furnished and the reasonable value of the same. Affidavits were filed in support of the motions alleging, among other things, that neither Frank Frost nor James McKay had been personally served with summons; that they were residents of the State of Nevada and absent from the county of Fresno; that they had no notice that this action had been filed until after the default judgment was entered and the writ of execution issued; that they first learned on January 19, 1955, that this judgment by default had been taken against them; and that they immediately retained counsel to take proceedings to have said default judgment vacated. No counteraffidavits were filed and no oral evidence was received at the hearing on these motions which was later held. The court entered an order granting the motions, and the plaintiff has appealed from that order.

[1–3] It is conceded by both parties that personal service on one member of a partnership is effective to bind the partnership and the other partners. The appellant contends that it thus appears that a default judgment was properly entered; that a party moving to set aside a default judgment must show a reasonable excuse for his failure to appear, alleging facts which show the existence of surprise or excusable neglect; that since one of the partners was personally served in Fresno County the fact that the other partners had no notice of the action until after the default judgment was entered is not a sufficient showing; and that it follows that the respondents failed to make a sufficient showing under the provisions of Section 473 of the Code of Civil Procedure. It appears from the affidavits that the partners who were not personally served were residents of Nevada, that they had no knowledge of this action until January 19, and that they acted with great promptness as soon as they knew of the action. It also appears that they could well have been lulled into a sense of security by the letter written to Mrs. Weller, and the receipt of summons out of the county. The court also had before it the answer from which it appeared quite probable that an unjust judgment had been entered, at least with respect to its amount. It is well settled that the granting of relief of this nature is a matter in which the trial court has a wide discretion, that this discretion should be exercised in the interest of seeing that justice is done, that this is particularly true where a prompt application for relief is made, and that the court's action will be disturbed only where an abuse of discretion clearly appears. Downing v. Klondike Min., etc., Co., 165 Cal. 786, 134 P. 970; Berri v. Rogero, 168 Cal. 736, 145 P. 95; County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154. Under the circumstances here appearing, it cannot be held that an abuse of discretion clearly appears.

[4] A further consideration is that a large part of the amounts prayed for, and reflected in the default judgment, rested on allegations as to the reasonable value of the equipment leased and materials furnished. The authority of a clerk to enter a judgment is found in Section 585 of the Code of Civil Procedure. This authority is limited to cases where there is a contract and where it appears from the contract itself that a definite or liquidated sum of money is to be paid, or where such sum can be ascertained by mere mathematical computation. No agreement of that nature here appeared, and the allegations of reasonable value presented questions of fact. The clerk has no such power where the taking of any evidence is necessary. It has been held that where the reasonable value of services or goods must be determined evidence is required, and that in such a case the clerk is not authorized to enter a default judgment. Landwehr v. Gillette, 174 Cal. 654, 163 P. 1018; Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662. It rather clearly appears that the court did not abuse its discretion in making the order here appealed from.

The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

140 Cal.App.2d 609

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
William C. PAYNE, Defendant and Appellant.
Cr. 5491.

District Court of Appeal, Second District, Division 1, California.
April 9, 1956.
Hearing Denied May 9, 1956.

Defendant was prosecuted for robbery and attempted robbery. Judgment of conviction in the Superior Court, Los Angeles County, Clement D. Nye, J., and from an order denying a petition for writ of error coram nobis the defendant appealed. The District Court of Appeal, Fourt, J., held that where defendant presented nothing to sustain a court in ordering the issuance of a writ of error coram nobis and the alleged grounds were not within the limited scope of the writ and no affidavits or other evidence was offered in support of the application, the application was properly denied.

Order affirmed.

1. Criminal Law ⚷1081

Where defendant filed a petition for writ of error coram nobis which came on for hearing on June 8, 1955 and on that date was denied and on July 6 there was filed a notice of appeal dated July 30, appeal was subject to dismissal on the ground that there was no compliance with the Rules. West's Ann.Rules on Appeal, rule 31.

2. Criminal Law ⚷997(15)

A petition for writ of error coram nobis places burden of proof to overcome a strong presumption in favor of the validity of the judgment on the petitioner, and it requires the production of strong and convincing evidence, and a mere naked allegation that a constitutional right has been invaded will not suffice.

3. Criminal Law ⚷997(6)

The office of a "writ of error coram nobis" is to bring to the attention of the trial court errors of fact which without negligence of the defendant, were not presented to the court at time of trial.

See publication Words and Phrases, for other judicial constructions and definitions of "Writ of Error Coram Nobis".

4. Criminal Law ⚷997(2)

Relief in the nature of a petition for writ of error coram nobis does not lie for errors, which could be advanced on motions for new trial or on appeal.

5. Criminal Law ⚷997(6)

Writ of error coram nobis is a limited writ aimed at reaching errors of fact outside of the record and available only where no other remedies exist.

6. Criminal Law ⚷997(2)

Where remedy of motion for a new trial or appeal exists, the writ of error coram nobis is not available and cannot be used to serve the purpose of an appeal, when such remedy was lost through failure to invoke it in time, even though failure occurred without neglect of the petitioner.

7. Criminal Law ⚷1147

Where there are grounds for sustaining the trial court on the ruling on the petition for writ of error coram nobis, its decision will not be reversed on appeal except where there is evidence of an abuse of discretion.

8. Criminal Law ⚷997(16)

Where defendant presented nothing to sustain a court in ordering the issuance of a writ of error coram nobis, and the alleged grounds were not within the limited scope of the writ and no affidavits or other evidence was offered in support of the application, the application was properly denied.

William C. Payne, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal by the defendant from an order of the Superior Court, denying his petition for writ of error coram nobis.

Defendant was charged in an information with nine counts of robbery and attempted robbery. The public defender was appointed to represent defendant; later, however, the defendant stated that he preferred to represent himself and counsel was dismissed. After a trial by jury, defendant was found guilty of eight counts of robbery and one count of attempted robbery, the jury disagreeing on one count of robbery which said count was later dismissed. The jury found that in each instance it was robbery in the first degree and that the defendant was armed at the time of the commission of the robberies.

A motion for a new trial was made and denied. Defendant was sentenced to the state prison. Judgment was entered July 6, 1954. A purported appeal was taken from the judgment which appeal was subsequently dismissed for good cause on December 15, 1954. Remittitur issued and was filed in the Superior Court on January 18, 1955.

[1] On June 6, 1955, defendant filed what is denominated "Petition for a writ of error coram nobis: and the order to show cause why the writ should not be granted immediately". The petition came on for hearing on June 8, 1955, and on that date was denied. On July 6, 1955, there was filed a Notice of Appeal which was dated June 30, 1955. It is at once apparent that the appeal is subject to dismissal on the ground that there was no compliance with the requirements of Rule 31 of the Rules on Appeal.

However, we have seen fit to dispose of the matter on its merits, rather than on the ground of failure to comply with the Rules on Appeal.

Petitioner contends that the judgment is barred by "intellectual honesty", that it is repugnant to the Federal and State Constitutions. Further, "that he was entrapped by trickery, search and seizures contrary to the Fourth Amendment of the United States Constitution"; that "he was convicted on false hearsay testimony coerced and conspired against him"; that there was an unlawful breaking into his home and that an attempt was made to force a confession out of him; that the prosecuting attorney made prejudicial remarks to the jury; that his attorney was incompetent and should have presented certain facts in open court; that the trial was dominated by passion and prejudice in an "atmosphere of hysteria" and that he was denied the right to appeal.

We have carefully gone over the record in this matter and find that the charges and contentions as made by the appellant are completely unsupported.

As was stated in People v. Stapleton, 139 Cal.App.2d 512, 293 P.2d 793, 794:

[2–4] "A petition for writ of error *coram nobis* places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires the production of strong and convincing evidence. A mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of the specific facts relied upon and not merely state conclusions as to the nature and effect of such facts. People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330.

"In People v. Martinelli, 118 Cal.App.2d 94, 257 P.2d 37, it was held that the trial court, in such a proceeding, is not required to accept the face value of the allegations of the petition, unsupported by affidavits or other evidence, even though the petition is verified and uncontradicted.

"The office of the writ is to bring to the attention of the trial court errors of fact which, without negligence on the part of the defendant, were not presented to the court at the time of the trial. People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505.

"It is well established that relief in the nature of a petition for writ of error *coram nobis* does not lie for errors which could be advanced on motions for new trial or on appeal. People v. Adamson, 34 Cal.2d 320, 210 P.2d 13. There is no showing of lack of effective aid of counsel. People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117.

"As to the remaining 'grounds' claimed, People v. Bible, 135 Cal.App.2d [65], 286 P.2d 524, sufficiently disposes of them."

[5, 6] It has been repeatedly said that the writ of error coram nobis is a limited writ aimed at reaching errors of fact outside of the record and available only where no other remedies exist. The office of the writ is to bring to the attention of the trial court errors of fact, which, without negligence on the part of the defendant, were not presented to the court at the time of the trial. People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505; People v. Reid, 195 Cal. 249, 255, 232 P. 457, 36 A.L.R. 1435; People v. Gennaitte, 127 Cal.App.2d 544, 548, 274 P. 2d 169.

The writ of error coram nobis never issues to correct an error of law or to redress an irregularity occurring at the trial which could be corrected on motion for a new trial or by an appeal. People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375.

It is well settled that where the remedy of the motion for a new trial or appeal exists the writ is not available. And the writ cannot be used to serve the purpose of an appeal when this remedy was lost through failure to invoke it in time even though such failure occurred without fault or neglect on the part of the one seeking the remedy. People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Pryor, 87 Cal.App.2d 352, 353, 196 P.2d 948.

[7] Where there are grounds for sustaining the trial court on the ruling on the petition, its decision will not be reversed on appeal except where there is evidenced an abuse of discretion. People v. Stuhlmiller, 37 Cal.App.2d 603, 604, 605, 99 P.2d 1072.

[8] In the instant case the defendant presented nothing to sustain a court in ordering the issuance of a writ of error coram nobis. The alleged "grounds" were not within the limited scope of the writ. Further, no affidavits or other evidence were offered in support of the application. The only alternative the court below had was to deny the petition.

Order affirmed.

WHITE, P. J., and DORAN, J., concur.

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140 Cal.App.2d 604

Michael D. JEFFERS, Plaintiff and Appellant,

v.

SCREEN EXTRAS GUILD, Inc., H. O'Neil Shanks, and Buck Harris, Defendants and Respondents.

Civ. 21698.

District Court of Appeal, Second District, Division 1, California.

April 9, 1956.

Libel action. From judgment for defendants, plaintiff appealed and defendants moved to dismiss the appeal on the ground that plaintiff failed to deposit with clerk of Superior Court the estimated cost of preparing a reporter's transcript as required by rule. The District Court of Appeal, White, P. J., held where plaintiff was without funds for appeal, and his wife made a conscientious effort to secure the cost of the appeal by obtaining a loan on a parcel of her separate realty, but due to unforeseen delay had not yet obtained such loan, District Court of Appeal would grant plaintiff relief from rule requiring a deposit with the clerk of the estimated cost of a reporter's transcript within 10 days after notification of the estimated cost, by granting plaintiff an additional 30 days within which to make such deposit.

Motion to dismiss denied, if condition specified in opinion met, otherwise motion granted.

1. Appeal and Error ⚷357(1)

A burden rests upon an appellant to use reasonable diligence to perfect and prosecute his appeal, but in proper cases, relief from default may be extended. West's Ann.Rules on Appeal, rule 53(b).

2. Appeal and Error ⚷371

Where plaintiff was without funds for appeal, and his wife made a conscientious effort to secure the costs of the appeal by obtaining a loan on a parcel of her separate realty, but due to unforeseen delay had not yet obtained such loan, District Court of

Appeal would grant plaintiff relief from rule requiring a deposit with clerk of Superior Court of the estimated cost of a reporter's transcript within 10 days after notification of estimated cost by granting plaintiff an additional 30 days within which to make such deposit. West's Ann.Rules on Appeal, rules 4(c), 53(b).

3. Constitutional Law ⚷321

Courts favor a determination of litigation upon the merits and favor all parties having their day in court in all stages of proceedings.

4. Appeal and Error ⚷784

Courts are reluctant to dismiss an appeal for delays in complying with rules, unless not to do so would result in manifest injustice or injustice to a party moving for dismissal of an appeal.

5. Appeal and Error ⚷136

Where appellant failed to comply with previous judgments for costs in Superior Court which judgments were based upon orders previously affirmed by District Court of Appeal, but there was no showing before District Court of Appeal that appellant's failure to comply with such orders and judgments was either contumacious or wilful, District Court of Appeal would not dismiss appeal.

◆

Perry Bertram, Los Angeles, for appellant.

Gilbert, Nissen & Irvin, by Robert W. Gilbert, Los Angeles, for respondents.

WHITE, Presiding Justice.

Respondents move to dismiss this appeal upon the following grounds:

"(1) That within the time allowed therefor, and thereafter up to the present time, appellant has failed to deposit the necessary sum of money or any sum whatsoever to secure the estimated cost of preparing the reporter's transcript herein and has further failed to procure and file a waiver of such deposit signed by the reporter, as required by Rule 4(c) of the Rules on Appeal;

"(2) That solely by reason of appellant's failure to make the necessary arrangements to procure the preparation and filing of the reporter's transcript herein, as required by Rule 4(d), no record on appeal has been transmitted and filed as required by Rule 10(a) of the Rules on Appeal;

"(3) That no bond or undertaking to secure costs on the part of the plaintiff and appellant is on file with the Clerk of the Superior Court in the instant libel action as required by Section 830 of the Code of Civil Procedure of the State of California;

"(4) That appellant has failed and refused to comply with the previous judgments for costs of the Superior Court in the instant libel action which judgments were based upon orders previously affirmed by this Honorable District Court of Appeal (134 Cal.App.2d 622 [286 P.2d 30]), granting $100.00 to cover counsel fees to each of 31 successful defendants;

"(5) That appellant has failed and refused to comply with the previous judgment of this Honorable District Court of Appeal granting respondents their costs on appeal upon two previous appeals herein. * * *"

Appellant resists the motion upon grounds stated in supporting affidavits filed by himself, his wife and his attorney. These grounds may be epitomized from the affidavit of appellant's wife, who avers that immediately following denial of appellant's motion for a new trial, he and she were advised by the former's attorney that the estimated cost of an appeal would be approximately $7,500.00; that appellant owns no property and is without sufficient funds to procure a reporter's transcript, but that affiant is the owner of certain real property in the county of Los Angeles, as her sole and separate property. That she immediately commenced negotiations to borrow the amount necessary to prosecute her husband's appeal. To that end, affiant "* * consulted approximately eight to ten different real estate brokers and loan brokers, all of whom were generally familiar with property values in the area in which affiant's property is located, to-wit, near the summit on Coldwater Canyon Drive and on Mulholland Drive in Los Angeles, California. With each of these people, affiant gave a complete statement concerning plaintiff's earnings, affiant's earnings and the existing encumbrances on the property and was assured that there would be no difficulty in raising the amount of money needed for the appeal. Upon such assurance, plaintiff's attorney was instructed to perfect the appeal.

"During the next two to three weeks immediately following the filing of the notice of appeal, affiant further discussed the making of the necessary loans on her property with the aforementioned brokers. It then, for the first time, became apparent that with brokerage fees of ten per cent on not only the amount to be raised but on the additional amount necessary to clear the existing encumbrances together with maximum interest rates, together with incidental costs, fees and bonuses, the net amount available to affiant would be considerably less than the amount needed for the appeal.

"Early in December, 1955, affiant was referred to a loan representative of certain eastern insurance companies. This party obtained a commitment for a maximum loan to be made by an eastern insurance company which was sufficient to pay off the existing encumbrances and yield to affiant over and above the costs of the loan the amount needed to pay the costs of appeal. Affiant made formal application for said loan and had an official appraisal of the property made for the purpose of completing the application. The final step was to be an inspection of the property by the agent employed by the company in Los Angeles for this purpose."

Affiant then avers that the agent became ill and was unable to make an inspection of the property until about the middle of January, 1956. That the agent approved the property for the amount of the loan applied for and sent his report to the insurance company. That on or about February 8, 1956, affiant was advised that for stated reasons the loan would not be approved for the full amount, but only for an amount which would be insufficient to meet the needed costs of appeal. It is then averred that affiant earnestly continued her efforts, but was unable to secure a loan in the amount needed. Finally, affiant avers, that through a broker who represents a number of loan companies, she was assured that a loan of sufficient amount could be made. That the transaction should be in escrow within a matter of days. At the oral argument, on March 27, 1956, before this court, appellant's counsel stated that the escrow would be established within a few days and asked that appellant be granted thirty days within which to deposit with the clerk of the superior court the estimated cost of preparing a reporter's transcript.

The within action was commenced May 18, 1950, seeking damages for libel; an amended complaint was filed July 11, 1950, wherein the relief sought is for judgment against defendants for general damages in the sum of $100,000, and for punitive and exemplary purposes in the sum of $100,000. On September 26, 1950, a second amended complaint was filed. On April 27, 1953, an amendment to the first amended complaint was filed.

Since May 18, 1950, when the action was initiated, to the present date, the cause has been the subject of three trials in the superior court of Los Angeles County and four appeals by appellant to this court, including the appeal now before us.

The judgment which is the subject of this appeal was entered on September 20, 1955, and notice of appeal therefrom was filed November 9, 1955. Notice to the clerk to prepare clerk's and reporter's transcripts was given on November 18, 1955. The clerk's transcript was filed February 10, 1956, but to date no arrangement has been made with the clerk for payment of the reporter's transcript, and no waiver of deposit has been filed by reporter, Rule 4(c), Rules on Appeal.

[1, 2] We are not unmindful of the fact that it is a fundamental rule of appellate procedure that the burden rests upon an appellant to use reasonable diligence to perfect and prosecute his appeal but, that in proper cases, relief from default may be extended is evidenced by the provision of Rule 53(b), Rules on Appeal, which provides that, "The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, * * *." Therefore, the question squarely presented to us for determination

is whether, on the showing made, appellant is entitled to relief from default for failure to comply with the Rules on Appeal. We are persuaded that appellant and his wife have exercised a sincere and reasonable amount of diligence to comply with the rules, as is evidenced by the foregoing affidavit of appellant's wife.

[3, 4] It is axiomatic that the courts favor a determination of litigation upon the merits and that all parties should have their day in court at all stages of the proceedings. Because of this long recognized policy, courts are reluctant to dismiss an appeal for delays in complying with the rules, unless not to do so would result in manifest injustice or prejudice to the moving party.

In the instant case the notice of appeal was filed November 9, 1955, and the clerk's transcript has been procured and filed. In view of appellant's efforts to obtain funds for a reporter's transcript, we do not regard the delay as flagrant. And from a review of the record before us on this motion which contains references to the previous trials and other proceedings had, we are not prepared to say, as contended by respondents, that by his present appeal, appellant seeks "further unwarranted harassment of respondents by litigious and dilatory tactics". Furthermore, appellant asks for only thirty days within which to deposit with the clerk the sum required for preparation of reporter's transcript.

[5] As further grounds for dismissal of the appeal, respondents urge that appellant has failed to comply with previous judgments for costs in the superior court in the instant action, and which judgments were based upon orders previously affirmed by this court, Jeffers v. Screen Extras Guild, etc., 134 Cal.App.2d 622, 286 P.2d 30, awarding $100 to cover counsel fees to each of thirty-one successful defendants who were eliminated from the action by non-suits and dismissals. Also, that appellant has failed and refused to comply with the previous judgment of this court granting respondents their costs in two appeals.

We do not regard these obligations as coming within the purview of the rule that one cannot ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state. There is no showing before us that appellant's failure to comply with the orders and judgments above mentioned was either contumacious or willful. As was said by this court in Tobin v. Casaus, 128 Cal. App.2d 588, 592, 275 P.2d 792, 794:

"The right to an appeal must not be lightly forfeited, and where a doubt exists as to a litigant's conduct being contumacious or wilful, an appellate court will tolerate temporarily the acts which were disruptive of the judicial process. We always prefer to resolve a cause on its merits; once the rights of the parties have been determined with finality, then the thwarted authority and offended dignity of the court may be assuaged with condign sanctions to the extent of the affront."

We are inclined to the view that the interests of justice will best be served if the appeal is not dismissed and appellant is granted thirty days within which to deposit the required amount with the clerk of the superior court for preparation of a reporter's transcript.

It is therefore ordered that if appellant, within thirty days after the filing of this opinion, deposits with the clerk of the superior court the amount of money necessary for preparation of a reporter's transcript, and which amount the clerk is ordered to accept, the motion to dismiss will be denied and the cause will be decided on the merits. However, if appellant fails so to do for any reason whatsoever, the motion to dismiss is to be granted without further hearing or opinion. Tobin v. Casaus, supra, 128 Cal. App.2d at page 593, 275 P.2d at page 795.

DORAN and FOURT, JJ., concur.

140 Cal.App.2d 481

Parker MANN, doing business under the fictitious firm name and style of Property Investment Co., Plaintiff and Respondent,

v.

A. R. MUELLER, sometimes known as Alfred Robert Mueller, and Evelyn L. Mueller, Defendants and Appellants.

Civ. 21482.

District Court of Appeal, Second District, Division 1, California.

April 4, 1956.

Rehearing Denied April 23, 1956.

Action for real estate broker's commission. The Superior Court, Los Angeles County, Robert H. Scott, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, White, P. J., held that evidence was sufficient to sustain trial court's finding that failure of defendants and another to enter into a written agreement and an escrow agreement as provided for in agreement for exchange of realty was occasioned entirely by defendants' fault, failure, and refusal.

Judgment affirmed.

1. Appeal and Error 🔑102, 870(5)

Order overruling a demurrer is not an appealable order and can be reviewed only on appeal from a final judgment.

2. Appeal and Error 🔑1040(11)

Overruling of a special demurrer becomes unimportant when the case is fairly tried on the merits under circumstances which indicate that nothing in the pleadings mislead the unsuccessful litigant to his prejudice.

3. Pleading 🔑428(7)

Defendants, who made proper and timely objection to introduction of any evidence on ground that complaint did not state a cause of action, did not, by answering complaint and proceeding to trial, waive their right to have ruling on their general demurrer reviewed on appeal from the judgment.

4. Appeal and Error 🔑1050(1)

Where, by denials and allegations of their answer, defendants put in issue facts which were omitted from complaint, court properly proceeded to trial of the issues raised by the pleadings, and overruling of the general demurrer was not subject to review on appeal from the judgment and overruling of defendants' objection to admission of evidence on same ground was not prejudicial error, in view of fact that defects in complaint had been cured by the answer.

5. Trial 🔑412

In action on contract, defendants' objection to admission of contract in evidence was waived by their answer which alleged the same contract.

6. Contracts 🔑25

Contract, which provided that parties were to enter into a satisfactory written agreement, was not unenforceable as merely an agreement to agree in view of fact that other provisions of contract spelled out an agreement between the parties.

7. Contracts 🔑25

Neither law nor equity provides a remedy for breach of an agreement to agree in the future, and such agreement cannot be made basis of a cause of action.

8. Exchange of Property 🔑3(1)

Where parties agreed in writing upon essential terms of their contract for exchange of realty, written agreement signed by them was binding contract even though several more formal instruments were to be prepared and signed later, and, when one party to such binding contract refused to execute the more formal instruments intended, other party had right to rely upon the contract already expressed in writing.

9. Exchange of Property 🔑3(1)

Where terms of exchange of realty did not indicate any intent to violate Health and Safety Code provision making it unlawful for any one to rent or hold out for rent any trailer coach which is in auto and trailer park and which is owned by or in possession or control of owner or operator of the park or his agent, an intent to violate such law would not be presumed. West's Ann.Health & Safety Code, § 18252.

10. Appeal and Error ⚷1011(1)

Where, in action for real estate broker's commission, evidence regarding alleged fraudulent mirepresentation by plaintiff was conflicting, trial court's findings, contrary to defendants' contention were conclusive.

11. Brokers ⚷86(5)

In action for real estate broker's commission, evidence was sufficient to sustain trial court's finding that failure of defendants and another to enter into a written agreement and an escrow agreement as provided for in agreement for exchange of realty was occasioned entirely by defendants' fault, failure, and refusal.

◆

Arthur E. Briggs, Los Angeles, for appellants.

Robert S. Butts, Hollywood, for respondent.

WHITE, Presiding Justice.

Defendants have appealed from the judgment for plaintiff for real estate broker's commission. The following statement of the case is quoted from Respondent's Brief:

> "Plaintiff's complaint alleged: That plaintiff was, at all material times, a real estate broker duly licensed by the State of California. That on July 3, 1954, defendants were the owners of certain real property and that other persons were the owners of other real property. That on said date defendants and one H. H. Young entered into a written standard exchange agreement by the terms of which defendants agreed to exchange their property for certain other property. That on and prior to said date plaintiff had rendered his services as a real estate broker in connection with said exchange of property.
>
> "The complaint then sets forth in *haec verba* a portion of the exchange agreement as follows:
>
> "'Acceptance of Agreement.
>
> "'The foregoing offer is hereby accepted on the terms stated, and the undersigned, therein called the party of the second part agrees to pay Property Investment Co., 678 S. Vermont Ave., Los Angeles, Calif., $5,000.00 commission for services rendered. *Commission to become due and payable on the execution of this agreement by all parties hereto,* and further agrees that said Agent may act as agent for all parties hereto and may accept commission therefrom. *Commission to be Secured by Note & 3rd Deed of Trust on property to be acquired.* Said Note to be payable at $100.00 or more per month including 6% interest. Full amount of commission note to be due and payable on or before Sept. 1, 1955. Dated July 3, 1954.
>
> "'A. R. Mueller
> "'Evelyn L. Mueller.'"
>
> "The complaint further alleges that said exchange agreement was executed by all parties thereto, that demand had been made on defendants for the execution and delivery of the security above referred to and for the payment of the commission and that defendants have failed to honor such demand."

The first ground for reversal urged by appellants is that their general demurrer to the complaint should have been sustained for the reason that "the complaint did not allege *full* performance by the broker as required by statute", "that plaintiff broker procured a party ready, able and willing to make the exchange", "that the exchange was consummated", "that defendants acquired the property upon which the deed of trust was to be given", and that "the terms of the exchange agreement are not alleged in the complaint". After the first witness was called and sworn, appellants objected to the introduction of any evidence on the ground that the complaint did not state a cause of action. The overruling of that objection is also cited by appellants as prejudicial error. These two points will be considered together.

Respondent's reply to these points is that: "After the defendants' demurrer to the complaint was overruled the defendants answered and no appeal was taken by defendants from the ruling of the law and motion department in connection with defendants' demurrer to the complaint. The time for appeal has expired as is clearly evidenced from the record."

[1–4] An order overruling a demurrer is not an appealable order and it can be reviewed only on appeal from a final judgment. Hanke v. McLaughlin, 20 Cal.App. 204, 128 P. 772; Southern California Telephone Co. v. Damenstein, 81 Cal.App.2d 216, 217, 183 P.2d 675. The overruling of a special demurrer "becomes unimportant when a case is fairly tried on the merits under circumstances which indicate that nothing in the pleadings mislead the unsuccessful litigant to his prejudice. (Buxbom v. Smith, 23 Cal.2d 535, 543(6), 145 P.2d 305; Alonso v. Hills, 95 Cal.App.2d 778, 782(2), 214 P.2d 50.)" Ravel v. Hubbard, 112 Cal.App.2d 255, 258, 246 P.2d 88, 90. Where, as in the instant action, defendants make proper and timely objection to the introduction of any evidence on the ground that the complaint does not state a cause of action, by answering the complaint and proceeding to trial they do not waive their right to have the ruling on their general demurrer reviewed on appeal from the judgment. Harris v. Seidell, 1 Cal.App.2d 410, 414, 36 P.2d 1104; Ravel v. Hubbard, 112 Cal.App.2d 255, 258, 246 P.2d 88. But, in the instant action, by the denials and allegations of their answer (including seven affirmative defenses), defendants put in issue all of those facts omitted from the complaint, and the court properly proceeded to the trial of the isues raised by the *pleadings*. In this action, therefore, the defects in the complaint having been cured by the answer, the overruling of the general demurrer is not subject to review on appeal, and the overruling of the objection to the admission of evidence on the same ground was not prejudicial error. Vance v. Anderson, 113 Cal. 532, 535, 45 P. 816; Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 523, 203 P.2d 522; Wilson v. Stearns, 123 Cal.App.2d 472, 483, 267 P.2d 59.

[5] The third ground for reversal urged by appellants in their opening brief is the overruling of their objection to the admission in evidence of plaintiff's Exhibit 1, the contract dated July 1, 1954. The same contract is alleged in appellants' first amended answer. Any objection they might otherwise have had to the introduction of that agreement was waived by their answer.

Said Exhibit 1 is the agreement relied upon by respondent and only a part of it is alleged in his complaint or stated in his brief on this appeal as hereinabove quoted. Said Exhibit 1 also contains the following language:

> "Terms of Exchange
>
> "Both parties shall enter into a satisfactory written agreement covering the rental of the grocery store building and space rental for approximately 55 rental trailers owned by H. Harrison Young.
>
> "The agreed rate of rent for the grocery store building is to be 3% of the gross monthly receipts with a minimum guarantee of $100.00 per month.
>
> "The agreed rate of rent for each rental trailer space is to be 60¢ per day when occupied and 30¢ per day when unoccupied.
>
> "Both parties agree to enter into an Escrow Agreement on or before July 7th, 1954 in order to consummate this Exchange."

[6, 7] It is urged by appellants that the paragraph, "Both parties shall enter into a satisfactory written agreement * * *" is an agreement to agree; and that not only that paragraph is unenforceable but, because of it, the entire agreement is likewise merely an unenforceable agreement to agree. However, reading that paragraph with the two immediately following and considering the contract as a whole, it is obvious that appellants and respondent had determined the rate and amount of the rentals. There is also in the record evidence that appellants had previously inspected the grocery store, that the trailers were on the ground and their respective sizes and locations also had been observed by appellants. Therefore, the language quoted from Autry v. Republic Productions, 30 Cal.2d 144, 151, 180 P.2d 888, 893, and relied upon by appellants,—"Neither law nor equity provides

a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action." —has no application to the facts in the instant action.

It is next contended by appellants that, because all the parties to the exchange failed to enter into any written agreement respecting rentals of the grocery store or the trailer spaces, failed to enter into any escrow agreement for the consummation of said exchange, and abandoned their said exchange agreement, the evidence does not support the finding that on and prior to the signing of the exchange agreement respondent "had rendered his services as real estate broker in connection with said exchange of property".

In support of this contention, appellants have cited Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 266 P.2d 856, an action for real estate commission, wherein judgment for plaintiff was reversed for the reason that the agreement to pay commission was included in a purported agreement of sale expressly subject to buyer's approval of OPA statements and of the apartments after inspection, and subject to seller's ability to procure a certain loan which she did not obtain. In Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d at page 306, 266 P.2d at page 860, it is stated: "In support of its proposition, plaintiff relies on such cases as Deeble v. Stearns, 82 Cal.App.2d 296, 186 P.2d 173; Cole v. Low, 81 Cal.App. 633, 254 P. 676; Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225; Jauman v. McCusick, 166 Cal. 517, 137 P. 254. Those cases hold that a broker employed to sell real property has earned his commission when he has produced a purchaser who has been accepted by his principal as his purchaser by entering into a contract with him, and that the failure of either party to perform the contract is not material to the right of the broker to receive compensation from his principal. The rule laid down in those cases is based entirely on the principle that the broker, having performed what he was employed to do, is entitled to be paid without regard of the ultimate fate of the contract between his principal and the purchaser produced by him."

Lawrence Block Co. v. Palston, supra, Ajax Holding Co. v. Heinsbergen, 64 Cal.App.2d 665, 149 P.2d 189, Autry v. Republic Productions, 30 Cal.2d 144, 151, 180 P.2d 888, 893, and Keeler v. Glendon, 124 Cal.App.2d 634, 268 P.2d 1089, the cases cited in support of appellants' said contention that respondent had not rendered the service for which he seeks payment, each involve agreements to agree where there was no meeting of the minds of the parties as to essential provisions. In the instant action, appellants have failed to state either in the trial court or upon appeal what essential provisions, if any, had been omitted from the agreement signed by them. This is not a case where appellants were high pressured into buying property unknown to them. One of the appellants was, himself, a licensed real estate broker. He had sought to make the same trade a year before, and shortly before the agreement involved in the instant action he had called upon and asked the respondent to work up an exchange of the properties described in said agreement. The cases last above cited have no application to the facts of the instant action.

[8] Where the parties, as in the instant action, have agreed in writing upon the essential terms of their contract, even though several more formal instruments are to be prepared and signed later, the written agreement which they have already signed is a binding contract. When one party refuses to execute the more formal instruments intended, the other has a right to rely upon the agreement already expressed in writing. Gavina v. Smith, 25 Cal.2d 501, 504, 154 P.2d 681.

[9] It is further urged by appellants that the exchange agreement was in violation of Section 18600.5 of the Health and Safety Code of the State of California, now § 18252, which provides: "It shall be unlawful for any person to rent or hold out for rent any trailer coach in an auto and trailer park which is owned by or in the possession or control of the owner or op-

erator of the auto and trailer park or his agent."

Again considering the "Terms of Exchange" hereinbefore quoted and relied upon by appellants as showing the invalidity of the exchange agreement, we find nothing therein to indicate any intent to violate the Health and Safety Code, and an intent to violate the law will not be presumed. If appellants, in fact, did intend to violate the law by renting trailers owned or controlled by them after completion of their exchange, it does not appear from the writing.

[10] In a separate defense contained in their amended answer, appellants alleged that fraudulent misrepresentations were made by respondent. The trial court found contra. The evidence regarding such alleged misrepresentations is conflicting and the findings are, therefore, conclusive. This is true as to statements regarding gross and net spendable income and as to the physical boundaries of the trailer park.

In their Opening Brief, appellants state: "H. H. Young was not the owner of the auto trailer park. It was held in Mott v. Minor, 11 Cal.App. 774, 106 P. 244 [246], an exactly parallel case, that the broker failed to produce a purchaser ready, able and willing to purchase, that the contract not being signed by the real party in interest but by an agent of an undisclosed principal, it was unenforceable, 'and where the real party in interest is not disclosed to the vendor the broker should not be allowed to prevail upon the theory that he has produced the agent of the undiscovered principal.'" However, the facts before the court in Mott v. Minor, supra, are not analogous to those in the instant action. It appears in Mott v. Minor, 11 Cal.App. at page 780, 106 P. at page 247, that "plaintiff's authority had been canceled before the purchaser was found." Also, in Mott v. Minor, instead of accepting the offer and signing an agreement in writing as in the instant proceeding, defendant refused to sell and signed no agreement with the purchaser produced.

In Hanson v. Fox, 155 Cal. 106, 99 P. 489, 20 L.R.A.,N.S., 338, plaintiff vendee under an instalment contract made a tender of the entire balance due, demanded a deed, and brought action to rescind his agreement to purchase on the ground that defendant vendor was not the owner of the property sold. Judgment for plaintiff was reversed. The court, at page 107, 99 P. at page 490, said: "In a case such as this it is perfectly legal for one to contract to convey title to land which he does not own, and he is in default under such contract only when the vendee has performed his part of the contract and made demand for a title which the vendor is unable to furnish. * * *

"* * * The same principle is announced and the rule laid down in Garberino v. Roberts, 109 Cal. [125] 126, 41 P. 857, and it is further said: 'In order to put the defendant (vendor) in the wrong, it is incumbent upon him (the vendee) to await the time of performance provided in the contract, and thereupon make his tender of performance and demand his deed.' * * *"

See also Lemle v. Barry, 181 Cal. 6, 9, 183 P. 148, to the same effect.

[11] In the instant action, the trial court found upon sufficient evidence "that the failure of defendants and H. H. Young to enter into a written agreement and an escrow agreement as provided in said exchange agreement * * * was occasioned entirely by the fault, failure and refusal of defendants."

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Stephen STUART, Defendant and Appellant.*

Cr. 5482.

District Court of Appeal, Second District, Division 3, California.

March 30, 1956.

As Modified on Denial of Rehearing April 10, 1956.

Hearing Granted April 25, 1956.

Pharmacist was convicted of manslaughter and of deviating from the terms of a prescription with the result that death ensued. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment and an order denying motion for new trial, and the pharmacist appealed. The District Court of Appeal, Shinn, P. J., held that where prescription called for addition of pure sodium citrate, and pharmacist, in filling prescription, added compound from a bottle labeled sodium citrate, but the bottle in fact contained a mixture of sodium citrate and sodium nitrite, and medicine was administered to child and caused the child's death because of the presence of sodium nitrite, pharmacist was guilty of manslaughter, though pharmacist was the victim of the mistake of some unidentified person through whose error the sodium nitrite was placed in bottle labeled sodium citrate, but that pharmacist was not guilty of violating statute making it a felony for one dealing in drugs to willfully, negligently, or ignorantly deviate from the terms of a prescription with the result that death ensues.

Judgment and order affirmed as to manslaughter conviction and reversed as to conviction for deviating from prescription, with instructions to dismiss count of information dealing with deviation from prescription.

1. Druggists ⚿12

Where prescription called for addition of pure sodium citrate, and pharmacist, in filling prescription, added compound from a bottle labeled sodium citrate, but the bottle in fact contained a mixture of sodium citrate and sodium nitrite, pharmacist was guilty of violating section of the Health and Safety Code prohibiting the preparation or sale of an adulterated drug, though pharmacist was the victim of the mistake of some unidentified person through whose error sodium nitrite had been placed in bottle labeled sodium citrate. West's Ann. Health & Safety Code, § 26280.

2. Druggists ⚿2

Section of the Health and Safety Code prohibiting the preparation or sale of an adulterated or misbranded drug denounces as a penal offense the sale of an adulterated drug even though the seller be ignorant of the fact that it is adulterated and his ignorance is not due to any negligence on his part. West's Ann. Health & Safety Code, § 26280.

3. Druggists ⚿2

It was within the power of the Legislature to denounce as a penal offense the sale of an adulterated drug even though the seller be ignorant of the fact that it is adulterated and his ignorance is not due to any negligence on his part. West's Ann. Health & Safety Code, § 26280.

4. Druggists ⚿12

Since the Legislature had power to denounce as a penal offense the sale of an adulterated drug even though the seller be ignorant of the fact that it is adulterated and his ignorance is not due to any negligence on his part, it is the duty of the courts to enforce the statutory penalties prescribed for violations, however harsh they may be. West's Ann. Health & Safety Code, § 26280.

5. Adulteration ⚿1

The Legislature has the power to denounce as a penal offense possession or sale of an adulterated or misbranded substance without requiring as an element of the offense knowledge of its adulteration or misbranding or negligence in failing to have such knowledge. West's Ann. Health & Safety Code, § 26280.

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* Opinion vacated 302 P.2d 5.

6. Druggists ⚿2

Section of the Health and Safety Code prohibiting the compounding or sale of an adulterated or misbranded drug is not limited in its application to manufactured drugs and devices sold by intrastate manufacturers or jobbers to retailers. West's Ann. Health & Safety Code, § 26280.

7. Homicide ⚿74

Where prescription called for addition of pure sodium citrate, and pharmacist, in filling prescription, added compound from a bottle labeled sodium citrate, but the bottle in fact contained a mixture of sodium citrate and sodium nitrite, and medicine was administered to child and caused the child's death because of the presence of sodium nitrite, pharmacist was guilty of manslaughter, though pharmacist was the victim of the mistake of some unidentified person through whose error the sodium nitrite was placed in bottle labeled sodium citrate. West's Ann.Pen.Code, § 192; West's Ann. Health & Safety Code, §§ 26280, 26295.

8. Druggists ⚿12

Where prescription called for addition of pure sodium citrate, and pharmacist, in filling prescription, added compound from a bottle labeled sodium citrate, but the bottle in fact contained a mixture of sodium citrate and sodium nitrite, and pharmacist was the victim of the mistake of some unidentified person through whose error sodium nitrite was placed in bottle labeled sodium citrate, and child who was given medicine died because of the presence of sodium nitrite, pharmacist was not guilty of violating section of the Penal Code making it a felony if death results because a dealer in drugs or medicines willfully or ignorantly deviates from the terms of a prescription and death ensues. West's Ann. Pen.Code, § 380.

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John N. Frolich and William Levin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondent.

Dean M. McCann, Upland, amicus curiæ.

SHINN, Presiding Justice.

Stephen Stuart was informed against in two counts and convicted of two offenses, namely, manslaughter, in that he "did willfully, unlawfully, feloniously and without malice, kill Peter James Sills, a human being," and "being then and there an apothecary, druggist and person carrying on business as a dealer in drugs and medicines did, in making up a prescription, willfully, unlawfully, negligently and ignorantly substitute a different article for an article prescribed and ordered, put up a less quantity of an article than that prescribed and ordered and otherwise deviated from the terms of the prescription and order, in consequence of which human life and health was endangered resulting in death to Peter James Sills, a human being." Imposition of sentence was suspended and probation was granted. Stuart appeals from the judgment and from an order denying his motion for new trial. The case was tried upon the evidence adduced at the preliminary hearing and additional evidence introduced at the trial.

The facts essential to a determination of the question of Stuart's guilt were not in conflict and that question is to be resolved from the application to those facts of Sections 192[1] and 380[2] of the Penal Code and

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[1] Section 192: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: 1. Voluntary—upon a sudden quarrel or heat of passion. 2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle. * * *"

[2] Section 380: "Every apothecary, druggist, or person carrying on business as a dealer in drugs or medicines, or person employed as clerk or salesman by such person, who, in putting up any drugs or medicines, or making up any prescription, or filling any order for drugs or medicines, willfully, negligently, or ig-

Sections 26280 and 26295 of the Health and Safety Code.[3]

Stuart was employed by the Ethical Drug Company in Los Angeles, owned in part by a Charles Covet. He obtained a B.S. in chemistry from Long Island University in Brooklyn, New York, and a B.S. in pharmacy from Columbia University of Pharmacy in New York. He came to California in September 1945, was licensed as a pharmacist in 1946 and had been employed since that time. He started employment with Ethical Drug Company in April 1954. Covet was operating the store and had been since April 1950. On or about July 17, 1954, Irvin Sills presented to Stuart a prescription written by Dr. Goldstein intended for use as a sedative for the Sills' eight day old child. It called for sodium phenobarbital, grains eight, sodium citrate, drams three, simple syrup, ounces two, aqua peppermint, ounces one, aqua distillate QS, ounces four. There being no bottle at hand containing simple syrup, Stuart mixed the other ingredients with syrup of orange, a flavoring syrup, but found they would not mix satisfactorily into a clear liquid and threw it away. He called Dr. Goldstein, believing that no simple syrup was available; Dr. Goldstein advised him he might use elixir of mesopin-pb if he was unable to fill the prescription as written. Upon inquiry of the clerk at the soda counter Stuart learned that simple syrup was available, mixed the prescription and gave it to Sills. The medicine was administered to the child and caused his death soon afterwards. Stuart had taken three drams from a bottle labeled sodium citrate, had thrown away the first mixture and again had taken three drams from the same bottle on the final filling of the prescription. There was another bottle on the shelf marked sodium nitrite which was poisonous although the citrate was not. After the child's death a four ounce sample was taken from the sodium citrate bottle, was analyzed by a chemist, who testified that he found in the sample 1.33 drams of sodium citrate and 1.23 drams of sodium nitrite. It was the sodium nitrite which caused the child's death. Stuart did not label the bottle as containing a poison. The evidence as to the appearance of the two substances was that both are composed of small sugar-like crystals; sodium citrate is white; sodium nitrite may be white or may have a slightly yellowish tinge. There was no evidence that the difference could be determined by observation or without chemical analysis. Upon the contrary there was evidence that the mass was not homogeneous and was incapable of visual identification as one thing or the other. Although some of the compound was exhibited to a witness at the trial and was observable by the court, there was no sample of either sodium citrate or sodium nitrite with which to make comparison. Stuart took another sample from the bottle to the Biochemist Laboratory where it was analyzed and found to have 38.9 milligrams of nitrite per gram of material. After learning of the child's death Covet emptied the sodium citrate bottle and refilled it with new sodium citrate. He washed the bottle, not

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norantly omits to label the same, or puts an untrue label, stamp, or other designation of contents, upon any box, bottle, or other package containing any drugs or medicines, or substitutes a different article for any article prescribed or ordered, or puts up a greater or less quantity of any article than that prescribed or ordered, or otherwise deviates from the terms of the prescription or order which he undertakes to follow, in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony."

[3] Section 26280: "The manufacture, production, preparation, compounding, packing, selling, offering for sale, advertising or keeping for sale within the State of California, or the introduction into this State from any other State, Territory, or the District of Columbia, or from any foreign country, of any drug or device which is adulterated or misbranded is prohibited."

Section 26295: "Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than twenty-five dollars ($25) or more than five hundred dollars ($500), or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. * * *"

too thoroughly, but did not wash the bottle cap. Later the cap of the bottle was examined and the analysis showed distinctly the presence of sodium nitrite. Covet had another pharmacist in his employ, one Axelrode, who had been with him since 1946. On August 11, Axelrode filled a prescription for one Moonjian which also called for sodium citrate. He took this from the same bottle from which Stuart had filled the Sills' prescription. The Moonjian child became ill but recovered. From April 1950 to July 1954, three prescriptions using sodium citrate had been filled in the drugstore. These totaled about 18 drams. There was no evidence that harm resulted from their use. In that time only one prescription calling for sodium nitrite had been filled.

With respect to the conviction of manslaughter, the People contend that the death of the child resulted from the commission of an unlawful act, not amounting to felony. It is this provision of section 192, Penal Code, which applies and not the provision of that section relating to "the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

[1] Our first inquiry is whether upon the admitted facts Stuart was guilty of violation of section 26280 of the Health and Safety Code in that he sold an adulterated drug. We think there can be no doubt as to his guilt of violation of that section. The prescription called for the addition of pure sodium citrate; as filled there was substituted a mixture of sodium citrate and sodium nitrite. One definition of "adulterate" is "to corrupt, debase, or make impure by an admixture of a foreign or a baser substance." This is precisely what took place in the filling of the prescription.

[2] Section 26280 denounces as a penal offense the sale of an adulterated drug even though the seller be ignorant of the fact that it is adulterated and his ignorance is not due to any negligence upon his part. When a pharmacist fills a prescription he must know what he is putting into it. If in using substances from containers he relies upon the labels, he is bound to know whether they correspond with the contents of the bottles. If the labels are incorrect, and this leads to the use of a wrong ingredient, the fact that the mislabeling was not his own but the act of a third person is not a defense. His responsibility is absolute. Such are the facts of the present case. Stuart is the victim of the mistake of some unidentified person through whose error the two substances were mixed and placed in the bottle labeled sodium citrate.

[3, 4] The Legislature has seen fit to impose upon the dispenser of drugs this strict and unconditional responsibility. It was within the power of the Legislature to do so and the statute being valid it is the duty of the courts to enforce the statutory penalties prescribed for violations, however harsh they may be.

[5] It is well-established that the Legislature has the power to denounce as a penal offense possession or sale of an adulterated or misbranded substance without requiring as an element of the offense knowledge of its adulteration or misbranding or negligence in failing to have such knowledge. People v. Schwartz, 28 Cal.App.2d Supp. 775, 70 P.2d 1017. The principle which is applicable in the present case was stated in People v. Beggs, 69 Cal.App.2d Supp. 819, 822, 160 P.2d 600, 601, as follows: "Neither knowledge nor an intent to defraud is made a condition of the statute, with the result that the act of selling misbranded goods constitutes the offense, though done, as it doubtless was in the case before us, both in happy ignorance of the fact that the legend on the sacks was incorrect and without any intention of defrauding anyone. This conclusion is supported by cases analogous to ours, decided in this state." Other cases to the same effect are People v. Pera, 36 Cal.App. 292, 171 P. 1091; In re Casperson, 69 Cal.App.2d 441, 159 P.2d 88, and see, also, Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 189 P.2d 17, 3 A.L.R.2d 90. There is equal, if not greater, justification for penalizing conduct which is neither intentional nor negligent in the sale of drugs.

[6] Appellant says "Section 26280 was intended to apply only to manufactured drugs and devices sold by intrastate manufacturers or jobbers to the retailers. * * * Nowhere does it state that a pharmacist is one of the applicable class." While such may have been the primary purpose of the enactment of the section it cannot be interpreted as implying a limitation that would be contrary to its clear and comprehensive provisions.

[7] Appellant also argues that the offense of manslaughter is not committed where death occurs in the commission of an act which is not malum in se but only malum prohibitum. He says that the existence of this rule was recognized in People v. Mitchell, 27 Cal.2d 678, 683, 166 P.2d 10, and he relies upon Thiede v. State, 106 Neb. 48, 182 N.W. 570, 15 A.L.R. 237, as a case which announces the rule. The opinion in that case is well-reasoned. The defendant had been convicted of manslaughter for furnishing homemade liquor to a number of his friends, including one who met death from acute alcoholism brought on by imbibing the defendant's fiery concoction. The conviction was reversed because of the court's instructions directing a finding of guilt if the death of the deceased was caused by drinking the liquor, and in failing to instruct upon the question of recklessness on the part of the defendant. After reviewing the authorities the court distinguished between unlawful acts which of themselves are not likely to result in injury to person and acts which are perilous to human safety. The element of recklessness which the court held was for the jury's consideration was the question whether the accused knew or should have known that harm was likely to result from drinking the liquor. We need not decide whether the crime of involuntary manslaughter encompasses the taking of human life in all cases where it occurs in the commission of an unlawful act. Undoubtedly it does include cases of death occurring in the commission of unlawful acts which from their very nature are threatening to human life or safety. People v. Mitchell, supra, 27 Cal.2d 678, 166 P.2d 10. That the furnishing of a poisonous or seriously deleterious drug falls within this category is self-evident. The hazard to human life in the mishandling of drugs is the very reason for holding the dispenser to strict accountability. Even from the viewpoint that the unlawful acts which are an element of involuntary manslaughter be those only that are threatening to or in disregard of human safety, that element is supplied, as a matter of law, in the present case where the proof established the unlawful furnishing of a poisonous drug. All questions of intent and negligent or reckless conduct were foreign to the issues. The death of the child resulted from the use of the drugs compounded and sold by appellant in violation of section 26280 of the Health and Safety Code and the conviction of manslaughter must therefore be affirmed.

Count I of the information charged involuntary manslaughter in the language of the statute but without specifying whether the death was in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. Violation of section 380 of the Penal Code was charged as a felony in Count II of the information, in that death ensued. Violation of that section where death occurs is a felony, whereas violation of section 26280 of the Health and Safety Code is a misdemeanor. In reviewing the conviction of manslaughter it has not been necessary to consider the conviction under section 380. As to that conviction appellant contends that the evidence did not establish his guilt and also that he could not be convicted of violation of manslaughter and also violation of section 380 for the reason that the latter offense is necessarily included in the former.

[8] We are of the opinion that the first contention must be sustained. Unlike section 26280 of the Health and Safety Code, section 380 applies only to acts which are done or omitted to be done "willfully, negligently, or ignorantly." Those modifying words relate to all the specified acts constituting violations of the section. In our opinion the evidence failed to establish

that the acts of Stuart were in any respect done wilfully, negligently or ignorantly. The facts we have related satisfactorily establish that Stuart did not act wilfully or negligently. The People contend that he acted ignorantly, but the only theory they advance is that he was ignorant of the fact that the substance he used was not sodium citrate in a pure form. Appellant contends that the ignorance which is made an element of an offense under section 380 is lack of the technical knowledge that should be possessed by one who fills prescriptions or otherwise dispenses drugs or medicines. If this be the true meaning, Stuart, of course, did not act "ignorantly." Section 380 was enacted in 1872 as above quoted and it was not amended until by Statutes 1955, Chapter 596, § 1, the word "ignorantly" was deleted and there was substituted in its place "without consideration of those facts which by the use of ordinary care and skill he should have known." The amendment was adopted after the offense was committed and is of interest only insofar as it may aid us in giving the original section proper application.

In considering the question whether original section 380 could properly be applied to the facts of the present case it is important to keep in mind that the primary purpose of all legislation designed for the regulation of the practice of the professions is the weeding out of incompetency by requiring of practitioners the possession of greater or less ability to do the things that constitute the practice of the profession. An indispensable requisite to this ability is knowledge of the subject.

In 1872 it was recognized in California that there was need for legislation regulating the dispensing of drugs. At that time any one could lawfully sell drugs. This condition was being met throughout the country by measures designed to confine the sale of drugs and medicines and the filling of prescriptions to persons of proven knowledge and competency. See Griffenhagen, The Story of California Pharmacy, 1950, and Kremers & Urdang History of Pharmacy, 1945.

By Statutes 1872, page 681, Chapter 454, a law was enacted for the regulation of the practice of pharmacy and the dispensing of medicines and poisons in the city and county of San Francisco. Certain qualifications of practitioners were established. Generally speaking the right to dispense drugs or to fill prescriptions was limited to "graduates," "licentiates" and "practicing pharmacists or assistant pharmacists." "Graduates" must have had four years experience "in stores where prescriptions of medical practitioners are compounded," and also a diploma from a college of pharmacy within the United States or from an authorized foreign institution or examining board; "licentiates" must have had the same store experience and been passed by the board of pharmacy. "Practicing pharmacists" and "assistant pharmacists" were persons who had kept and continued to keep "open store in the City and County of San Francisco for compounding and dispensing of the prescriptions of medical practitioners, and for the sale of medicines and poisons." Violation of the act in any part, including the practice of pharmacy by unregistered persons and the adulteration of any drug knowingly, intentionally and fraudulently was made a misdemeanor. The first school of pharmacy was established in 1873, Griffenhagen, The Story of California Pharmacy, p. 27. After the San Francisco act was repealed, but in substantially the same form, a statewide act was passed in 1891, Stats.1891, Ch. 85, p. 86. Other legislation followed until the adoption of Chapter 9, Division 2, Article 1, Business and Professions Code, which contains the present law.

It is altogether clear that in 1872 when the San Francisco act and section 380 of the Penal Code were adopted the Legislature had in mind that the dispensing of drugs and filling of prescriptions should be limited to those who had sufficient knowledge of the properties and uses of drugs to dispense them intelligently and in such a manner as not to imperil the health and safety of the users. The ignorance at which the San Francisco act and section 380 were directed was the lack of such knowledge. That this was the legislative purpose was made clear by the standards of knowledge and experience set up in the

San Francisco act. While this enactment was designed to protect the public against ignorance in the handling of drugs in that locality, at the same time section 380 was enacted as a measure of protection from harm occasioned by the dispensing of drugs in the remainder of the state by persons who were ignorant of the subject of drugs and medicines and their proper uses. And we see from the 1955 amendment of section 380 which deleted the word "ignorantly" that the statute still relates to the matter of technical knowledge, for in using the words "without consideration of those facts which by use of ordinary care and skill he should have known", the statute is speaking of the registered pharmacist and assistant pharmacist and of what he should have known. Generally speaking, they are the only ones who may sell drugs or compound prescriptions. Bus. & Prof. Code, § 4030.

The original section 380 was aimed at errors by persons who are ignorant because of their lack of special education and training; the amended statute measures the conduct of the pharmacist by what he, with his educational qualifications, "should have known." The unregistered pharmacist of 1872 whose mistakes were due to his ignorance of the use of drugs was amenable to prosecution as a violator of the law just as the present practitioner is liable for mistakes due to his failure to make proper use of his higher degree of knowledge. Under the statute as originally enacted mistakes not due to ignorance of the subject were to be judged under the principles of wilfulness and negligence.

We conclude that the purpose of the Legislature in 1872 in using the word "ignorantly" was to protect the public from mistakes due to want of knowledge and understanding of the proper use of medicines and drugs and that it does not encompass mistakes of fact having no relation to the lack of such knowledge and understanding. The mistake made by Stuart was not due to any lack of qualifications as a pharmacist and in our opinion did not constitute a violation of section 380. It is unnecessary to consider appellant's second contention.

In the reply brief of defendant the point is made that he was deprived of due process through failure of the authorities to comply with sections 26380 and 26381 of the Health and Safety Code, which require the sheriff, upon receipt of a verified complaint of the possession of a misbranded drug or device, to purchase a quantity of it, divide it into three parts and give one to the possessor. We do not pass upon the applicability of these requirements for the reason that the point was not raised at the trial, and it was conceded by defendant that the drug was adulterated as claimed by the People.

The judgment and order denying motion for new trial are affirmed as to the conviction of the manslaughter and reversed as to the conviction of violation of section 380 of the Penal Code, with instructions to dismiss Count II of the information.

PARKER WOOD and VALLÉE, JJ., concur.

140 Cal.App.2d 623

B. L. LUNSFORD and J. Dykes Johnson, copartners, doing business as L & J Oil Company, Plaintiffs and Respondents,

v.

J. F. KOSANKE, Defendant and Appellant.

Civ. 5312.

District Court of Appeal, Fourth District, California.

April 9, 1956.

Action for balance due on contract for assignment of interest in oil lease and sublease and transfer of title to oil field equipment. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for plaintiffs and defendant appealed. The District Court of Appeal, Conley, J. pro tem., held that judgment rendered in earlier action because complaint was so defective that no evidence could be received under it was not a judgment on the merits and did not bar another action on same issue between same parties.

Affirmed.

1. Judgment ⚷540

A party plaintiff or defendant is entitled to his day in court; if he raises a question as to respective rights of another person and himself he deserves, and will get, his answer; but once having secured a final determination of his rights, he cannot again ask the court to redecide the same question on its merits.

2. Action ⚷53(1)

A party cannot split his cause of action or have his case decided piecemeal.

3. Judgment ⚷713(2)

A party is bound, as is his opponent, by decision on its merits, as well with respect to questions which might have been raised in case as by questions expressly decided.

4. Judgment ⚷576(1)

An erroneous judgment, under doctrine of res judicata, is as conclusive as a correct one.

5. Judgment ⚷563(2)

Judgment rendered because complaint was so defective that no evidence could be received under it was not a judgment on merits and did not bar another action on same issue between same parties.

6. Judgment ⚷746

Where party in earlier action had objected to introduction of evidence upon ground that pleadings did not permit any proof, and, after trial, court sustained objection, that party's plea of res judicata could not be sustained in subsequent action, since one cannot take inconsistent positions to the injury of an opponent.

7. Judgment ⚷563(1)
Trial ⚷404(1)

Where court after trial of action on contract sustained objection made at start of trial to introduction of evidence on ground that pleadings were fatally defective, findings as to issues made by pleadings were ineffective and surplusage and of no effect and could not be relied on to invoke res judicata doctrine.

8. Mines and Minerals ⚷74
Sales ⚷359(1)

In action on contract for assignment of interest in oil and gas lease and transfer of oil field equipment, where buyer had received everything seller agreed to sell, evidence was sufficient to support finding that buyer had waived escrow agreement and was liable for balance due on contract.

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Siemon & Siemon, Bakersfield, for appellant.

Vizzard, Baker & Sullivan, Bakersfield, for respondents.

CONLEY, Justice pro tem.

The defendant appeals from a judgment for the plaintiffs in the sum of $9,000 besides interest and costs, on a contract for the assignment of their interest in an oil lease and sublease, and the transfer of title to the oilfield equipment used in operating the property. The principal point raised on appeal is that the issues became *res judicata* because of an earlier action tried in the same department of the court before the same judge, between the same parties represented by their present attorneys. Although the appellant then prevailed on his claim that there could be no decision on the merits because the pleadings were insufficient, he now as firmly maintains that the earlier judgment was actually on the merits, and even if erroneous, prevents any recovery in the instant suit.

The essential facts are simple against a rather complex background. The plaintiffs had an interest in oil property derived from a United States oil and gas lease originally held by Exeter Oil Co. which had made an operating agreement with one Johnson (not one of the parties here) who in turn assigned his rights to Chico-Martinez Oil Company. The latter partnership made an agreement to sell its remaining rights to one Pruitt, who, in turn, agreed to sell to the plaintiff J. Dykes Johnson. At the time of the inception of business relations between the parties to this action the plaintiffs had not perfected their paper title to the lease, the Exeter Oil Co. claimed a small balance as due to it, and the Chico-Martinez Oil Company had not made a formal assignment of its rights while awaiting the payment of a balance.

A written "mutual agreement" dated March 22, 1951, was executed by the parties; it was a "home-made contract" which appears in form to be an option, but which both sides term an agreement in their pleadings, granting to the defendant the right to purchase the L & J Company lease and sublease and its oilfield equipment for $10,000, of which $1,000 was to be cash ($500 down and "$500 at time escrow is closed") and $9,000 payable out of the income from 30 percent of oil, "but in any event $4500.00 in the first year and $4500.00 the next year"; the document continues with the provision that the L & J Company will assign their interest in the oil lease and sublease to the defendant, subject to Government regulations and the provisions contained in the documents, through an escrow with one of their attorneys. The receipt of $500 is acknowledged and "the balance of $500.00 to be paid when the papers are transferred and o. k.'ed." All oil in tanks owned by the plaintiffs was to be removed and a bill of sale was to be given for all the equipment "such as pipe lines, pipe, heating units, pumping units, etc." Shortly afterwards, according to plaintiffs' allegations, the defendant exercised the option and waived the necessity of securing a transfer of the lease and sublease rights from the plaintiffs, accepting instead a direct transfer of the rights from Exeter and Chico-Martinez to him, and also waived the setting up of the escrow and the execution of a bill of sale; at that time defendant paid the second $500 provided for in the agreement of March 22, 1951. It is alleged also by plaintiffs that a bill of sale covering all of the personal property was nevertheless finally executed by plaintiffs; the court finds that such an instrument was prepared and signed, but that it was not actually delivered until the day following the filing of the complaint in this case. The oilfield equipment was admittedly promptly delivered to the defendant in March or April of 1951, and the record shows that it has been used by him or under his direction ever since. In July of 1953, the defendant executed an operating agreement and option to purchase in favor of one James L. Garliepp, who has used the equipment in operating the lease and before the trial of the first case had paid about $4,000 to the defendant on the contract.

The defendant contends that a certain writing dated April 11, 1951, in form a letter from Kosanke to L & J Oil Company, was in fact a modification of the "mutual agreement" of March 22, 1951; plaintiffs say that the letter was received but never accepted by them as a modification of the contract, and the court by its finding determines plaintiffs' position thereon to be correct.

The first action, filed September 30, 1952, alleged that the plaintiffs sold to defendant by contract dated April 11, 1951, oilfield equipment at an agreed price of $10,000, on which a balance of $9,000 was due; in a supplemental complaint it was averred that the agreement in writing for the sale of this personal property was dated March 22nd, 1951. The answer and amended answer to complaint and answer to supplemental complaint denied that any sum was due; alleged as separate defenses that the provision for the sale of oilfield equipment constituted only part of the contract between the parties, and that plaintiffs had failed to complete the assignment of the oil lease, which the agreement also provided for; that plaintiffs never acquired title to any oil lease so that they could transfer it; that no escrow was ever set up as provided in the contract of the parties; that the letter of April 11, 1951, was a modification of the March 22 contract; and that its terms which would control the relationship of the parties were not complied with.

The first case was tried December 28, 1953, and findings of fact and conclusions of law filed June 25, 1954, with a judgment that plaintiff take nothing and that defendant be awarded his costs.

[1–3] The doctrine of *res judicata* is dictated by the wisdom of eliminating needless and repetitive calls upon our law courts.

The dignity and seriousness of the judicial process, and the necessity of preventing any harassment of litigants, require that reasonable restrictions be placed on the right to submit any one controversy between specific parties to our courts of justice. A party plaintiff or defendant is entitled to his day in court; if he raises a question as to the respective rights of another person and himself he deserves, and will get, his answer; but once having secured a final determination of his right, he cannot again ask the court to redecide the same question on its merits. He cannot split his cause of action, or have his case decided piecemeal. He is bound, as is his opponent, by the decision on its merits, as well with respect to the questions which might have been raised in the case as by the questions expressly decided.

[4] As is said in Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 134 P.2d 242, 243:

> "The doctrine of res judicata rests upon the ground that the party to be affected, * * * has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation."

The doctrine of *res judicata* if applicable to a given case extends the bar of subsequent litigation not only to issues pleaded but also to those that might have been pleaded, Steiner v. Thomas, 94 Cal.App.2d 655, 659–660, 211 P.2d 321; Watkins v. Watkins, 117 Cal.App.2d 610, 256 P.2d 339; Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497, and an erroneous judgment, under the doctrine, is as conclusive as a correct one. Panos v. Great Western Packing Co., supra, 21 Cal.2d 636, 640, 134 P.2d 242; People v. Ocean Shore Railroad, Inc., 32 Cal.2d 406, 418, 196 P.2d 570, 6 A.L.R.2d 1179; Stafford v. Yerge, 129 Cal.App.2d 165, 172, 276 P.2d 649; Lamb v. Wahlenmaier, 144 Cal. 91, 95, 77 P. 765.

Dillard v. McKnight, 34 Cal.2d 209, 214, 209 P.2d 387, 391, 11 A.L.R.2d 835, lays down the following rule to test the applicability of the doctrine:

> "* * * the application of the principle of *res judicata* in a given case depends upon an affirmative answer to these three qustions: Was the issue decided in the prior adjudication identical with the one presented in the subsequent litigation? Was there a final judgment on the merits? Was the party against whom the principle is invoked a party or in privity with a party to the prior adjudication?" Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 813, 122 P.2d 892; Citizens Nat. Trust & Savings Bank of Los Angeles v. Hawkins, 87 Cal.App.2d 535, 541, 197 P.2d 385; Zaragosa v. Craven, 33 Cal.2d 315, 317, 202 P.2d 73, 6 A.L.R.2d 461; Hughes v. Bank of America Nat. Trust & Savings Ass'n, 78 Cal.App.2d 631, 636, 178 P.2d 533.

[5] Here the first and third questions must be answered in the affirmative; in other words, if there had been a trial and decision on the merits in the first case, the plea of *res judicata* would have to be upheld; but at the trial of the first case there was no final judgment on the merits. This conclusion is based on the fact that the trial judge held in the first case that the complaint was so defective that no evidence could be received under it. A judgment not rendered on the merits does not operate as a bar. Goddard v. Security Title Insurance & Guarantee Co., 14 Cal.2d 47, 52, 92 P.2d 804; Gonsalves v. Bank of America Nat. Trust & Savings Ass'n, 16 Cal.2d 169, 172, 105 P.2d 118; Campanella v. Campanella, 204 Cal. 515, 269 P. 433; 2 Freeman on Judgments [5th ed.], Sec. 723, p. 1530.

[6] Another consideration leading to the conclusion that defendant's plea of *res judicata* cannot be sustained is that he himself induced the ruling that no evidence was admissible under the pleadings in the first case. Our courts have in appropriate situations weighed the motions and objec-

tions of counsel in a former action to determine whether a contradictory stand was later assumed, and the general principle has been applied that one cannot take inconsistent positions to the injury of an opponent. Thus, where a party litigant successfully blocked the attempt of its opponents in an earlier case to amend their pleading and consolidate with another pending action to include certain issues, and later contended that such issues were *res judicata* because they might have been adjudicated in the earlier case, the Supreme Court in United Bank & Trust Co. of California v. Hunt, 1 Cal.2d 340, 345, 34 P.2d 1001, 1004, held that "Litigants cannot successfully assume such inconsistent positions" and treated the situation developed in the first trial as "* * * tantamount to an express determination on the part of the court with the consent of opposing counsel to reserve the issues involved for future adjudication." Again, in Corona Investment Co. v. Riedman, 11 Cal.App.2d 648, 54 P.2d 85, when a party in a quiet title action involving an oil lease sought to make an issue of title to the casing as well, and the move was successfully defeated, the opposing parties could not later claim the question was *res judicata;* for, said the court, "* * * They prevented plaintiffs' attempt to have the present issue determined in the former action and now inconsistently seek to have the court declare that the entire controversy, including the present issue, was in fact adjudicated in the former action." In Stockwell v. McAlvay, 10 Cal.2d 368, 74 P.2d 504, it was held that one who prevents the adjudication of an issue in an earlier trial by successfully demurring and moving to strike a portion of the pleading tendering the issue cannot later successfully assert that the issue is *res judicata* because it might have been determined in the earlier case.

Appellant in the first action repeatedly and consistently stressed his position that under the pleadings as they stood no relief could be granted; he asked at the outset for a continuance so that plaintiffs could amend their complaint because, as he said, plaintiffs showed by their opening statement they could not recover on their pleadings; counsel objected to the introduction of any evidence "upon the grounds that the pleadings here do not permit any proof" of the entire claim as outlined in the opening statement, or of facts explaining any existing ambiguity or of any modification of the contract as pleaded; "in the long run it probably would not result in any delay, because we are serious about these objections." The court took these basic objections under advisement and after the trial sustained them and held that because of the defective complaint no evidence whatsoever was admissible.

During the trial counsel objected to an offer of evidence relative to oral communications between the parties "on the ground that it is either offered for the purpose of showing a modification of the agreement, or an excuse for performance, but neither one has been pleaded here." Later, counsel interposed an objection to testimony on the ground that "It would be a modification. They have not pleaded a modification," and argued that all that was pleaded was the sale of personal property and that there was nothing pleaded with respect to an assignment of a government oil lease; counsel said "We are certainly trying a case without any pleadings * * * Why ask a question that is not permissible under the pleadings * * * You cannot rely upon an ambiguity in the instrument unless you make a pleading to that effect, and then you can put on evidence to explain the ambiguity. * * * Now, they have counted on the written agreements and that is the basis of this suit here. That is why I thought they should back up and amend their complaint and be in Court on both feet * * * This is a complicated case and should be pleaded. If you are going to get this case in the record here the way it is presented, you have no pleading here * * * The statute of limitations has not run on this yet, if there is a contract * * * I think Mr. Vizzard is a good enough lawyer to know he cannot do what he is trying to do. He has plenty of time and we will agree to his amending his pleading." In connection with the testimony of the witness Garliepp, counsel for the appellant made the objection "One objection I want to make to that is that this is a matter of a cause of action they are relying on that is not pleaded." At the close of the plaintiffs' case, counsel for defendant rested without producing any evidence, saying: "I am going to stand on this pleading. I would like a chance to file a memorandum."

The memorandum was evidently convincing, for the trial judge determined that plaintiffs' pleadings were insufficient to permit the reception of any evidence, holding:

> "The Court further specifically finds that plaintiffs herein failed to plead in their complaint and supplemental complaint that the contract of March 22, 1951 had been performed by them, or that said performance by them had been excused either by pervention thereof by defendant, or by any waiver thereof by defendant, and that all testimony taken in this action thereby became inadmissible and could not be considered by the Court."

And as a conclusion of law the court said:

> "1. That the plaintiffs are not entitled to recover against defendant on account of the evidence being offered by plaintiffs as to any performance of their contract by them, or any waiver or prevention of said performance, being inadmissible by reason of plaintiffs' having failed to plead the same in their complaint and in their supplemental complaint."

And, now, with his victory won in the first case, appellant claims *res judicata* of the very questions which he prevailed upon the court not to consider because of the defective pleading.

As was said in 30 Am.Jur. at page 944:

> "* * * a defendant who succeeds in defeating an action on the ground that the pleadings do not warrant a recovery on the facts proved is estopped in a second action, based on the theory successfully asserted by the defendant in the earlier action, to insist that the latter action is barred by the former judgment because the matter might properly have been settled in the former action." See also Leonard v. Schall, 132 Minn. 446, 157 N.W. 723, 4 A.L.R. 1166; Hall v. Coyle, 38 Cal.2d 543, 546, 241 P.2d 236.

[7] But what is the effect of the trial court's purported complete set of findings in the first case, in view of its final holding that the pleadings are fatally defective and that no evidence was admissible under them? It is clear that such findings on the issues made by the pleadings should not have been made at all, and that the court should have announced his view of the pleadings by a minute order sustaining the objection of counsel for the defendant to the admission of any evidence followed by an order of dismissal. Certainly no findings were necessary. As was held in Colver v. W. B. Scarborough Co., 73 Cal.App. 421, 432, 238 P. 1096, a ruling sustaining an objection to the reception of all evidence is equivalent in its effect to an order granting a motion for nonsuit and findings are unnecessary in either event. Flynn v. Flynn, 103 Cal.App.2d 91, 96, 229 P.2d 5. The same rule is applicable to any similar situation where no evidence is actually admitted, such for example as an order granting a motion for judgment on the pleadings. Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 330, 58 P.2d 194. But, as certainly, the unnecessary and void "findings" did no harm and may be treated as surplusage. For respondents' counsel in the present suit specifically repudiated any idea that they were binding on either party, stating during the course of the trial "* * * if Your Honor rules against Mr. Siemon's affirmative defense I don't think we could say * * * in this prior case you made certain findings and we submit the case on those findings and say those are the facts of the case and the defendant is bound by those facts." The answer to the question is that these additional findings as to the issues made by the pleadings in the first case were wholly ineffective and surplusage in view of the specific and controlling ruling of the court that because of major defects in the pleading no evidence was admissible and the general objection to the evidence was sustained. Obviously, with no evidence before it, the court was in no position to find on any issue of fact.

[8] With the claim of *res judicata* thus disposed of, it appears that little of substance remains of appellant's case. In his closing brief, he undertakes a detailed survey of the findings; many of the criticisms are obviously captious and unsound. For example, objection is made that the court found the writing of March 22, 1951, to be an agreement rather than an option, although both parties in their pleadings term it an agreement; it is objected that the oral waivers did not occur under the evidence on the specific date April 6, whereas the findings say "on or about April 6"; the contradiction in the findings by reference to the pleadings in saying at one place that the bill of sale was delivered prior to the filing of the complaint and at another place one day after is not fundamentally important. The finding that there was not another action pending is subject to the criticism that it should more fully state the facts as of the time when the present suit was filed. But an error of this kind certainly would not warrant a reversal. Collins v. Ramish, 182 Cal. 360, 367, 188 P. 550. Other objections to the findings have their source in the rather vague evidence produced by each side with respect to some of the details of the transactions involved. However, we are satisfied from an inspection of the record that the trial court had before it substantial evidence which either directly or by ligitimate inference sustained the court's basic findings as made. References to one or two of the principal findings as tested by applicable legal principles show, for example, that there may be a waiver by a party of the provisions of a contract inserted for his benefit, Gilmore v. Hoffman, 123 Cal.App.2d 313, 320, 266 P.2d 833, and that the trial court had substantial evidence on which to base its finding that the defendant waived the term of the agreement of March 22 which provided for an escrow to insure good title on a transfer of the lease rights to him by plaintiffs, in favor of a direct transfer of rights from Exeter and Chico-Martinez; going into possession of the property covered by the oil lease and of the oilfield equipment, was some evidence of the practical construction by the defendant of the completed contract, Work v. Associated Almond Growers, 102 Cal.App. 232, 235, 282 P. 965, as was the turning over by defendant of the lease and personal property to the proposed purchaser, Garliepp. It is argued that perhaps there may be defects in defendant's title, but the answer to that is that defendant accepted the substituted performance of transfers directly from Exeter and Chico-Martinez and thereupon paid his second $500; that was the time for him to be sure he was satisfied with the deal as modified by the waivers, and he apparently was. In short, it appears to this court that Kosanke received all that plaintiffs agreed to sell him, that the trial court had ample warrant for all of its material findings, and that no error in connection with the decision in justice or in common sense would require or justify a reversal.

The judgment is therefore affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 666

Mickey NUNNEMAKER and H. Nunnemaker, Plaintiffs and Appellants,

v.

Guy HEADLEE, Defendant and Respondent.

Civ. 8629.

District Court of Appeal, Third District, California.

April 10, 1956.

Rehearing Denied May 7, 1956.

Hearing Denied June 6, 1956.

Action for injuries sustained by pedestrian who was struck by defendant's automobile as she attempted to cross highway after alighting from bus. A judgment for defendant was entered in the Superior Court, Mendocino County, Lilburn Gibson, J., and the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that where there was testimony as to action of both driver and pedestrian before accident, leaving no room for presumptions, giving of instruction relative to presumptions that every person takes ordinary care of his own concerns and obeys law was reversible error.

Reversed.

1. Automobiles ⚷246(58)

In action for injury to pedestrian who was struck by defendant's automobile as she attempted to cross highway after alighting from bus, where evidence showed that there was not a "sidewalk" at site of accident as no portion of intersecting driveway was set apart for pedestrian travel, and further that intersecting roadway did not qualify as a "highway", refusal to give instruction with respect to right of way of a pedestrian in an unmarked crosswalk was not error. Vehicle Code, §§ 81, 84–86.

2. Appeal and Error ⚷1064(1)

In action for injuries to pedestrian who was struck by defendant's automobile as she attempted to cross highway after alighting from bus, giving of instruction that mere fact that accident happened, considered alone, did not support inference that some party or any party to the action was negligent, was not prejudicial error.

3. Negligence ⚷121(2)

It is only in a case where doctrine of res ipsa loquitur is applicable that happening of accident raises an inference that defendant was negligent.

4. Courts ⚷91(1)

District Court of Appeal, as an intermediate appellate tribunal, is bound by decisions of Supreme Court.

5. Appeal and Error ⚷1064(1)
Automobiles ⚷246(60)

In action for injury to pedestrian who was struck by defendant's automobile as she attempted to cross highway after alighting from bus, where there was testimony as to action of both driver and pedestrian before accident, leaving no room for presumptions, giving of instruction relative to presumptions that every person takes ordinary care of his own concerns and obeys law was reversible error. West's Ann.Code Civ.Proc. §§ 1957, 1961, 2061, subd. 2.

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Burke & Rawles, Ukiah, Phil Giberson, Ukiah, of counsel, for appellant.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondent.

SCHOTTKY, Justice.

This is an appeal by plaintiffs from a judgment based on a jury verdict in favor of defendant in an action for personal injuries sustained by plaintiff wife when she was struck by defendant's automobile.

The accident occurred in Mendocino County March 4, 1951, on California Highway 28, which runs in a general northerly and southerly direction, and at a location where the prima facie speed limit of 55 miles per hour is applicable. Plaintiff wife had been a passenger on a Mendocino County bus traveling in a southerly direction. The bus had stopped on the main traveled portion of the highway in a position where it occupied most of the southbound traffic lane for the purpose of discharging plaintiff. Plaintiff alighted on the west edge of the roadway and stood there until the bus started moving in a southerly direction along the highway, which at that point curves slightly to the right and ascends a slight grade. As soon as the rear end of the bus had passed the plaintiff about a foot or two, she started walking rapidly directly across the two lane highway in an easterly direction. During this time, she looked both ways along the highway, her last observation in a southerly direction having been made when she was a foot or two to the west of the center line. She then put her head down and continued across the highway in an easterly direction into the northbound lane. She at no time observed the approach of the defendant's vehicle, nor did she at any time stop after she had commenced crossing from the west edge of the roadway. It had been raining off and on and the pavement was wet.

The defendant was operating his vehicle in a northerly direction. When he first observed the bus, it was moving slowly uphill in its proper southbound lane. He was unable at this time to see the plaintiff because she was screened behind the bus. He first saw her at the moment she appeared in view from behind the bus, when she was walking in an easterly direction and was just about at the white line. He thereupon applied his brakes and swerved to his left in an effort to avoid the collision. In the meantime, the plaintiff continued into the northbound lane and at the last moment stepped or jumped back in a westerly direction into the path of the automobile. The right front of the defendant's vehicle came in contact with plaintiff about on the center line of the highway. The defendant brought his vehicle to a stop in the southbound lane headed northerly, about 60 feet north of the point of impact. According to defendant's testimony, he was traveling at about 40 or 45 miles an hour when he first saw the plaintiff some 30 to 35 feet away from him as she emerged from behind the bus. There was also testimony that defendant was traveling 70 to 75 miles per hour.

Near the scene of the accident there is a dirt roadway which leads from the east edge of the state highway to a parallel county road some 150 feet distant. The road is not publicly maintained. There is a "Trespass at your own risk" sign alongside it facing in a westerly direction. There are no signs on the highway to indicate an intersection or crosswalk.

Other evidence will be referred to in the course of this opinion.

Appellants do not question the sufficiency of the evidence to support the judgment but appellants do contend most earnestly that the court committed prejudicial error in refusing certain instructions offered by them and in improperly giving certain instructions to the jury.

[1] Appellants first complain that the court refused to give an instruction offered by them with respect to the right of way of a pedestrian in an unmarked crosswalk, but instead instructed the jury that a pedestrian must yield the right of way to all vehicles upon the roadway so near as to constitute an immediate hazard and omitted to advise the jury of the exception in a case where a pedestrian is in an unmarked crosswalk. Respondent in reply contends that under the facts of the instant case it cannot be held as a matter of law or fact that a pedestrian crosswalk existed at or near the scene of the accident.

A crosswalk is defined by Section 85 of the California Vehicle Code as either: "(a) That portion of a roadway ordinarily included within the prolongation or connection of the boundary lines of sidewalks at intersections where the intersecting roadways meet at approximately right angles, except the prolongation of any such lines from an alley across a street. (b) Any portion of a roadway distinctly indicated for pedestrian crossing by lines or other markings on the surface."

Since it is not contended that there was a marked crosswalk in the instant case, a crosswalk could only be found to exist, if at all, by virtue of the provisions of subdivision (a) of said section 85.

To satisfy the statutory definition, there must be a "sidewalk" and an "intersection" at the scene of the accident. Section 84 of the California Vehicle Code defines "sidewalk" as "that portion of a highway, other than the roadway, set apart for pedestrian travel"; and section 86 defines "intersection" as "the area embraced within the prolongation of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways, of two highways which join one another at approximately right angles or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict." Section 81 defines "highway" as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel."

The evidence shows that there was not a "sidewalk" at the site of the accident as no portion of the intersecting driveway was "set apart for pedestrian travel." In order to have an "intersection," there must be at least two "highways." Respondent argues that the intersecting dirt roadway was not a "highway" because it was not "publicly maintained." The county surveyor testified to this effect. Also the sign "Trespass at your own risk" infers that this roadway is not "publicly maintained" or "open to the use of the public for purposes of vehicular travel." Even conceding that the intersecting way was a public road in the sense that it was open to and available for the use of the public, as appellants contend, it was not "publicly maintained" and thus could not qualify as a "highway."

In view of the said provisions of the Vehicle Code and of the evidence in this case a finding that there was an unmarked crosswalk at the place of the accident could not have been sustained, and there was, therefore, no error in the refusal of the court to give an instruction as to the right of way of a pedestrian in an unmarked crosswalk.

[2, 3] Appellants next contend that it was prejudicial error for the court to give the jury the following instruction:

> "The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action was negligent."

Appellants argue that inasmuch as respondent admitted that his automobile was on the left side of the road and struck a pedestrian who was crossing the road at a point approximately on the white center line a prima facie case of negligence was made out and hence it was error to give the foregoing instruction.

We are unable to understand how the giving of the instruction complained of could have been prejudicial to appellants in the instant case. It is only in a case where the doctrine of res ipsa loquitur is applicable that the happening of an accident raises an inference that a defendant was negligent. The cases of Sullivan v. Market St. Ry. Co., 136 Cal. 479, 69 P. 143; Moeller v. Market St. R. Co., 27 Cal. App.2d 562, 81 P.2d 475; Waite v. Pacific Gas & Electric Co., 56 Cal.App.2d 191, 132 P.2d 311, and Smith v. Hollander, 85 Cal. App. 535, 259 P. 958, cited by appellants, involve the doctrine of res ipsa loquitur, which doctrine is not applicable to the instant case.

In the case of Keller v. Pacific Telephone & Telegraph Co., 2 Cal.App.2d 513, 38 P. 2d 182, 185, also cited by appellants, the jury was instructed: " 'The mere fact that the defendant erected and maintained the pole involved in this case, does not mean that the defendant is negligent, and does not entitle the plaintiff to recover damages from the defendant.' " However, in that case the very basis of the liability of defendant, if any, was the maintenance of the pole, and the instruction in the form given was plainly erroneous. Similarly, in the case of Roberts v. Salmon, 66 Cal.App.2d 22, 151 P.2d 556, 558, cited by appellants, an instruction that "the mere fact that the accident in question occurred upon Mr. Tobey's wrong side of the road is not in itself enough to establish liability upon the part of the defendant Mr. Tobey", was properly held to be erroneous.

In the instant case the instruction complained of merely informed the jury that the occurrence of the accident, considered alone, that is, without reference to the evidence concerning the conduct of either of the parties, did not entitle the jury to infer that either the appellant Mrs. Nunnemaker or the respondent was negligent. Furthermore, the jury was fully and correctly instructed on the burden of proof, proximate cause, negligence, contributory negligence, last clear chance, and other subjects. They were also instructed that they must consider all of the instructions as a whole, and we are satisfied that even if the giving of the instruction complained of was error, which we do not hold, appellants suffered no prejudice therefrom.

Appellants' final contention is that the court erred in giving the following instruction:

> "At the outset of this trial each party was entitled to the presumptions of law that every person takes ordinary care of his own concerns and that he obeys the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary.

> "When there is other evidence that conflicts with such a presumption, it is the jury's duty to weigh that evidence against the presumption and any evidence that may support the presumptions to determine which, if either, preponderates. Such deliberations, of course, shall be related to and in accordance with my instructions on the burden of proof."

Appellants argue that it was prejudicial error to give said instruction which they assert told the jury that respondent was presumed to have exercised due care and to have obeyed the law when respondent admitted that at the time of the collision with appellant pedestrian he was driving on the left side of the center line when the highway was wet and when there was evidence that respondent was driving 70 miles per hour in a 55 mile speed zone. (Respondent testified that he was driving from 40 to 45 miles per hour.)

In support of this contention appellants cite Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 255 P.2d 850, in which the identical instruction here under attack was held to be reversible error. In that case a judgment in favor of defendant in a personal injury case was reversed because of the giving of this instruction, the court stating at page 287 of 117 Cal.App.2d, at page 852 of 255 P.2d:

> "Repeatedly it has been held that the giving of the quoted instruction, or an instruction of similar tenor, is error when thereby the benefit of the presumption of due care is extended to a party who by his testimony or by evidence introduced in his behalf has disclosed his acts and conduct immediately preceding and at the time of the accident. Speck v. Sarver, 20 Cal.2d 585, 587, 588, 128 P.2d 16, and cases cited; Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597; Ford v. Chesley Transportation Co., 101 Cal.App.2d 548, 225 P.2d 997; Wertheim v. Mears, 104 Cal.App.2d 120, 231 P.2d 89. The precise instruction here under attack was considered in the two last-cited cases and in each case the court on appeal concluded that the giving of the instruction constituted prejudicial error.
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> "In determining whether prejudice resulted in a particular case, the vice of the criticized instruction should be kept in mind. The party against whom the presumption is invoked must not only overcome by a preponderance of the evidence the case presented by the opposing party, but must also overcome the presumption, for in the language of the instruction, conflicting evidence must be weighed 'against the presumption, and any evidence that supports the presumption, to determine which, if either preponderates.' In circumstances such as are here presented, paraphrasing the language in Speck v. Sarver, supra, 20 Cal.2d at page 588, 28 P.2d 16 (quoting from Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884), whether either of the defendants took ordinary care of his own concerns while operating his vehicle on the particular occasion in question was a matter of evidence established by such defendant and witnesses called by him, and 'in the face of this evidence, there was no room for any presumption.' (20 Cal.2d 585, 128 P.2d 18.) Or, as was said by Division Three of this court in an opinion prepared by Presiding Justice Shinn in Ford v. Chesley Transportation Co., supra, 101 Cal.App.2d at page 553, 225 P.2d at page 1001, 'The effect of the instruction was to add strength to defendant's claim that it was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that defendant was not negligent.'" (A hearing was denied by the Supreme Court.)

Appellants also cite Verhaegen v. Guy F. Atkinson Co., 126 Cal.App.2d 442, at pages 444 and 445, 272 P.2d 855, at page 856, where the same instruction was given, and the court in reversing a judgment in favor of plaintiff stated:

"Whether the error in giving the instruction is prejudicial depends on the facts of the particular case, Ford v. Chesley Transportation Co., 101 Cal. App.2d 548, 552, 225 P.2d 997; Cole v. Ridings, 95 Cal.App.2d 136, 140, 212 P.2d 597. It is therefore necessary to analyze the quoted instruction, and relate it to the evidence and certain other instructions that were given.

"This instruction was given verbatim in Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 255 P.2d 850 (hearing denied) and was held to be prejudicial. It was there pointed out, 117 Cal.App. 2d at page 288, 255 P.2d at page 852, that in determining whether prejudice resulted in a particular case, the vice of the instruction must be kept in mind, viz., that 'The party against whom the presumption is invoked must not only overcome by a preponderance of the evidence the case presented by the opposing party, but must also overcome the presumption, for in the language of the instruction, conflicting evidence must be weighed "against the presumption, *and* any evidence that supports the presumption, to determine which, if either, preponderates."' (Italics added.) Since plaintiff testified fully as to his acts and conduct immediately prior to and at the time of the accident there was no room for the presumption of due care. Mundy v. Marshall, 8 Cal.2d 294, 296, 65 P.2d 65. The effect, however, of the instruction was to add strength to plaintiff's claim that he was free from negligence. The considerations pointing to negligence would have to overcome not only those pointing to a contrary conclusion, but also the presumption that plaintiff was not negligent. Ford v. Chesley Transportation Co., supra, which dealt with this identical instruction. It is thus clear that plaintiff received substantial benefit from this portion of the court's charge."

Also cited by appellants in support of their contention that the giving of this instruction was reversible error are: Ford v. Chesley Transportation Co., 101 Cal. App.2d 548, 225 P.2d 997; Tice v. Kaiser, 102 Cal.App.2d 44, 226 P.2d 624, and Kelly v. Fritz, 19 Cal.App.2d 356, 65 P.2d 914.

Respondent in reply points to several sections of the Code of Civil Procedure. Section 1957 provides that a disputable presumption is evidence. Section 1961 provides that a disputable presumption may be controverted by other evidence. Section 2061, subdivision 2, directs the trial court to instruct the jury "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

Respondent argues that the only logical conclusion to be drawn from these sections is the rule of the Mar Shee and Smellie cases.

In Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, at page 9, 210 P. 269, at page 273, our Supreme Court, after discussing the statutory presumptions and how they have been applied in cited cases, defined the only circumstances in which a trier of fact properly could hold that an applicable presumption ceased to have significance as evidence in a case, and stated:

> "From the foregoing we deduce that a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

And in Smellie v. Southern Pac. Co., 212 Cal. 540, 553, 299 P. 529, 534, the court said that presumptions "do disappear when contradicted or controverted by the evidence of the party relying upon them, *with the qualification stated in the Mar Shee case,* * * *." (Italics ours.)

However, notwithstanding the language of the Mar Shee and Smellie cases, both of which were cases in which the persons in whose favor the disputable presumptions that a person takes ordinary care of his own concerns was invoked, later decisions appear to have limited the application of the presumptions to cases where the conduct either of a decedent or of a person who by reason of incapacity or loss of memory has no recollection of the events was involved. Thus in Speck v. Sarver, 20 Cal.2d 585, at pages 587–588, 128 P.2d 16, at page 17, the court said:

> "The rebuttable presumption that a person takes ordinary care of his own concerns is declared in section 1963, subd., 4 of the Code of Civil Procedure. An instruction as to the existence of this presumption may properly be given to the jury in certain situations. See Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Downing v. Southern Pacific Co., 15 Cal.App.2d 246, 59 P.2d 578. Such an instruction, however, should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. See cases last cited and also Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. In the instant case the plaintiffs testified in regard to the events leading up to the collision. Plaintiff Matthew Speck, the driver, explained all of his actions. Under such circumstances there was no room for the presumption in this case. What was said in Rogers v. Interstate Transit Co., supra, is equally applicable here. It is there stated at page 38 of 212 Cal., at page 885 of 297 P.: 'At the trial of this action, plaintiff not only testified as to the circumstances of the collision between the car he was driving and the autostage of the defendant, but he produced witnesses who gave evidence, both direct and on cross-examination, of his acts and conduct just before and at the time of the collision. Whether the plaintiff took ordinary care of his own concerns while operating his car at that particular occasion was a matter of evidence established by the plaintiff and witnesses called by him in support of his claim that he did. In the face of this evidence, there was no room for any presumption. If the evidence on his part showed that he was negligent, then it cannot be said that the jury, notwithstanding this evidence, might presume that he was not negligent, or that he took ordinary care of his own concerns, which amounts to the same thing. On the other hand, if this evidence showed that plaintiff was not negligent in the operation of his car at the time of its collision with defendant's stage, then that fact was before the jury, not as the result of any presumption, but in response to testimony of witnesses testifying in the case. In either event, the jury, in determining whether the plaintiff was guilty of negligence, would look to, and be governed by, the evidence before the court, and not by any presumption.' In view of the foregoing, the giving of the instruction complained of was error."

And in the recent case of Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809, 814 the court said:

> "Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (see Speck v. Sarver (1942), 20 Cal.2d 585, 587–588, 128 P.2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.'"

[4, 5] In view of the foregoing decisions, and particularly those of our Supreme Court, by which we as an intermediate appellate tribunal are bound, we believe that it must be held that in the instant case, in which both respondent and appellants testified fully as to their actions at the time involved, the giving of the instruction here under attack was error. We reach this conclusion with some reluctance as we believe that there is an inconsistency between these later decisions and the code sections hereinbefore referred to. It would seem to us that if, as the code sections indicate, a presumption is evidence, then it is hardly logical to consider that the instruction is erroneous, but if it is not evidence the instruction would be erroneous. Our Supreme Court has never held that it is not evidence, but it has reiterated the statement that there is no room for the presumption where the person whose claimed negligence is at issue testifies as to his actions at the time involved.

Having concluded, as we feel we are bound to do by the decisions hereinbefore referred to, that it was error in the instant case to give said instruction, there remains only the question of whether the giving of it amounted to prejudicial error. The evidence in the case was highly conflicting and there was evidence which pointed strongly to negligence on the part of respondent. If it was error to give to respondent the benefit of the presumption that he exercised "ordinary care for his own concerns and that he obeys the law," and to permit the jury to consider the presumption as prima facie evidence and to weigh the other evidence against the presumption, then it could well be that the jury, relying upon the presumption, determined that respondent was not negligent. Therefore if it was error to give the instruction, as we are compelled by the authorities to conclude that it was, we must also conclude that it was reversible error.

In view of the foregoing the judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

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140 Cal.App.2d 633

Rubin MENDOZA and Henry Mendoza, a minor, by his guardian ad litem, Angela Ashmore, Plaintiffs and Respondents,

v.

Harry Adam RUDOLF and Henry A Rudolf, Defendants and Appellants.

Civ. 5320

District Court of Appeal, Fourth District, California.

April 9, 1956.

Rehearing Denied May 8, 1956.

Hearing Denied June 6, 1956.

Action for injuries and property damage sustained in automobile collision. The Superior Court, Fresno County, Milo Popovich, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Mussell, J., held that amounts awarded plaintiffs as general damages were not excessive, but that awards of special damages should be reduced by the amounts awarded for future medical treatment in absence of evidence showing that such treatment would be necessary and indicating with reasonable certainty the amounts required for such treatment.

Judgment modified in accordance with opinion, and, as modified, affirmed.

1. Damages ⚿130(3)

Award of $7,500 as general damages for injuries consisting of cerebral concussion, multiple contusions, rib fractures, and contusion of right kidney necessitating examination by use of a cystoscope and painful treatment by insertion of a catheter, and resulting in dizzy spells, loss of memory, shooting pains in the back, and inability to hold any position because of kidney trouble, was not excessive.

2. Damages ⚿130(3)

Award of $6,250 as general damages for injuries consisting of multiple contusions and abrasions, severe contusion of the brain, and probable brain lesion, resulting in partial paralysis of right arm and leg and right side of face, frequent headaches and dizzy spells, and impairment of vision, was not excessive.

3. Appeal and Error 🔑1004(1), 1013

Reviewing court can interfere with amount of damages awarded only when the facts before court are such as to suggest passion, prejudice or corruption of trial judge or jury.

4. Trial 🔑311, 367

Trial judge or jurors in arriving at amount of damages to be awarded under the facts of a particular case may use their personal experiences and knowledge.

5. Damages 🔑32, 53, 96

Damages may be awarded for pain, anxiety, inconvenience, annoyance, interference with comfort of plaintiff and his family, and disadvantage suffered by reason of defendant's acts, and the amount of compensation for such elements of damage is not susceptible of proof in dollars and cents, but must be left to sound discretion of trial court to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence.

6. Damages 🔑208(1)

The amount of damages is ordinarily a question of fact entirely within province of jury or trial court, in absence of jury, partcularly where the law furnishes no rule for their admeasurement.

7. Appeal and Error 🔑1004(1), 1013

A court may interpose its judgment against that of jury only where verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it was based on prejudice or passion rather than sober judgment, and the same rule applies to findings of trial court when considered on appeal.

8. Damages 🔑185(1)

Evidence that plaintiff at time of trial of action for personal injuries was still suffering from loss of memory, had shooting pains in his back and dizzy spells, and was unable to hold any position because of kidney trouble was sufficient to support award of damages for future pain and suffering.

9. Damages 🔑185(1)

Evidence that plaintiff at time of trial of action for personal injuries was still suffering from headaches and dizzy spells and impairment of vision was sufficient to support award of damages for future pain and suffering.

10. Damages 🔑185(1)

Award of damages for pain and suffering as a result of personal injuries need not be supported by medical testimony.

11. Damages 🔑191

Award of special damages for personal injuries should be reduced by the amount awarded for future medical treatment, in absence of evidence showing that such treatment would be necessary and indicating with reasonable certainty the amount required for such treatment.

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Stutsman, Hackett & Nagel, Fresno, for appellants.

Lewis W. Boies, Jr. and L. Kenneth Say, Fresno, for respondents.

MUSSELL, Justice.

This is an action for personal injuries and property damage resulting from an intersection collision between two automobiles, a Ford coupe being operated by defendant Henry Rudolf (and owned by his father) and an Oldsmobile owned and operated by plaintiff Ruben Mendoza.

Plaintiff Henry Mendoza, a minor, seventeen years of age, was riding in the front seat of the Oldsmobile with his brother, Ruben, on September 3, 1954, at about 7:00 a. m., when the accident happened and both plaintiffs sustained personal injuries. A jury trial was had in which a verdict was returned for plaintiffs, assessing the damages as $735.90 for Ruben Mendoza and $385.90 for Henry Mendoza. Ruben moved for a new trial on the statutory grounds and inadequacy of the damages awarded, and Henry moved for a new trial on the sole ground of the insufficiency of the evidence to justify the verdict in that the amount awarded by the jury was not in conformity with the evidence and was inadequate. Ruben's motion was granted as to all issues in the case and Henry's was granted on the issue of damages alone. Both motions were granted on the ground of the insufficiency of the evidence to justify the verdict. The cause was then tried without a jury and the court ordered judgment against the defendants in favor of the plaintiffs. Ruben was awarded $939 special damages and general damages of $7,500. Henry was awarded special damages of $712.90 and general damages in the sum of $6,250. These judgments were limited as to defendant Henry Adam Rudolf to $5,250 for Ruben and $5.000 for Henry pursuant to section 402(b) of the Vehicle Code.

Defendants appeal from the judgment and their first contention is that the amount of general damages allowed is so grossly disproportionate to any compensation which could be reasonably awarded as to shock the sense of justice.

The record shows that plaintiff Ruben Mendoza was taken to the Fresno County Hospital immediately after the accident. It was found he was suffering from cerebral concussion, multiple contusions, fracture of the tenth and eleventh ribs on the right side, and contusion of the right kidney. He was hospitalized for a period of thirteen days and at the time of his discharge on September 16, 1954, he had not recovered from his injuries. He testified at the trial that he had a cut and lump on the right side of his head behind the ear and still had the mark there; that he was suffering from loss of memory; that his kidney and ribs bothered him all the time, and he had shooting pains in his back; that he was unable to hold any position because his kidney bothered him; that he had to get up four or five times during the night, and had dizzy spells. The record shows that during the course of his treatment for contusion of the right kidney it became necessary for a catheter to be inserted in his bladder and that apparently this painful treatment was necessary for a period of some ten days. In addition, an examination was conducted on him by the use of a cystoscope. When questioned about this treatment and examination he "broke down in tears".

Plaintiff Henry Mendoza was also taken to the hospital and was suffering from multiple contusions and abrasions involving his head, chest, right arm, right leg and sensitivity in the right hip region. He apparently was suffering from a partial paralysis of the right arm and leg and the right side of his face. The medical testimony was that he had suffered a severe contusion of the brain and a spinal tap indicated a brain lesion. At the trial he testified that he was "knocked out" and did not remember anything from the time of the accident until he woke up in the hospital seven or eight days later; that he was paralyzed on his whole right side, and that his leg still hurt him an "awful lot"; that since he went back to work after the accident, he often had headaches and dizzy spells; that for ten days after the accident he had double vision, and that he had trouble with his vision since going back to work. One of the physicians who examined him testified that at the time of his discharge from the county hospital on December 16th, Henry had a questionable facial paralysis.

[1–7] We cannot here hold as a matter of law that the general damages awarded plaintiffs exceeded the amount justified by the evidence. It is only when the facts before us are sufficient as to suggest passion, prejudice or corruption on the part of the trial judge or jury that we can interfere with the amount of damages awarded. Sassano v. Roullard, 27 Cal.App.2d 372, 374, 81 P.2d 213. In Thompson v. Simonds, 68 Cal.App.2d 151, 162, 155 P.2d 870, it was held that jurors, and a trial judge as well, may use their personal experiences and knowledge in arriving at the amount of damages to be awarded under the facts of a particular case, and that damages may be awarded for pain, anxiety, inconvenience, annoyance, interference with the comfort of plaintiff and his family, and disadvantage suffered by reason of a defendant's acts; that as to such elements of damage the amount of compensation is not susceptible of proof in dollars and cents, but must be left to the sound discretion of a trial court, to be ascertained and adjudged after consideration of all the facts and circumstances established by the evidence in the case; and that the amount of damages to be awarded in a particular case is ordinarily a question of fact, entirely within the province of a jury, or, in the absence of a jury, of a trial court, especially where the law furnishes no rule for their admeasurement. It was further held that it is only where a verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that a court is at liberty to interpose its judgment against that of a jury; and this rule applies equally to the findings of a trial court when considered on appeal.

[8–10] Appellants argue that there was no substantial evidence to support the findings of fact and judgment for future pain and suffering and medical care. There was testimony adduced that Ruben Mendoza at the time of trial was still suffering from a loss of memory; that he had shooting pains in his back; that he was unable to hold any position because his kidney bothered him and that he had dizzy spells. There was also evidence that plaintiff Henry Mendoza at the time of the trial was suffering from headaches and dizzy spells and was having trouble with his vision. This evidence tended to prove future damages, supporting an award therefor. Loper v. Morrison, 23 Cal.2d 600, 611, 145 P.2d 1. In Paolini v. City and County of San Francisco, 72 Cal.App.2d 579, 591, 164 P.2d 916, 922, the court said:

> "It was not required that the doctor testify that he was reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. Bauman v. [City and County of] San Francisco, 42 Cal.App.2d 144, 108 P.2d 989; Riggs v. Gasser Motors, 22 Cal.App.2d 636, 72 P.2d 172; Ostertag v. Bethlehem, etc., Corp., 65 Cal.App.2d 795, 151 P.2d 647."

It appears, therefore, that it was not necessary that the award for the pain and suffering, if any be supported by medical testimony as argued by appellants. In this connection it is further argued that the court took judicial notice of medical facts solely within the knowledge of experts and resorted to personal knowledge on subjects which must be proved by medical testimony. However, as stated by appellants, it would be speculation to say what portions of the judgment were based on this phase of the case. In People v. Miller, 41 Cal.App.2d 252, 258, 106 P.2d 239, it was held that the judge could not be charged with error in calling to his aid his own personal experience with the elements involved in the action. In the instant case the trial court observed that Ruben Mendoza broke down in tears when questioned about his painful examination in the hospital, and the court noted his behavior and attributed it to his kidney condition, stating that he could appreciate the condition referred to by the witness from personal experience and studies. Whether the court awarded damages for future suffering in this connection is not ascertainable from the record and we are unable to say as a matter of law that the general damages awarded are excessive in the case of either plaintiff. The awards of special damages, other than the sums allowed for future medical care are supported by the record and there is no serious contention that they were excessive.

[11] It is argued that there is no evidence that future medical treatment will be necessary as the result of the injuries to plaintiffs and that the award of $100 to Ruben and $200 to Henry for such treatments was error. We are in accord with this contention. None of the physicians or other witnesses who testified at the trial stated that future medical expenses would be necessary. The medical testimony was to the effect that expenses for such treatment would be unnecessary. There was no evidence indicating with reasonable certainty the amounts, if any, required for such purposes.

The judgment is modified by reducing the amount awarded plaintiff Ruben Mendoza for special damages to the sum of $839 and by reducing the special damages awarded Henry Mendoza to the sum of $512.90.

As so modified, the judgment is affirmed. Appellants shall pay costs.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

140 Cal.App.2d 618

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lewis Donald FRITZ, Philip William Fritz and Richard Fargo, Defendants,

Lewis Donald Fritz, Appellant.

Cr. 5560.

District Court of Appeal, Second District, Division 1, California.

April 9, 1956.

Defendant pleaded guilty of kidnapping and was sentenced to state prison. From an order of the Superior Court of Los Angeles County, David Coleman, J., denying defendant's petition for a writ of error coram nobis, he appealed. The District Court of Appeal, Fourt, J., held that alleged grounds of petition that judgment on plea was void as repugnant to certain amendments of Federal Constitution and contrary to law and evidence, that he was sentenced under double jeopardy, that his attorney refused to defend him properly, and that facts in evidence were concealed by extrinsic fraud, were not within limited scope of such writ, and that denial of petition was required, in absence of affidavits or other evidence supporting application.

Order affirmed.

1. Criminal Law 🔑997(1)

The writ of error coram nobis is a limited writ aimed to reach errors of fact outside record and available only where no other remedies exist.

2. Criminal Law 🔑997(1)

The office of writ of error coram nobis is to bring to trial court's attention errors of fact, which, without negligence of defendant seeking writ, were not presented to court at time of trial.

3. Criminal Law 🔑997(2)

The writ of error coram nobis never issues to correct an error of law or redress an irregularity occurring at trial which can be corrected on motion for new trial or by appeal.

4. Criminal Law 🔑997(2)

The writ of error coram nobis cannot be used to serve purpose of appeal, where such remedy was lost through failure to invoke it in time, though without fault or neglect of party seeking remedy.

5. Criminal Law 🔑997(15)

A petition for writ of error coram nobis places on petitioner burden of proof to overcome strong presumption in favor of validity of judgment complained of by strong and convincing evidence.

6. Criminal Law 🔑997(16)

On petition for writ of error coram nobis, Superior Court is not required to accept allegations of petition or supporting affidavits at their face value, though uncontradicted.

7. Criminal Law 🔑1147

Where there are grounds for sustaining trial court's ruling denying petition for writ of error coram nobis, its decision will not be reversed on appeal, unless abuse of discretion is evidenced.

8. Criminal Law 🔑997(6)

One applying for writ of error coram nobis must show that facts on which he relies were unknown to him and could not have been discovered by him in exercise of due diligence before time of application to be entitled to such relief.

9. Criminal Law 🔑997(12)

The Superior Court properly denied application for writ of error coram nobis by one sentenced to state prison on plea of guilty of kidnapping, where he offered no explanation for two years delay in applying for writ after entry of such judgment. West's Ann.Pen.Code, § 207.

10. Criminal Law ⚷997(2)

A claim of one sentenced to state prison on plea of guilty of kidnapping that judgment was repugnant to various constitutional provisions stated no ground for writ of error coram nobis, which is not a proper vehicle for vindication of constitutional rights; that being function of motion for new trial, appeal, or habeas corpus. West's Ann.Pen.Code, § 207.

11. Criminal Law ⚷997(11)

An applicant for writ of error coram nobis must allege facts establishing his right to such writ within its recognized narrow confines, and mere conclusions or generalities, such as statement that evidence, witnesses, etc., were suppressed by extrinsic fraud, are insufficient to establish right to relief.

12. Criminal Law ⚷997(6)

Since writ of error coram nobis does not issue to remedy an error of law, claim that judgment complained of was contrary to law and evidence does not aid applicant for writ.

13. Criminal Law ⚷273

A plea of guilty admits all elements of crime charged and constitutes conclusive admission of defendant's guilt thereof.

14. Criminal Law ⚷997(5)

A claim of one sentenced to prison on plea of guilty of crime charged that he lacked effective aid of counsel cannot be asserted by him in proceeding for writ of error coram nobis.

15. Criminal Law ⚷997(2)

A plea of double jeopardy raises question of denial of constitutional rights, which is reviewable on appeal and hence not ground for writ of error coram nobis.

16. Criminal Law ⚷178

One charged in information with crimes of escape and kidnapping was not placed in double jeopardy, where count charging escape was dismissed on withdrawal of his pleas of not guilty and entry of plea of guilty to kidnapping count. West's Ann.Pen.Code, §§ 207, 4532.

17. Criminal Law ⚷173

Jeopardy does not attach until defendant is placed on trial before an impaneled jury, first witness is sworn in court trial, or defendant pleads guilty.

18. Criminal Law ⚷997(16)

Alleged grounds of petition for writ of error coram nobis by one sentenced to state prison on his plea of guilty of kidnapping that such judgment was void as repugnant to certain amendments of Federal Constitution and contrary to law and evidence, that he was sentenced under double jeopardy, that his attorney refused to defend him properly, and that facts in evidence were concealed by extrinsic fraud, were not within limited scope of such writ, and denial of petition was required, where petitioner offered no affidavits or other evidence in support of application. West's Ann.Pen.Code, § 207.

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Lewis Donald Fritz, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal by the defendant Lewis Donald Fritz from an order of the Superior Court denying his petition for writ of error coram nobis.

Appellant was charged in an information with the crime of escape in violation of section 4532, Penal Code, and with the crime of kidnapping in violation of section 207, Penal Code. He was arraigned and pleaded not guilty as charged in the information, as well as not guilty by reason of insanity. Later, on August 19, 1953, appellant withdrew his pleas as to the kidnapping count and entered his plea of guilty thereto. He was thereafter sentenced to the state prison for the term prescribed by law, the sentence to run concurrently with the sentences in another case involving grand theft and forgery with which we are not here concerned. No appeal was taken from the judgment.

About two years later, on September 20, 1955, a petition for a writ of error coram nobis was filed with the clerk of the superior court in Los Angeles county, and on September 22, 1955, the matter came on for hearing and the petition for the writ was denied. A notice of appeal bearing date September 30, 1955, was filed with the clerk of the superior court on October 6, 1955.

The appeal is subject to dismissal on the ground there was no compliance with the requirements of Rule 31 of the Rules on Appeal, however, we have seen fit to dispose of the matter on its merits.

Appellant contends "that the judgment was void and repugnant to certain amendments of the United States Constitution"; that the judgment was void because contrary to law and evidence; that the appellant was sentenced "under double jeopardy"; that the appellant's attorney refused to properly defend him; that facts and evidence were "concealed by extrinsic fraud", and that appellant was denied the right to appeal.

We have carefully searched the record in this case and we find nothing whatsoever to support any of the contentions of the appellant.

[1, 2] It has been repeatedly said that the writ of error coram nobis is a limited writ aimed at reaching errors of fact outside of the record and available only where no other remedies exist. The office of the writ is to bring to the attention of the trial court errors of fact, which, without negligence on the part of the defendant, were not presented to the court at the time of the trial. People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505; People v. Reid, 195 Cal. 249, 255, 232 P. 457, 36 A.L.R. 1435; People v. Gennaitte, 127 Cal.App.2d 544, 548, 274 P. 2d 169.

[3] The writ of error coram nobis never issues to correct an error of law or to redress an irregularity occurring at the trial which could be corrected on motion for a new trial or by an appeal. People v. Martinez, 88 Cal.App.2d 767, 771, 199 P.2d 375.

[4] It is well settled that where the remedy of the motion for a new trial or appeal exists the writ is not available. And the writ cannot be used to serve the purpose of an appeal when this remedy was lost through failure to invoke it in time even though such failure occurred without fault or neglect on the part of the one seeking the remedy. People v. Mooney, 178 Cal. 525, 529, 174 P. 325; People v. Pryor, 87 Cal.App.2d 352, 353, 196 P.2d 948.

[5] Further, a petition for writ of error coram nobis places the burden of proof to overcome the strong presumption in favor of the validity of the judgment on the petitioner. This burden requires production of strong and convincing evidence. People v. Shorts, 32 Cal.2d 502, 508, 197 P.2d 330.

[6] In the instant case the petitioner did not produce any proof (much less convincing proof) of a fact constituting legal ground for the issuance of the writ. It is also the rule that on such an application the court is not required to accept at face value the allegations of the petition or of affidavits (if any) in support thereof, even though such allegations or affidavits are uncontradicted. People v. Adamson, 34 Cal. 2d 320, 326–327, 330, 210 P.2d 13; 12 Cal. Jur.2d, Coram Nobis, § 20, p. 572.

[7] Where there are grounds for sustaining the trial court on the ruling on the petition, its decision will not be reversed on appeal except where there is evidenced an abuse of discretion. People v. Stuhlmiller, 37 Cal.App.2d 603, 604–605, 99 P.2d 1072.

[8] Further, it is well settled in California that a showing of diligence is a prerequisite to the availability of relief by writ of error coram nobis. One who applies for such a writ must show that the "facts" upon which he relies were not known to him and could not, in the exercise of due diligence, have been discovered by him at any earlier time than the time of his application. Otherwise, he has stated no grounds for relief. People v. Shorts, supra, 32 Cal.2d 502, 512–514, 197 P.2d 330; People v. Collins, 97 Cal. App.2d 552, 556, 218 P.2d 87; People v. Krout, 90 Cal.App.2d 205, 209, 202 P.2d 635.

[9] In the instant case the defendant offered no explanation for the delay that

occurred between the entry of judgment and the tardy application for the writ. On this ground alone the court below acted properly in denying his application. 12 Cal.Jur.2d, Coram Nobis, §§ 8–10, pp. 558, 561.

[10] The claim of the defendant that the judgment was "repugnant" to various provisions of the Constitution does not state a ground for relief by writ of error coram nobis. It is well established that coram nobis is not a proper vehicle for vindication of constitutional rights; that is the function of a motion for a new trial, appeal or habeas corpus. People v. Ayala, 138 Cal. App.2d 243, 291 P.2d 517.

[11] The applicant for this relief must allege facts which establish a right to the writ within its recognized narrow confines. Mere conclusions or generalities will not suffice. People v. Ayala, supra, 138 Cal. App.2d 243, 291 P.2d 517. Thus, merely stating that evidence, witnesses, etc., were suppressed by "extrinsic fraud" does not establish any right to relief.

[12, 13] Since coram nobis does not issue to remedy an error of law, the claim that the judgment was contrary to the law and the evidence does not aid the defendant. Further, in the instant case, the defendant entered a plea of guilty to the charge of kidnapping. It must be noted that the plea of guilty admits all of the elements of the crime charged and constitutes a conclusive admission of the defendant's guilt. People v. Ward, 118 Cal.App.2d 604, 608, 258 P.2d 86; People v. Outcault, 90 Cal.App.2d 25, 29, 202 P.2d 602.

[14] Likewise, the claim of lack of effective aid of counsel cannot be asserted in a coram nobis proceeding. People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117; People v. Krout, supra, 90 Cal.App.2d 205, 208, 202 P.2d 635.

[15–17] The plea of double jeopardy raises a question of denial of constitutional rights, a matter which is reviewable on appeal; hence, the matter is not one for coram nobis. Further, even if this were a proper ground for coram nobis the defendant could not prevail since no double jeopardy has been shown. Jeopardy does not attach until a defendant has been placed on trial before an impanelled jury or until the first witness has been sworn in a court trial, or until he has pleaded guilty. When that occurred in this case the other count naming the defendant was dismissed. People v. Ayala, supra, 138 Cal.App.2d 243, 291 P.2d 517.

The remaining so-called grounds presented to the trial court are disposed of in what was stated in People v. Bible, 135 Cal.App. 2d 65, 286 P.2d 524.

[18] In the instant case, it is apparent that the defendant presented nothing to sustain a court in ordering the issuance of a writ of error coram nobis. The alleged "grounds" were not within the limited scope of the writ. Further, no affidavits or other evidence were offered in support of the application. The only alternative the court below had was to deny the petition.

The order is affirmed.

WHITE, P. J., and DORAN, J., concur.

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140 Cal.App.2d 433

M. Louise CASPER, Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, a Municipal Corporation, and Does One, Two and Three, Defendants and Respondents.
Civ. 21461.

District Court of Appeal, Second District, Division 2, California.
April 2, 1956.

Action against city for injuries suffered from fall on defective sidewalk. The Superior Court, Los Angeles County, Philbrick McCoy, J., denied relief sought and plaintiff appealed. The District Court of Appeal, Moore, P. J., held that evidence as to whether there was dangerous condition on sidewalk and whether it was proximate cause of plaintiff's injury, and whether she contributed any negligence to cause herself to fall, was sufficient to present questions of fact for jury determination.

Judgment affirmed.

1. Appeal and Error ⚷1001(1), 1005(2)

The results of jury trial are final where no prejudicial error appears, and where there is substantial evidence supporting verdict, and especially where trial court has reviewed record on motion for new trial and rejected such motion.

2. Appeal and Error ⚷1001(1)

The function of the trial court is to hear and determine controversies of gravest concern, and its judgments are made upon the hypothesis that all issues of a controversy are raised by the pleadings, are settled by the judgment and that when based upon substantial evidence such judgment is final.

3. Municipal Corporations ⚷821(6, 19, 20)

In action against city for injuries suffered from fall on defective sidewalk, evidence as to whether sidewalk was in dangerous condition and such condition was proximate cause of plaintiff's injuries, and whether she contributed any negligence to cause herself to fall, was sufficient to present questions for jury.

4. Appeal and Error ⚷996

Where inferences from evidence adduced fairly supported verdict, District Court of Appeal was powerless to upset implied findings.

5. Appeal and Error ⚷930(1)

In reviewing evidence, all conflicts are resolved in favor of judgment.

6. Appeal and Error ⚷996, 1001(1)

Whether judgment will stand is to be determined only by whether any substantial evidence is found or whether inferences can be fairly drawn that will support the implied findings.

7. Appeal and Error ⚷996

If facts proved will support inferences reasonably deduced therefrom even though they would support contrary findings, the appellate court cannot substitute its inferences for those of the trial court and order a different judgment.

8. Appeal and Error ⚷996

A reversal is proper only when reviewing court finds that reasonable minds would concur that the ultimate facts must be contrary to the findings of the trial court and that a different judgment should be entered.

9. Appeal and Error ⚷996

Findings of trial court are determinative on appeal unless, as a matter of law, the evidence is without substantial conflict and the only reasonable inference deducible is contrary to the findings.

10. Appeal and Error ⚷1057(1)

In action against municipality for injuries suffered from fall on defective sidewalk, possible error in rejecting offer of photostats to show municipality had knowledge both actual and constructive of long-continued dangerous and defective condition of sidewalk involved was not prejudicial error, where contents of such photostats had been proven by testimony of city street maintenance foreman.

Philip Mirecki, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Joseph N. Owen, Deputy City Atty., Los Angeles, for respondent city.

MOORE, Presiding Justice.

Appeal from a judgment denying relief for injuries assertedly sustained by appellant when she allegedly fell on a defective sidewalk of respondent city and suffered injuries.

On July 18, 1953, about 9:00 p. m. while walking, "practically like walking a chalk line" on the right-hand edge of Lyman Place, appellant stepped her left foot into what she thought was a hole, fell and suffered broken bones in the same pedal extremity. She now demands a reversal of the judgment entered on the verdict on the grounds that (1) the sidewalk at the place of her fall was in a defective condition;

(2) the City had knowledge thereof; (3) for a reasonable time after acquiring such knowledge it failed to remedy the dangerous condition or take action reasonably necessary to protect the public against such condition. The statutes under which the action was alleged appear on the margin hereof.[1] She contends that the evidence clearly established that the broken edge of the sidewalk was raised 2½ inches for a distance of about six feet; that she was not familiar with the street and knew nothing of the impairment of the sidewalk and therefore she should be reimbursed for her expenditures made necessary by her fall and should recover compensation for her pain and suffering and for time lost from her employment by reason thereof.

[1, 2] Appellant is reminded that she had a trial in the forum of her choice. She presented all her evidence to a jury which heard and considered not only hers but also that presented by respondent, and decided that she was not entitled to prevail. The results of such a trial are final where no prejudicial error appears, where there is substantial evidence supporting the verdict, and especially where the trial court has reviewed the record on a motion for new trial and rejected such motion. We cannot overemphasize the important position of the trial court in the judicial system. Its function is to hear and determine controversies of the gravest concern. Its judgments are made upon the hypothesis that all issues of a controversy were raised by the pleadings, were by the judgment settled and that when based upon substantial evidence, it is final.

Despite the universal acceptance of the truth of the foregoing observations, appellant comes now urging here the very evidence she produced in the trial court, makes the same argument she made there and insists that a different judgment should be ordered. She says that "the conclusion is inescapable, from the uncontradicted evidence introduced at the trial that the City of Los Angeles is liable for maintaining its sidewalks in a dangerous and defective condition for an accident occurring through ordinary, usual and customary use of such street, when the city, managing board, officer or person in charge had knowledge of such defective condition and * * * failed to take such action as may be reasonably necessary to protect the public * * *."

It appears that she was walking south on the east side of Lyman Place, on the right-hand edge of the sidewalk, putting one foot "directly in front of the other * * * and I had just come out of a driveway, so it would be between the driveway and the alley * * *. The second step I took is the step that broke the foot." [44 inches from the driveway.] By such testimony, the jury could reasonably have found that she could not have been within a foot of the claimed defect [60 inches from the driveway] when she fell and therefore could not have stepped into the "hole" at her second step beyond the driveway.

The jury could have found that she was not wholly free from contributory negligence. As she was walking south, she did not "concentrate on the fact, but there was something about the place that made me go on the outer edge of the walk * * * there was a feeling that I should stay away from that inner edge as I walked, so I walked to the extreme right edge of the sidewalk * * * I walked down in the driveway and up out of it * * * I was specially looking at the alley." She had not been particularly looking at the sidewalk and could not remember the last time she had looked at it prior to the fall, but did not look at it after she came out of the driveway. "It was fairly light; it wasn't a real dark street."

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[1] Government Code, section 53050.

"(a) 'Person' or 'public' includes a pupil attending the public schools of any school or high school district.

"(b) 'Public property' means public street, highway, building, park, grounds, works, or property.

"(c) 'Local agency' means city, county, or school district."

Government Code, section 53051.

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

Thus appellant evidently impressed the jury that if she relied upon her faculties in negotiating the sidewalk, her chief reliance was upon her hunches and her "feeling" in selecting a safe course to pursue and did not intelligently and carefully select a way that might lead her safely to her destination.

[3–9] The questions of fact presented to the jury, to wit, whether there was a dangerous condition on the sidewalk, whether it was the proximate cause of appellant's injury, whether she contributed any negligence to cause herself to fall, were addressed to the triers of fact, the jury, functioning under the supervision of the trial judge. Inasmuch as the inferences from the evidence adduced fairly support the verdict, this court is powerless to upset the implied findings. The rule is that in reviewing the evidence, all conflicts are resolved in favor of the judgment. Whether the judgment will stand is to be determined only by whether any substantial evidence is found or whether inferences can be fairly drawn that will support the implied findings. Also, if the facts proved will support inferences reasonably deduced therefrom, even though they would support contrary findings, the appellate court cannot substitute its inferences for those of the trial court and order a different judgment. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Percin v. Easley, 108 Cal.App.2d 510, 514, 238 P.2d 1025. A reversal is proper only when the reviewing court finds that reasonable minds would concur that the ultimate facts must be contrary to the findings of the trial court and that a different judgment should be entered. Merlino v. Southern Pacific Company, 132 Cal.App.2d 58, 66, 281 P.2d 583. The findings of the trial court are determinative on appeal unless, as a matter of law, the evidence is without substantial conflict and the only reasonable inference deducible is contrary to the findings. Scholz v. Hilbert, 30 Cal. App.2d 228, 229, 231, 85 P.2d 902. Appellant's contention is right only so far as saying that the facts she proved and the inferences she draws are as persuasive as those urged by respondent and reasonable minds might disagree with respect thereto. Ibid; Thomas v. City of Bayshore, 35 Cal.App.2d 650, 652, 96 P.2d 389. So final is the judgment that had appellant recovered, the City could not have effected a reversal on the superiority of its proof in quality or quantity. Jones v. City of Los Angeles, 104 Cal. App.2d 212, 216, 231 P.2d 167.

[10] The court committed no prejudicial error. At the trial appellant offered in evidence photostatic copies of "complaint memoranda, filed by citizens with the Department of Public Works," with the purpose of establishing "that the City had knowledge, both actual and constructive, of a long continued dangerous and defective condition of the sidewalk and it is appellant's contention that such evidence was material to the jury's consideration of the veracity of the witness." The facts are that Mr. O'Leary, foreman of District 7 of the Bureau of Street Maintenance, which includes Lyman Place, testified as to a description of the repair work required in each case. He admitted having signed the "repaired" notations on the dates indicated. It is observed that counsel for appellant admitted that the complaints did not call for repairs on the sidewalks. Also, such photostats could not be used to impeach Mr. O'Leary for the reason that "the foreman admitted his notations and signatures." Moreover, appellant did not offer to lay a foundation for showing that the *"memoranda of complaints"* furnish any evidence of knowledge or constructive notice of the defect asserted by appellant. While the latest memorandum of complaint was signed by O'Leary February 5, 1952, yet the "repaired" notation of O'Leary was dated February 8, 1952. The court correctly held that "cracks in the pavement * * * a year and a half before, is too remote to permit the jury to draw an inference that at that time there was a crack in the sidewalk." The earliest date shown for the existence of the alleged defect was "sometime in August, 1953" as testified by appellant's witnesses. The complaint alleges that appellant "tripped and fell on the broken and uneven sidewalk" about July

28, 1953. In that state of her pleading and her proof, how could the offer be material and how could appellant have proved the defect had existed so long prior to her fall as to constitute constructive notice to the City of the defect?

But conceding, arguendo, an error in rejecting the offer of the photostats, still there was no prejudice for the reason that their contents had been proved by the testimony of Mr. O'Leary.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

140 Cal.App.2d 597

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Lewis Elmer FRAYER, Defendant and Appellant.

Cr. 3196.

District Court of Appeal, First District, Division 2, California.

April 9, 1956.

Defendant was convicted of pimping. The Superior Court, Santa Clara County, William F. James, J., entered judgment, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that prostitute, who permitted herself only to be exploited, was not an "accomplice" of defendant, and, therefore, prostitute's testimony was not subject to requirement of corroboration involved in case of testimony of an accomplice.

Judgment affirmed.

1. Criminal Law 🔑507(1)

An accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction. West's Ann.Pen.Code, § 1111.

2. Criminal Law 🔑507(1)

For purpose of determining who is an accomplice, woman who permits herself to be criminally exploited is not in the same relation to the crime and does not approach it from same direction as the exploiter, but woman who assists in exploitation of another woman is in the same position as the exploiter.

3. Criminal Law 🔑507(7)

Prostitute, who permitted herself only to be exploited, was not an "accomplice" of person found guilty of pimping, and, therefore, prostitute's testimony, in pimping prosecution, was not subject to requirement of corroboration involved in case of testimony of an accomplice. West's Ann.Pen. Code, §§ 31, 266b, i, 1111, 1237, subd. 1.

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Johnson, Thorne, Speed & Bamford, Robert W. Speed, San Jose, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was found guilty of pimping, Penal Code, § 266b, and was granted probation. He appeals from the final judgment, which is the order granting probation, Penal Code, § 1237, subd. 1. The only question presented by the appeal is whether the prostitute from whose earnings defendant was found to have lived and who was the main witness at the trial, was an accomplice whose testimony required corroboration. Penal Code, § 1111. Appellant's contentions that for lack of such corroboration the evidence did not support the verdict and that the court erred in refusing the instructions offered by defendant with respect to accomplices and the requirement of corroboration of their testimony are both answered by our conclusion that the prostitute was not an accomplice.

[1–3] In People v. Simpson, 79 Cal. App. 555, 559, 250 P. 403, it was held that a woman from the gains of whose sexual activities in defendant's "massage parlor" defendant took his share was not an accomplice of defendant in the pimping of which he was convicted, because section 1111, supra, requires the accomplice to be liable to prosecution for the identical offense as charged and it was "manifest" that the witness could not be prosecuted for pimping which requires a male defendant deriving support from the earnings of known prostitution. However, in People v. Young, 132 Cal.App. 770, 23 P.2d 524, it was held that a woman can be charged with pimping as a principal under the provision of Penal Code section 31 which includes among principals persons concerned in the commission of a crime who not being present have advised its commission. Although the latter case seems in conflict with the reasoning of the Simpson case it does not necessarily conflict with its decision. Both decisions seem correct. With respect to the related offense of pandering, Penal Code, § 266i, it is settled that a woman who complies in her own procurement as an inmate for a house of prostitution is not an accomplice of the procurer, but that such inmate who aids and abets in the procurement of another woman can be an accomplice. People v. Wilkins, 135 Cal.App.2d 371, 287 P.2d 555; People v. Montgomery, 47 Cal.App. 2d 1, 10, 15, 117 P.2d 437. The distinction can be rationalized under the rule that " 'an accomplice must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction.' " People v. De Paula, 43 Cal.2d 643, 647, 276 P.2d 600, 603, where this rule is used to take out of the rule of Penal Code section 31 that an aider and abetter is a principal, a minor used in the unlawful transportation of a narcotic. The woman who permits herself to be criminally exploited is not in the same relation to the crime and does not approach it from the same direction as the exploiter, but a woman who assists in the exploitation of another woman is in the same position as the exploiter. The prostitute in the case before us, like the woman in the Simpson case, permitted herself only to be exploited and under the above authorities is not an accomplice.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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140 Cal.App.2d 662

The PEOPLE of the State of California, Plaintiff and Respondent.

v.

Joe Vargas LUNA and Luis Nestor Lopez, Defendants,

Luis Nestor Lopez, Defendant and Appellant.

Cr. 5534.

District Court of Appeal, Second District, Division 3, California.

April 10, 1956.

Prosecution for assault. The Superior Court, Los Angeles County, Joseph M. Maltby, J., denied defendant's motion for a new trial, and entered judgment of conviction, and defendant appealed. The District Court of Appeal, Shinn, P. J., held evidence sustained conviction.

Judgment and order denying motion for new trial affirmed.

1. Assault and Battery 🔑71

One who merely stands by, watching an assault and even approving of it, is not aiding and abetting.

2. Assault and Battery 🔑71

A person who stands by, and watches an assault, and even approves of it, is a mere bystander, and not an accessory to the assault.

3. Assault and Battery 🔑95

In prosecution for assault, question of whether defendant was a bystander or a participant in the assault was for the jury.

4. Assault and Battery 🔑91

Evidence sustained conviction for assault.

5. Criminal Law 🔑878(3)

Where defendant was indicted for two offenses of assault on two different persons, on same occasion, acquittal of assault against one person did not operate as a determination that defendant did not aid and abet in assault on the second person.

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Albert C. S. Ramsey, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Joe Vargas Luna and Luis Nestor Lopez were jointly charged with two offenses of assault by means of force likely to produce great bodily injury, in Count I of an assault upon Joe E. Vigil, in Count II of an assault upon Johnny Barajas. In a jury trial they were acquitted of assault upon Vigil and convicted under Count II of the lesser offense of assault upon Barajas. Lopez made a motion for new trial which was denied; proceedings were suspended and he was granted probation, one of the conditions being that he spend two months in the county jail. He appeals from the judgment and the order denying his motion for new trial.

The grounds of appeal are that the evidence was legally insufficient to prove that Lopez either assaulted Barajas or aided and abetted Luna in assaulting him, and that having been acquitted of an assault upon Vigil, this amounted to an acquittal of the accusation of assault upon Barajas.

Defendant contends there was no evidence that he struck Barajas and this contention is not seriously challenged by the People. But it is nevertheless contended in urging affirmance of the judgment that there was sufficient evidence to prove that Lopez aided and abetted Luna in the assault upon Barajas, which, admittedly, Luna committed. We have concluded that the evidence was not legally insufficient to justify the verdict against Lopez.

The altercation from which the charges arose took place on a parking lot not far from a dance hall on the Pike in Long Beach. At 1:00 a. m., when the dance was over, three Mexican girls, Ophelia, Rosemary and Lucy, found themselves in the company of five sailors, Quirarte, Crabtree, Keller, Vigil and Barajas. The boys offered to drive the girls to the lot where their car was parked and they walked together to a nearby lot where the car of Barajas was parked. Three of the boys and two of the girls got into the rear of the car. Barajas took the wheel, Vigil sat next to him and Ophelia sat next to the right-hand door. Luna and Lopez came up, evidently some words were passed; Luna and Lopez came to the car and Luna held open the right-hand door with his shoulder so Ophelia could not close it. He then went around to the opposite door and invited Barajas to fight and opened the door. Luna was seen to have a metal object in his hand; Barajas refused to fight unless Luna would empty his pockets. The latter jumped over a low fence at the front of the car and did not empty his pockets, jumped back, struck at Barajas through the open window, put his foot through and kicked Barajas in the face, who kicked back at him; Luna was seen to take something from his pocket.

While Luna was holding the right-hand door open Lopez was standing by; when Luna went to the left side of the car Lopez went with him and stood by him. When other sailors started to leave the car on the right-hand side the two then went to the rear of the car. When Vigil was encountered coming around the rear some words were exchanged; Lopez hit Vigil and Luna also struck him. Vigil's lip was cut and there was blood on the hands of both Luna and Lopez, who then ran away. They were stopped by a police officer and searched; a beer can opener was found on Luna. Both denied they had been in a fight in a parking lot. Lopez had cuts on the fingers of his right hand. A girl came up and told the officers about the fight and the suspects and Vigil were taken to a hospital. Vigil's mouth was split and he had two teeth knocked out.

Lopez testified that as they approached the car, one of the girls smiled at Luna; he waved to her and she said "hello" to him; as they passed on they were accosted in profane language; they walked back and Luna and Barajas had words; he, Lopez, walked with Luna to the driver's side of the car where Lopez stood by, saying nothing; while Barajas and Luna were striking at each other, Crabtree came up and hit Luna in the back. As to his actions when he saw some of the other boys getting out of the car on the right-hand side Lopez testified: "Well, I decided I would go around so there would not be any more jumping on him [Luna]. There was two on him already. So I started around the back of the car and this Vigil was running around the car, so I took a punch at him." He struck Vigil and he, Lopez, got his face bruised by two of the sailors; no one struck him until after he had struck Vigil. He and Luna then ran away because they were outnumbered. According to Lopez, Luna first went to the car to reprove Barajas or some one else for using bad language and to demand an apology. He admitted having told the officers that he had not been in a fight. The can opener taken from Luna by the officers was introduced in evidence. Lopez denied having seen it in Luna's possession. He was unarmed.

[1-4] The witnesses agreed that Lopez did not strike or attempt to strike Barajas and that he remained silent while Luna and Barajas fought. It is argued that this was not aiding and abetting Luna. It is elementary that one who merely stands by, watching an assault and even approving of it is not aiding and abetting. People v. Hill, 77 Cal.App.2d 287, 175 P.2d 45. Such a person is a mere bystander, and if Lopez was nothing more, he was not an accessory to the assault upon Barajas. But whether, as a matter of fact, he was a bystander or a participant was for the jury to decide. The only question on appeal is whether the determination of that factual issue has support in the evidence and the reasonable inferences, all of which must be given the effect which is most consistent with the verdict. The following facts were significant: When, according to Lopez, one of the sailors cursed Luna, Lopez went with him and stood beside him while he prevented Ophelia from closing the door; when Luna went around the car and started fighting with Barajas, Lopez went along and stood by; when Vigil and the other sailors started to leave the car Lopez went around to meet them with the purpose of protecting Luna, and as soon as he met Vigil he struck him, and Luna also came up and struck him, with the result that Vigil's lip was split and he lost two teeth. The reasonable inferences were that when Luna and Lopez went to the car they expected trouble and were prepared for it; Lopez stood by Luna in order to protect him against the other sailors if need be; when the opportunity arose for him to join in the fight he did so by attacking Vigil before he, himself, was attacked. In brief, Lopez voluntarily entered into an altercation which would probably lead to trouble, stood by prepared to take a hand in the fight and aggressively entered it when he thought the proper time had arrived. The two stood together and fought together. There was concert of action and purpose which clearly proved Lopez to have been a participant in the entire fight and not a mere inactive and disinterested spectator. It is idle to argue that he was a mere innocent bystander. If there is difficulty in reconciling the verdict with the admitted facts it is due to the acquittal of the defendants of the charge of assaulting Vigil.

[5] There is no merit in the contention that the acquittal under Count I operated as a determination that Lopez did not aid and abet Luna in an assault upon Barajas. That question was to be determined from the facts in evidence. The acquittal of the charge of assault upon Vigil did not establish that Lopez was not an active participant in the entire fight; it did not alter the facts which satisfied the jury that Lopez participated in the assault upon Barajas.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

140 Cal.App.2d 523

Robert M. NEWELL, Plaintiff and Respondent,

v.

William M. BRAWNER, Defendant and Appellant.

Civ. 21174.

District Court of Appeal, Second District, Division 3, California.

April 5, 1956.

Hearing Denied May 29, 1956.

Action for recovery of household furniture and furnishings and damages for their detention. The Superior Court, Los Angeles County, Thurmond Clarke, J., granted the relief sought, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that at time when defendant received his bill of sale from his daughter and took possession of property, such property had been community property of plaintiff and such daughter.

Affirmed.

1. Husband and Wife ⚷264

In action for recovery of household furniture and furnishings and damages for their detention, evidence sustained finding that at time when defendant received his bill of sale from his daughter and took possession of property, such property had been community property of plaintiff and such daughter.

2. Husband and Wife ⚷262(1)

Property not given to wife alone was presumptively community property. West's Ann.Civ.Code, § 164.

3. Husband and Wife ⚷267(2)

Bill of sale executed by wife was ineffective to convey title to community property. West's Ann.Civ.Code, § 172.

4. Appeal and Error ⚷1050(1)

Where finding of community ownership, by plaintiff and his former wife of property sought to be recovered by plaintiff from his former father-in-law, was not based upon divorce decree awarding property to plaintiff, it was immaterial whether court erred in receiving such decree in evidence.

5. Appeal and Error ⚷762

As a rule, points raised for first time in reply brief need not be considered by reviewing court.

◆

Glenn A. Lane and Ernest W. Pitney, Los Angeles, for appellant.

Ernest J. Zack, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an action in claim and delivery brought by Newell against his father-in-law Brawner for the recovery of household furniture and furnishings and damages for their detention. Plaintiff had judgment for possession or for $6,240, the value of the property, and damages for detention in the sum of $1,300. Plaintiff bases his right to possession upon the claim that the property was acquired by his former wife and himself as community property and that it was lawfully in his possession at the time it was taken from his home by the defendant. He also introduced in evidence a default decree of divorce from Gertrude B. Newell, defendant's daughter, by which decree the property in question was found to be community property of the parties and was awarded to plaintiff in its entirety. Defendant claims title to the property upon two theories, first, that the major portion of the property belonged to himself and his wife and was loaned to their daughter for the use of herself and her children and as to this property and a small part of the remainder he claims under a bill of sale from his wife to himself of her interest in the property and also a bill of sale from the daughter. The court found that at the time defendant received his bill of sale from Gertrude and when he took possession of the property all the property involved was the community property of plaintiff and his then wife, Gertrude, and also found that thereafter in plaintiff's action for divorce against Gertrude, plaintiff was awarded all the property in question.

[1, 2] It is apparent that if the evidence was sufficient to support the above finding of community ownership of plaintiff and his then wife, defendant could not prevail in the action. In his briefs defendant makes

no attempt to set out the evidence bearing upon this issue. He merely assumes the truth of his own testimony that the property was only loaned to his daughter. This failure to state the evidence could well be regarded as an admission that the evidence was sufficient. However, we have read the record and are satisfied that the evidence in that respect was sufficient. To a large extent Mr. and Mrs. Brawner assisted their daughter and the plaintiff in the acquisition and furnishing of a home. They provided them with money in substantial amounts and except in minor particulars furnished their home either by providing them with furniture and other household equipment which they, the Brawners, owned or by purchasing new articles until the home was fully furnished and equipped. Mr. Brawner testified that all the larger and more valuable articles were merely loaned to their daughter for the use of herself and the three children during the time they should occupy the home in question and that he and Mrs. Brawner never intended to and never did part with title to any of the aforesaid articles. Other articles he testified were given to the daughter as her separate property; he took a bill of sale from his daughter of all the property merely as a precaution against any claims of the plaintiff and as evidence that the daughter surrendered any rights she had to the use of the property as a loan from himself and wife. There was no writing to evidence the agreement that the property was merely loaned to the daughter. Upon the other hand, plaintiff testified that all the property they received from the Brawners was given to both his wife and himself; that Mrs. Brawner, who made most of the arrangements, so stated at numerous times, and that neither she nor Mr. Brawner ever made any statement to him to the contrary; there was never any agreement between himself and his wife that any of the articles received from the Brawners were given to the wife alone, but that they always regarded and treated the property as belonging to both of them. The real property was taken in joint tenancy but at that time plaintiff said to his wife that they could have it as community property and place it in joint tenancy for convenience. Included in the property in litigation were some articles that had been purchased by plaintiff and some that had been received as wedding gifts or other gifts. However, these comparatively few articles were not the subject of particular dispute during the trial. The issue was whether plaintiff or defendant was entitled to the possession of all the property or none of it. Upon this issue we cannot, of course, reweigh the credibility of the witnesses or the weight of the evidence. We can only inquire whether there was substantial evidence to support the finding that the property in question was acquired by plaintiff and his then wife as community property and so remained. If it was not given to the wife alone, it was presumptively community property. Civ.Code, § 164; Cal. Jur.2d p. 710 et seq.; Falk v. Falk, 48 Cal. App.2d 762, 120 P.2d 714. We are concluded by the court's finding that this presumption was not overcome.

[3] From the fact that the property belonged to the community it follows that since it was in the possession of plaintiff and was taken without his consent by the defendant, possession was properly restored to plaintiff. The bill of sale executed by the wife was ineffective to convey title to the community property, or any part of it, to defendant. Civ.Code, § 172.

[4] In addition to his testimony as to the circumstances under which the property was acquired by his wife and himself plaintiff introduced in evidence, over the objection of defendant, the decree of divorce rendered by the Superior Court of Los Angeles County. The grounds of the objection are twofold, first, that the judgment was not binding upon defendant since he was not a party to the suit and, second, that the judgment insofar as it awarded the property in question to plaintiff was outside the issues and to that extent void. The particular point is that the personal property was not described in the complaint with sufficient certainty to put in issue the question of ownership. The complaint alleged in part "The community property of the parties consists of the following: (1) The house and lot situated at 1300 Virginia

Road, San Marino, California. (2) The furniture and furnishings in the family home. (3) One-half (½) interest in a 1953 Buick automobile." The prayer of the complaint was "(3) That the community property of the parties be distributed pursuant to law and in such manner as the court deems proper." And there was a request for general relief. The findings and judgment contained a particular description of the real property and also the furniture and furnishings.

If the court had based its finding of the community character of the property upon the decree there would be some point in discussing defendant's arguments but such is not the case. By far the greater part of the evidence on both sides consisted of detailed explanations of the sources of the property, some 70 or more articles, and the circumstances under which the Newells came into possession. The evidence as to the original ownership came in without objection and the issue was fully tried, independently of the decree in the divorce action. The court found that the decree was binding upon Gertrude Newell but did not find that it was binding upon defendant. If the court had determined that the property in major part had been loaned to Gertrude by the Brawners and that the remainder had been acquired as her separate property, plaintiff could have proven ownership only through the decree and the court would have been required to determine whether it was valid and binding upon defendant. It is clear, therefore, that the finding of community ownership was not based upon the decree and that it is immaterial whether the court erred in receiving it in evidence.

[5] In his reply brief defendant for the first time questions the sufficiency of the evidence to justify the finding that plaintiff suffered damage in the amount of $1,300 through defendant's detention of the property. The brief refers to only a few of the questions and answers elicited during an extensive examination and cross-examination of plaintiff's witness and ignores all the other testimony bearing upon his qualifications and the value of his opinion. As a rule, points raised for the first time in a reply brief need not be considered by the court and in view of the inadequate presentation of the point we are not inclined to depart from the rule. (See 4 Cal.Jur. 2d § 488.)

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

140 Cal.App.2d 722

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Marie KELSEY, Defendant and Appellant.

Cr. 5499.

District Court of Appeal, Second District, Division 3, California.

April 12, 1956.

Defendant was convicted of possession of marijuana. The Superior Court of Los Angeles County, John G. Barnes, J., entered judgment accordingly and order denying new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where defense counsel offered no evidence but stated that there might be question of unlawful search and seizure but that he was not going to stress point and defense rested, counsel in effect waived any objection to lawfulness of entry of premises where arrest was made and narcotics were allegedly found and issue could not be raised successfully for first time on appeal.

Judgment and order affirmed.

1. Criminal Law 🔑1030(1)

Where defense counsel, in narcotics prosecution, offered no evidence but stated that there might be question of unlawful search and seizure but that he was not going to stress point and then defense rested, counsel waived any objection to lawfulness of entry of premises where arrest was made and narcotics were allegedly found and issue could not be raised successfully by defendant for first time on appeal. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⚷322

Where evidence shows nothing more than entry of private premises by police officers and there is absence of evidence as to reasons they had for making entry or as to whether they had search warrant, it will be presumed that they acted lawfully in making such entry.

◆

Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Marie Kelsey was convicted in a court trial of the possession of marijuana in violation of section 11500 of the Health and Safety Code and was sentenced to serve 60 days in the county jail. She made a motion for new trial which was denied and appeals from that order and from the judgment. The cause was tried upon the evidence received at the preliminary examination and additional evidence at the time of trial. Defendant was represented by counsel but offered no evidence. Defendant is represented on the appeal by counsel other than the attorney who represented her at the trial.

There was evidence of the following facts. On March 28, 1955, a Los Angeles police officer and a state narcotics officer entered the apartment of the defendant on South Main Street in Los Angeles; defendant was seated at a desk at the far end of the room; she had in her hand what appeared to be a brown paper cigarette which she placed in her mouth; handcuffs were placed upon her; she was asked where the marijuana was, replied that she would tell if the handcuffs were removed; the officers said they would remove the handcuffs if she would tell them. She said it was in the top right-hand drawer of the desk; the officers opened the drawer and found 2 envelopes, one containing 11 brown paper wrapped cigarettes and the other 54 of the same. Defendant said she was not going to say that they belonged to her and was not going to say that they did not but that "there's something more to this case than meets the eye." The content of the cigarettes was identified by an expert in such matters as marijuana and the same was received in evidence.

At the conclusion of the receipt of evidence, the attorney for defendant stated "I will offer no evidence except to point out to the court that there may be a question of unlawful search and seizure, though I am not going to stress the point; at this time we rest."

Upon the hearing of the motion for new trial no affidavit was filed by the defendant but it was argued that a new trial should be granted for the purpose of the receipt of evidence by the People and by the defendant with respect to the lawfulness of the entry of the premises by the officers. It was the theory of the defendant that the burden was on the People to prove that the entry was lawfully made.

[1] At the time of trial defendant's attorney was familiar with the decision of the Supreme Court in the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, and not only made no objection to the receipt of the evidence or motion to strike, but, in effect, waived any such objection. Since the point was not raised below it will not be considered. People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17.

[2] Moreover, where the evidence shows nothing more than an entry of private premises by police officers and there is an absence of evidence as to the reasons they had for making the entry and whether they had a search warrant, it will be presumed they acted lawfully in making the entry. People v. Farrara, 46 Cal.2d 265, 294 P.2d 21; People v. Citrino, 46 Cal.2d 284, 294 P.2d 32; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6.

The judgment and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

140 Cal.App.2d 510

The PEOPLE of the State of California, Petitioner,

v.

SUPERIOR COURT OF The State of CALIFORNIA In and For The CITY AND COUNTY OF SAN FRANCISCO, Respondent.

Civ. 17099.

District Court of Appeal, First District, Division 2, California.

April 5, 1956.

Proceeding on application for writ of prohibition. The District Court of Appeal, Dooling, J., held that People's remedy by appeal was plain, speedy and adequate, and therefore People's application for writ of prohibition to restrain Superior Court from proceeding with new trial in criminal action would be denied.

Alternative writ discharged and peremptory writ denied.

1. Criminal Law ⚷1083

Appeal, from granting of new trial to defendant in criminal case, would divest trial court of jurisdiction to proceed with second trial. West's Ann.Pen.Code, § 1238, subd. 3.

2. Prohibition ⚷3(5)

People's remedy by appeal was plain, speedy and adequate, and therefore People's application for writ of prohibition to restrain Superior Court from proceeding with new trial in criminal action would be denied. West's Ann.Pen.Code, § 1238, subd. 5.

Thomas C. Lynch, Dist. Atty. of the City & County of San Francisco, Cecil F. Poole, Asst. Dist. Atty., San Francisco, for petitioner.

Michael Riordan, San Francisco, for respondent.

DOOLING, Justice.

[1, 2] This is an application by the People of the State of California for a writ of prohibition to restrain the Superior Court from proceeding with a new trial in a criminal action. The real party in interest, one Mitchell, was convicted by a jury of robbery. The clerk, on November 29, 1955, entered in the minutes an order denying the defendant's motion for new trial. On December 7, 1955, the court on its own motion set this order denying motion for new trial aside and on January 10, 1956, made an order granting the motion for new trial. Respondent seeks to justify its order setting aside the order denying a new trial on the ground that such order was a clerical misprision. We need not examine the merits of this contention in this proceeding, because we have concluded that under the rule of Phelan v. Superior Court, 35 Cal.2d 363, 217 P.2d 951, the people's remedy by appeal is plain, speedy and adequate and for that reason prohibition will not lie.

The people have a right of appeal from the order granting a new trial, § 1238(3) Pen.Code, and from the order setting aside the order denying the new trial, § 1238(5) Pen.Code.

Such an appeal would divest the trial court of jurisdiction to proceed with a second trial, People v. Sonoqui, 1 Cal.2d 364, 35 P.2d 123, and therefore would accomplish everything that could be accomplished by prohibition.

In Phelan v. Superior Court, supra, 35 Cal.2d at page 370, 217 P.2d at page 955, the court said: "Where, however, as here, there is a right to an immediate review by appeal, that remedy is almost as speedy as a writ proceeding, under present practice, and should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case." Petitioner has made no such showing here.

The alternative writ is discharged and the peremptory writ denied.

KAUFMAN, J., concurs.

140 Cal.App.2d 273

Mary L. BOARDMAN and Joy Ann Boardman, a minor, by her guardian ad litem and trustee, Mary L. Boardman, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION OF The State of CALIFORNIA and General Tire and Rubber Company, Inc., Respondents.

No. 16660.

District Court of Appeal, First District, Division 1, California.

March 27, 1956.

Proceeding to review a workmen's compensation award finding that decedent's death was not caused by industrial injury. The District Court of Appeal, Bray, J., held that where doctor who was appointed an independent medical examiner in compensation case violated code provision under which he was appointed by conferring with one of defendant's medical witnesses, this violation required that examiner's reports be entirely disregarded and Industrial Accident Commission erred in basing its decision, even in part, on the report.

Award annulled and proceeding remanded with instructions.

1. Workmen's Compensation ⚷1305

Doctor who was appointed an independent medical examiner in a compensation case by conferring with doctor who testified for defendant, violated Administrative Code provision that parties, attorneys or representatives shall not communicate with independent medical examiners in any manner.

2. Workmen's Compensation ⚷1305

Where doctor who was appointed an independent medical examiner in compensation case violated code provision under which he was appointed by conferring with one of defendant's medical witnesses, this violation required that examiner's reports be entirely disregarded and Industrial Accident Commission erred in basing its decision, even in part, on the report.

3. Workmen's Compensation ⚷1305

A medical examiner's report based, even in small part, on examiner's improper conference with an interested party is so tainted as to destroy its value, and the Industrial Accident Commission may not base its decision, even in part, upon such a report.

Bergen Van Brunt, Allan L. Sapiro, San Francisco, for petitioners.

Everett A. Corten, Daniel C. Murphy, San Francisco, for respondents.

BRAY, Justice.

This petition for a writ of review to review an award finding that the death of decedent[1] was not caused by an injury sustained during his employment, raises the question of the effect of whether the discussion by the independent medical examiner appointed by the commission pursuant to California Administrative Code, Title 8, section 10820, of the medical facts with one of the medical experts for the employer and its insurance carrier, is a violation of section 10823, Administrative Code.[2]

Record.

Decedent, a man in his early forties, died at Fort Miley Veterans Hospital August 2, 1952. "Embolus in right ventricle" due to "Ideopathic thrombosis of hypogastric veins, bilateral" was diagnosed as the immediate cause of death. Petitioner filed in the commission an application for adjustment of claim, alleging that on December 28, 1951, decedent had sustained an industrial injury when he was struck by an unmounted heavy bus tire which caused him injuries resulting in his death. At the hearing of this application the medical evidence concerning the probability of the injury being the cause of death was sharply in conflict. The doctor who treated him at the Veterans Hospital where he was admitted July 15, 1952, and the surgeon who performed the autopsy, opined that his death was in part attributable to the injury. Two medical experts called by the respondents (one of whom was Dr. Moon), basing their opinions on certain evidence, opined that the injury in no wise contributed to his death. At one of the hearings the referee suggested the appointment of an independent medical examiner at the respondents' expense to make an independent investigation of the medical problems vexing the referee and to render an opinion as to whether the injury contributed to the death. The parties stipulating to such appointment, Dr. Carr, a pathologist, was appointed. Thereafter Dr. Carr rendered his report in which he was of the opinion that the injury in no wise contributed to the death. The referee then reported that there was no causal connection between the injury and the death. Petitioners formally objected to, and moved to strike, the report of Dr. Carr, as not being "independent." Thereafter the commission filed its findings and conclusions denying the claim. A petition for reconsideration was granted and opinions of a urologist and a vascular surgeon were obtained. These supported the theory that the injury did not contribute to the death, although petitioners contend that both experts admitted there could have been a causal connection. Thereafter, the commission ordered that the previous findings, conclusions and orders be adopted as the decision on reconsideration.

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[1] Petitioners are Mary L. Boardman, wife of decedent, and Joy Ann Boardman, daughter of decedent, by her guardian ad litem.

[2] There are a number of other questions presented, but as our decision of this question is determinative of this petition we deem it unnecessary to discuss the other questions.

Independent Medical Examiner.

The report of the referee on decision after reconsideration shows that the report of Dr. Carr was considered by him in his recommendation to the commission that the original findings, conclusions and orders of the first referee and of the commission were correct and should again be adopted.

Section 10820, Administrative Code, provides: The commission may refer disputed medical questions in connection with compensation proceedings to * * * an independent medical examiner appointed by the commission * * * or * * * referee. Said reference may be for * * * an investigation of the medical question involved without examination of the injured employee." Section 10823 provides: "All correspondence concerning the examination and report of the independent medical examiner or amendments thereto shall be made through the commission, a panel, a commissioner or general referee, *and the parties and attorneys or representatives shall not communicate with the independent medical examiner in any manner* except for the necessary interview by the examiner incidental to such examination." (Emphasis added.)

Dr. Jesse Carr, the physician appointed by the referee, filed his report. In it he stated: "* * * I read the entire file carefully and have since talked to several people about this whole story, *including Dr. Moon.* * * * [T]he problem here is not one of fact but one of reconciling the medical testimony of two well known and well connected pathologists." (Emphasis added.) He then reviewed "the personalities and characteristics of the two men inasmuch as this issue is largely a philosophical one * * *" He then pointed out that Dr. Moon had stated that there was no causal connection between the traumatic injury and the death while Dr. Frerichs had stated that the injury was the prime mover in the disease process which resulted in death; that while both doctors agreed "on the specific mechanism of death" they disagreed on whether the injury was "either proximately or indirectly associated with the disease conditions which caused the demise." The difference in the two men "is the result of their thinking, but their thinking is the result of their experience and philosophy." He then stated that Dr. Moon had reached his conclusion from the facts while Dr. Frerichs "has been acting for an applicant, perhaps stimulated by the applicant's attorney, to conjure up theoretical possibilites and then, perhaps unwittingly, he has striven to substantiate these somewhat vacuous ideas." He then stated that the latter had a "lack of experience in the medical legal field" and that in his "honest zeal to help an applicant" Dr. Frerichs had attempted to "twist the existing facts into a hinterland of circumstance. * * *" He is convinced that Dr. Frerichs "would have liked not to have been the witness that he was and that he will never be again." Dr. Carr stated that Dr. Moon was originally trained by him in pathology, "a long time associate in the medical school and a person well known for his integrity and basic honesty * * *" Dr. Carr gave his opinion that "the time intervals, the circumstances of injury, the autopsy findings, the miscellaneous intercurrent circumstances, and the death itself are all wrong, each to itself and each to another to allow an association of the initial injury of six months prior to death with the death itself as described in this file."

Dr. Moon was a witness on behalf of the employer and its insurance carrier. He testified prior to the appointment of Dr. Carr as independent medical examiner. It was the conflict between the theory of Dr. Moon, a witness for the respondents, and that of Dr. Frerichs, a witness for the petitioners, which caused the referee to state that his problem was to determine which of the theories advanced was the most probable medically and caused him to ask for consent to the appointment of an independent medical examiner.[3]

Sections 10820 and 10823, supra, were adopted pursuant to the provisions of Labor Code section 5307. Section 9700, Administrative Code, Title 8, provides that the rules of which said sections are a part shall govern practice and procedure in any proceeding before the Industrial Accident Commission.

[1, 2] It is obvious from a study of it, that section 10823 was enacted to make sure that the independent medical examiner would be not only independent, but would be completely objective in his approach to, and in his investigation of the medical question involved. To insure this, the section prohibited him from considering data which did not come to him through the commission or commissioners or referees, and particularly prohibited "the parties and attorneys or representatives" from communicating with him *in any manner*. Dr. Carr, in talking to Dr. Moon, the respondents' medical expert, no matter how innocently, violated, if not the letter, the very spirit of this section. Even if, as claimed by respondents, the weight of evidence without Dr. Carr's report was on respondents' side, the violation of section 10823 required that the commission entirely disregard Dr. Carr's report.[4]

It may very well be that Dr. Carr would have come to the same conclusion as to the cause of death he did, even if he had not talked to Dr. Moon. However, the fact is that he did and appeared to place some importance upon this fact. Moreover, it is most important that a rule such as that specified in section 10823 be observed and that the report of the independent medical examiner be never subject to the possibility that it is based upon matters imparted to him by one so closely connected with a party as to leave it questionable as to whether the information imparted is objective and not partisan.

[3] The rule expressed in the section is a salutary one, and one which should be enforced strictly. A report based, even in small part, on its violation, is so tainted as to destroy its value. The commission erred in not granting the motion to strike it from the records and in basing its decision, even in part, upon it.

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[3] In petitioners' objection to and motion to strike the report of the independent medical examiner petitioners stated that Dr. Carr and Dr. Moon were then partners in what is designated on the door of their office as "Dr. Jesse L. Carr and Dr. Henry Moon 'Medical Laboratory.'" While the statements in Dr. Carr's report show a close association between the two doctors, there is nothing in the evidence to support the claim that they are partners. The association shown would not constitute a legal disqualification of Dr. Carr to act as an independent medical examiner. If he were a partner it would seem that it would be improper to appoint him to be the determinative factor in a conflict between his partner's theory and that of a third party.

[4] We are satisfied that Dr. Carr's violation of the section was unintentional and because of lack of knowledge of the section itself.

The award is annulled and the proceeding remanded to the commission for further proceedings, with instructions to strike the Carr report from the record.

PETERS, P. J., and FRED B. WOOD, J., concur.

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140 Cal.App.2d 578

MANN'S JEWELERS, a California Corporation, Appellant,

v.

The CITY OF SAN DIEGO, a Municipal Corporation, Respondent.

Civ. 5194.

District Court of Appeal, Fourth District, California.

April 6, 1956.

Hearing Denied May 29, 1956.

Action for declaratory and other relief. The Superior Court, San Diego County, C. M. Monroe, J., upheld the validity of a challenged ordinance, and the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that regulatory ordinance definition of auction sale, as including sale of property by public outcry addressed collectively to group of three or more persons assembled for purchasing purposes, was a valid exercise of police power, as applied to jeweler's "action" sale.

Affirmed.

1. Municipal Corporations 🔑615

Name of method employed by merchant conducting business is immaterial in deciding whether business may be regulated by municipality.

2. Municipal Corporations 🔑121

Whether regulatory ordinance, defining auction sale to include sale by public outcry addressed collectively to group of three or more persons assembled for purchasing purposes, would be held valid as applicable to department store demonstrator or waitress in restaurant was neither material nor controlling in action brought by jeweler to have ordinance declared inapplicable to "action sale" conducted by jeweler and to have the aforementioned portion of ordinance declared unconstitutional and to enjoin attempt to enforce same.

3. Auctions and Auctioneers 🔑2

Regulatory ordinance definition of auction sale as including sale of property by public outcry addressed collectively to group of three or more persons assembled for purchasing purposes was a valid exercise of police power, as applied to jeweler's "action" sale.

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Bertram H. Ross, Los Angeles, for appellant.

J. F. DuPaul, City Atty., Alan M. Firestone, John S. Rhoades, Deputy City Attys., San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in declaratory relief upholding the validity of Ordinance No. 6665 of the City of San Diego. This ordinance amends the auction sale ordinance, which is a part of the Municipal Code, by changing the definition of an "auction sale" in several respects. So far as material here this amendment provides: "The term auction sale or sale by public auction * * * shall mean a sale of property by public outcry addressed collectively to a group of three or more persons assembled for the purpose of conducting sales of property." Another section of the amending ordinance made a similar change in defining the word "auctioneer".

The complaint alleged that the plaintiff operates a jewelry store on Broadway in San Diego; that it has conducted and intends to conduct sales in the manner described; that the above quoted provision of the ordinance is unconstitutional in that it deprives the plaintiff of its property without due process of law, and illegally attempts to regulate the manner in which plaintiff conducts its business; and that it deprives the plaintiff of a method of operating its business by decreeing that the type of sale used by the plaintiff is an auction sale, which it is not. It is further alleged: "that the method of operation by this plaintiff is through a device commonly known and designated as an 'Action Sale'; that the nature of such sale is that merchandise is displayed by a salesman who fixes a price on the merchandise and requests anyone present in the store to buy the merchandise at said price; that said sale does not constitute an auction sale in that no bids are called upon from the customers and that title remains in plaintiff to the merchandise until an offer is made to purchase the merchandise at the price fixed by plaintiff's agents"; and that an actual controversy exists between the parties as to plaintiff's rights and duties under the ordinance. The prayer was for a declaration of plaintiff's rights under the ordinance; that it be decreed "that said ordinances do not affect the operation of an action sale as conducted by plaintiff"; that the challenged portion of the ordinance be declared unconstitutional; and that the defendant be enjoined and restrained from attempting to enforce the challenged portions of the ordinances.

At the trial the cause was submitted on a stipulated statement of facts, including the following:

> "6. That plaintiff's method of operation is as follows: That a podium is built behind the counters of the store whereby a salesman is elevated above the counters and addresses the people who come into the store with the aid of a sound amplifier. That the salesman displays the item to be sold, describes the item and indicates the price for which he will sell said item. That no other items are added to any particular item nor is the price at which an item is offered for sale changed on any business day. There is no grouping of items and unless the specific item that is offered for sale is sold at the price indicated by the salesmen, the item is laid aside and another item is displayed and the same procedure is followed. That in all instances three or more persons are assembled for the purpose of attending the sale."

In its findings the court set forth the provisions of the ordinance in question and the statement of facts as stipulated to by the parties, and as conclusions of law found that the regulation and licensing under these provisions of the ordinance are a valid exercise of the police power insofar as they regulate the sale of personal property which is sold by the method outlined in the stipulated facts, and that these provisions of the ordinance regulating such sales are constitutional and valid. A judgment was entered adjudging and declaring that these provisions of the ordinance, insofar as they pertain to plaintiff's business as described, are a reasonable exercise of the city's power; that they reasonably restrict the use of said property and are reasonably related to the public health, safety, morals and public welfare, and are therefore valid; that the sale as conducted by the plaintiff is a sale by public outcry and within the regulation of these provisions of the Municipal Code; and that no injunction be issued restraining the city from enforcing these provisions of the municipal code against the plaintiff. The plaintiff has appealed from this judgment.

The appellant states in its brief that "We have no argument with the right of the respondent to control either conventional auctions or action sales." It is further stated, contrary to the allegations of the complaint, that "Action sales are not involved here." It is then contended that the ordinance in question goes much further than an application to auction sales or action sales, and by its terms would apply to department stores where demonstrators are employed to demonstrate and sell merchandise, or to a restaurant where a waitress might ask how many customers desire apple pie. It is then argued that the questioned provisions of the ordinance are unconstitutional and invalid since they impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities, and that the police power cannot be so used as arbitrarily to limit the rights of one class of people while allowing the same rights and privileges to a different class, where the public welfare does not demand or justify such a classification. It is further argued that the ordinance provisions in question purport to treat the type of operation conducted by the appellant as an auction sale, which it is not; and that the burden thus placed upon the appellant had no relation to the exercise of police power and was an arbitrary and capricious exercise of municipal authority, as was held in McKay Jewelers, Inc., v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188.

[1–3] Regulations and restrictions upon the right to conduct auction sales of personal property, under various forms and circumstances, have been frequently upheld in other jurisdictions, and in some cases in this state where matters of classification, public welfare, the prevention of deception as to the character or quality of goods offered for sale, and other elements, have been considered. Hart v. City of Beverly Hills, 11 Cal.2d 343, 79 P.2d 1080; In re Bruce, 54 Cal.App. 280, 201 P. 789; In re West, 75 Cal.App. 591, 243 P. 55. Some of the basic principles were discussed and the general rules approved in McKay Jewelers, Inc., v. Bowron, 19 Cal.2d 595, 122 P.2d 543, 139 A.L.R. 1188, although it was there held that the restriction upon solicitation which had there been imposed was not a reasonable one. The evils which may flow from the holding of such auctions, and the opportunity afforded through them to impose upon and defraud the public, with particular application to the sale of jewelry, was pointed out in the case of In re West, supra. The circumstances and conditions which surround such auction sales, and the evils and abuses which led to the necessity for the taking of regulatory and preventive measures in connection therewith, are well known. It seems clear that the activity here in question contains practically all of the incidents of an auction sale except the factor of competitive bidding, and that it involves practically all, if not all, of the evils, abuses and potential interference with the peace and general welfare of the public which is found in connection with auction sales and which justifies their regulation. The merchandising technique here is similar and involves the assemblage of persons in a crowd, the resultant limited opportunity for an examination of the goods offered for sale, the restricted opportunity to reflect on the representations made as to the quality and worth of the article, the absence of individual negotiation, and the opportunity for practicing frauds and deceits on the buying public. The use of sound amplifiers will naturally have a tendency to attract crowds, increase the probability of the presence of pickpockets, and otherwise create various forms of police problems which are not to be expected, at least in the same proportion, where merchandising is carried on in the ordinary manner. It makes little difference whether appellant's admitted method of conducting business is that commonly known as an "action sale", as stated in its sworn complaint, or is something different as now contended. The name of the method employed by the appellant in conducting business is immaterial in deciding whether the business may be regulated. People v. Knowles, 35 Cal.2d 175, 217 P.2d 1. The evidence as to the method used clearly and sufficiently brings it within the meaning and intent of the ordinance provision here in question.

Whether or not the questioned provisions would be held valid as applicable to a department store demonstrator or a waitress in a restaurant is neither material nor controlling here. Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177. The judgment holding these provisions valid in respect to the situation here involved rests on evidence disclosing a classification which is a reasonable one. There is a real and substantial relation between these provisions of the ordinance and its object and purpose with a view of protecting the public health, safety, convenience and general welfare.

These provisions merely regulate but do not unreasonably restrict or inhibit the appellant's right to use and dispose of its property. We are in accord with the trial court's conclusion that the questioned provisions are a valid exercise of its police power by the city of San Diego, insofar as they regulate the sale of personal property under the circumstances and by the method outlined in the stipulated facts.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

140 Cal.App.2d 583

Matter of the Application of Wendell PHILLIPS for a Writ of Habeas Corpus.

Cr. 1072.

District Court of Appeal, Fourth District, California.

April 6, 1956.

Habeas corpus proceeding. The District Court of Appeal, Barnard, P. J., held that where it was obvious that arrest and confinement of petitioner had been voluntarily consented to by him, for apparent purposes of securing an earlier determination with respect to constitutionality of questioned provisions of ordinance regulating auction sales, temporary confinement prior to release on bail would be deemed involuntary, and writ of habeas corpus would not issue.

Writ discharged and petitioner remanded to custody.

Habeas Corpus ⚷11

Where it was obvious that arrest and confinement of petitioner had been voluntarily consented to by him, for apparent purpose of securing an earlier determination with respect to constitutionality of questioned provisions of ordinance regulating auction sales, temporary confinement prior to release on bail would be deemed voluntary, and writ of habeas corpus would not issue.

◆

Bertram H. Ross, Los Angeles, for petitioner.

J. F. DuPaul, City Atty., Alan M. Firestone, John S. Rhoades, Deputy City Attys., San Diego, for respondent.

BARNARD, Presiding Justice.

This proceeding involves the effect of the same ordinance which was involved in the case of Mann's Jewelers, Inc., v. City of San Diego, Cal.App., 295 P.2d 468. The petition for a writ of habeas corpus alleges that the petitioner was arrested on January 26, 1956; that he is an employee of Mann's Jewelers, Inc.; that at the time of his arrest he was, as such employee, engaged in the sale of a watch by public outcry as therein described; that he is charged with a violation of the provisions of Ordinance No. 6665 of the City of San Diego in that he sold a certain watch by public outcry, addressed collectively to a group of three or more persons assembled for the purpose of purchasing merchandise from him; that the method of operation in conducting such sales is (as described in the opinion in the other case); and that said Ordinance No. 6665 is an unwarranted interference with the method by which his employer can operate its business and said ordinance insofar as it applies to petitioner, is illegal and unconstitutional.

The petition for this writ was filed in this court at San Bernardino at 11:00 A.M. on January 26, 1956. The petition was verified by petitioner's attorney before a notary public in Los Angeles on January 26, 1956. From the return to the writ it appears that petitioner was arrested at 10:35 A.M. on that day, after a San Diego police officer received an anonymous call that an "action sale" was in progress and had watched petitioner sell a Hamilton watch worth $45 for $5 by public outcry to a group of three or more persons assembled for the purpose of purchasing merchandise.

Under our decision in the other case, holding that the ordinance in question is valid, the petitioner is not entitled to the relief here sought. Moreover, it is obvious that the arrest and confinement of petitioner was voluntarily consented to by him, apparently for the purpose of securing an earlier determination with respect to the constitutionality of the questioned provisions of the ordinance. It is obvious that the petition and the points and authorities could not have been prepared, typed and notarized in Los Angeles and thereafter filed in San Bernardino within the space of 25 minutes. It clearly appears that the petition was filed within the space of a few minutes after the arrest took place as the result of a prearranged plan. Under such circumstances, the temporary confinement before the petitioner was released on bail was not involuntary and the writ should not issue. In re Gow, 139 Cal. 242, 73 P. 145; Matter of Ford, 160 Cal. 334, 116 P. 757, 35 L.R.A.,N.S., 882.

The writ is discharged and the petitioner remanded to the custody of the chief of police of San Diego.

GRIFFIN and MUSSELL, JJ., concur.

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140 Cal.App.2d 567

Anthony SEVERINI, Plaintiff and Appellant,

v.

Charles Edwin MASSAE, Defendant and Respondent.

Civ. 8826.

District Court of Appeal, Third District, California.

April 6, 1956.

Rehearing Denied April 25, 1956.

Hearing Denied May 29, 1956.

Action for damages for malicious prosecution charging that defendants without probable cause charged plaintiffs with the crime of offering to receive a bribe for testifying in a civil action. Defendant's motion for summary judgment was granted in the Superior Court, Butte County, Dudley G. McGregor, J., and the plaintiff appealed. The District Court of Appeal, Schottky, J., held that the motion was improperly granted where there were triable issues of fact.

Judgment reversed.

1. Judgment ⚷178

The procedure for summary judgment is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of the issues of fact. West's Ann. Code Civ.Proc. § 437c.

2. Judgment ⚷185.3(21)

In action for damages for malicious prosecution for charging without probable cause that plaintiffs offered to receive a bribe for testifying in a civil action, granting defendant's motion for summary judgment was error where plaintiff's affidavits showed that there were triable issues of fact. West's Ann.Code Civ.Proc. § 437c.

3. Judgment ⚷186

On defendant's motion for summary judgment, the court could not disregard the plaintiff's allegations but had to accept such allegations as true. West's Ann.Code Civ. Proc. § 437c.

4. Judgment ⚷178

The statute respecting summary judgment was never intended to deprive a party of a right to trial. West's Ann.Code Civ. Proc. § 437c.

5. Judgment ⚷186

The use of the language "in the discretion of the court" within the statute respecting summary judgment means a legal discretion and where there are triable issues there is no room for the exercise of any discretion but it becomes a duty of the court to deny the motion. West's Ann. Code Civ.Proc. § 437c.

Leslie C. Gillen, San Francisco, Corkin & Ohmer, Oroville, for appellant.

Clewe, Blade & McDonald, Oroville, for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action for damages for malicious prosecution against defendant Massae and certain fictitious defendants, alleging that said defendants maliciously and without probable cause charged plaintiff with the crime of offering to receive a bribe for testifying in a civil action; and that plaintiff was arrested on said charge, held in custody for 5½ hours and thereafter held to answer to the superior court; that he was compelled to stand trial on said charge, and that on the second day of the trial the charge against him was dismissed by the district attorney. The complaint alleged in substance further that he was not guilty of the charge and that he had been greatly damaged.

Defendant Massae filed an answer admitting the making of the charge but denying that it was done "wrongfully and/or falsely and/or maliciously and/or without probable cause."

Thereafter defendant Massae filed a motion for summary judgment under section 437c of the Code of Civil Procedure asking the court to strike out the complaint and enter judgment in favor of defendant on the ground "that there is no issue between the parties that entitles plaintiff to any relief." Said motion was supported by the affidavits of defendant Massae, Robert V. Blade, one of his counsel, and R. A. Leonard, District Attorney of Butte County. These affidavits were in considerable detail and were amply sufficient to support defendant Massae's defense that he acted with probable cause and upon the advice of counsel.

Plaintiff filed his own affidavit in opposition to said motion in which he alleged that defendant Massae first approached him and offered to bribe him to give favorable testimony in certain civil litigation pending against defendant Massae, and that he advised said defendant that he would not perjure himself. Plaintiff's affidavit denied the allegations in defendant Massae's affidavit that plaintiff had offered to testify in favor of defendant in return for money, and alleged that certain subsequent conversations between them which were recorded "were engaged in by affiant for the purpose and with the intent of procuring evidence with which to discredit and impeach said Massae as defendant in said litigation brought against him for fraud as aforesaid."

After a hearing the court granted said motion, and a summary judgment was entered, decreeing that the complaint be dismissed with prejudice. Plaintiff has appealed from said judgment, and his principal contention is that the court erred in determining that there were no triable issues of fact.

Section 437c of the Code of Civil Procedure provides in part as follows:

> "* * * when an answer is filed in any kind of action if it is claimed that there is no defense to the action or that the action has no merit, on motion of either party, * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out or the complaint may be dismissed and judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."

[1] The rules applicable to a motion for summary judgment under section 437c are well stated in Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, at page 555, 122 P.2d 264, at page 265, as follows:

> "At the outset it should be observed that there are several pertinent fundamental principles which should be observed in the application of and procedure under section 437c. The issue to be determined by the trial court in consideration of a motion thereunder is whether or not defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. [Citing cases.] If that were not true controversial issues of fact would be tried upon affidavits by the court and not a jury. Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto.

> "The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact. See Walsh v. Walsh, supra [18 Cal.2d 439, 116 P.2d 62].
>
> "For these reasons it may further be said that the affidavits of the moving party, the plaintiff in this case, should be strictly construed and those of his opponent liberally construed. McComsey v. Leaf, supra [36 Cal.App. 2d 132, 97 P.2d 242]; Fuller v. General Accident Fire & Life Assur. Corp., Ltd. of Perth, Scotland, 224 Wis. 603, 272 N.W. 839; see 13 So.Cal.L.Rev. 523. And in this connection it may be further observed that the better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. McComsey v. Leaf, supra."

[2] Bearing the foregoing rules in mind we think it is clear that the court erred in granting the motion for summary judgment. It is evident from the court's memorandum opinion that the court was making a determination of fact from the affidavits as to the weight of the evidence on the issues of probable cause and advice of counsel, and did not give due consideration to the rule that the only issue to be determined by the court was whether or not plaintiff had "presented any facts which gave rise to a triable issue or defense, and not to pass upon or determine the issue itself * * *."

[3] Upon the motion for summary judgment the court could not disregard plaintiff's allegation that defendant Massae first approached and tried to bribe him, but had to accept such allegations as true. And if defendant Massae did so approach plaintiff then it could hardly be true that Massae could believe that plaintiff was guilty of the crime charged, nor could it be true that he had made a full and fair disclosure of such fact either to his counsel or to the district attorney.

[4, 5] We think that plaintiff's affidavit showed clearly that there were triable issues of fact and, this being so, plaintiff was entitled to a trial upon those issues, a full trial before a court or jury, in which trial he would have an opportunity to cross-examine defendant Massae and his witnesses. Section 437c was never intended to deprive a party of a right to a trial. Defendant Massae contends that the ultimate question to be determined by this court is: Did the trial court abuse its discretion? While section 437c does use the language "in the discretion of the court", it must necessarily mean a legal discretion, and where, as here, it appeared that there were triable issues, there was no room for the exercise of any discretion, but rather it became the duty of the court to deny the motion.

No other points raised require discussion.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

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140 Cal.App.2d 471

Colby G. SMITH, Plaintiff and Appellant,

v.

E. E. FETTERHOFF, Defendant and Respondent.

Civ. 8726.

District Court of Appeal, Third District, California.

April 3, 1956.

Rehearing Denied April 24, 1956.

Action to recover balance due for services rendered and materials supplied in connection with repair of automobiles. The Superior Court, Shasta County, Richard B. Eaton, J., allowed recovery in part and denied recovery in part and plaintiff appealed from part of judgment denying recovery. The District Court of Appeal, Schottky, J., held that where trial court concluded that credit entry made in book account after commencement of action was conclusive and refused to consider and weigh evidence as to nature of entry and decided case upon that erroneous theory, judgment would be reversed.

Reversed.

1. Account, Action on 🔑22

In action on open book account to recover balance due for services rendered and materials supplied for repair of automobiles, plaintiff was entitled to have evidence as to nature of entry in book account weighed and considered in view of fact that book account itself which was introduced in evidence was not conclusive on that question.

2. Appeal and Error 🔑854(1)

An appellate court need not concern itself with reasons which impelled a trial court to act, as it is the judicial action as shown in the findings and judgment and not the judicial reasoning or argument which is the subject of review.

3. Appeal and Error 🔑856(2)

Where trial court refused to consider and weigh evidence upon erroneous theory that it could not be considered, appellate court was not justified in affirming judgment upon ground that evidence supported judgment, but would reverse judgment.

4. Appeal and Error 🔑1169(1)

Where trial court concluded that credit entry made in book account after commencement of action was conclusive and refused to consider and weigh evidence as to nature of entry, and decided case upon that erroneous theory, the judgment would be reversed.

◆

Carlton & Shadwell, Redding, for appellant.

Carr & Kennedy, Redding, for respondent.

SCHOTTKY, Justice.

Appellant brought this action on an open book account to recover a balance due from respondent for services rendered and materials supplied in connection with the repair of automobiles at the request of respondent. Appellant recovered judgment in the sum of $161.42, plus accumulated interest, on two parts of the book account, but was denied recovery on the third part of $1,006.57. This appeal is limited to that part of the judgment denying recovery of this sum.

The court found that, except for the sum of $106.09, the services were rendered and materials supplied to respondent as a known agent for unknown principals (various insurance companies); that the reasonable charges for such services and materials were correctly reflected in appellant's original ledger sheets; that these ledger sheets were kept in the normal course of appellant's business; and that they constituted an open book account for the credits extended to respondent from time to time, and amounts due and owing to appellant from time to time. The court found further that no part of this book account was barred by the statute of limitations. This appeal raises no issue as to the abovementioned findings of fact.

That part of the book account on which appellant was denied recovery consists of three ledger sheets commencing with an entry for January 28, 1947, and ending with an entry for December 31, 1952. The next to last entry in this portion of the book account, under the date of October 27, 1951, shows a balance due in the sum of $1,006.57. The last entry of December 31, 1952, shows a book credit of $1,006.57, bringing the balance down to zero. Appellant's explanation as to the credit of $1,006.57 shown in said book account was that it was a mere entry for income tax purposes, but the court in finding against appellant on this issue chose to rely upon the entry in the book account, stating in its findings: "That defendant is not indebted to plaintiff in the sum of $1,006.57, or in any sum whatsoever, for any balance due as shown in that portion of the open book account contained in Plaintiff's Exhibit 1."

[1] Appellant contends that it was error to deny recovery of an unpaid balance due merely by reason of a subsequent credit entry that did not reflect an actual payment but was nothing more than a bad debt write-off for income tax purposes.

Appellant argues that the court erred in refusing to consider evidence that proved the correct and unpaid balance, because, although a balance due must be shown before recovery can be had on an open book account, evidence is admissible to prove the correctness of the items of the account and the true balance due.

Appellant argues that the trial court decided the case upon the erroneous theory that the entries in the book account were conclusive, and quotes the following from the court's memorandum opinion:

> "We have received from the plaintiff an explanation that last transaction was a mere entry for the benefit of the income tax collector, a mere closing out, but, unfortunately for the plaintiff, he is bound by his records as they stand. It is only by their proof under the facts of this case that he escapes the statute of limitations, and therefore he can only escape it on the face of the record. The rule is concededly technical but it is no more technical than the proof by which he escapes the statute or the liability by which defendant is bound."

The record shows that the complaint in the instant action was filed on May 14, 1952, and that the open book account as of that date showed a balance of $1,006.57. The credit entry of $1,006.57 was made on December 31, 1952, nearly 8 months after the filing of the complaint. It is clear that the trial court was of the opinion that respondent was bound by the book account as introduced in evidence and refused to consider and weigh the evidence that the credit entry of $1,006.57 made after the action was filed did not in fact show a payment by respondent but was an entry writing off the account as a bad debt for income tax purposes. In this we believe the court erred as the appellant was entitled to have this evidence weighed and considered.

[2, 3] While it is ordinarily true, as argued by respondent, that an appellate court need not concern itself with the reasons which impelled a trial court to act, as it is the judicial action as shown in the findings and judgment and not the judicial reasoning or argument which is the subject of review, DeCou v. Howell, 190 Cal. 741, 214 P. 444, yet where as in the instant case the trial court refused to consider and weigh evidence upon the erroneous theory that it could not be considered, an appellate court is not justified in affirming the judgment upon the ground that the evidence supports the judgment.

In Mathews v. Mathews, 49 Cal.App. 497, at page 500, 193 P. 586, at page 587, the court said:

> "Respondent urges that, because of the fact that his motion sought relief on the further ground that the financial circumstances of the parties had changed, we should uphold the ruling of the lower court. We are cited to numerous authorities holding that, in the event of a ruling by the lower court on a demurrer or motion for new trial, the respondent is not limited to the reason assigned by the trial court for its action, but may urge all the grounds specified in his demurrer or notice of motion. Burke v. Maguire, 154 Cal. [456] 461, 98 P. 21; Morgan v. [J. W.] Robinson [Co.], 157 Cal. 348, 107 P. 695. The soundness of these decisions cannot be questioned, but they are not applicable to the present case.
>
> "This appeal is prosecuted from the special order of the trial court above quoted. The proceeding was instituted by defendant's motion. The court did not grant such motion, but made an order which shows by its very terms that it was based upon the proposition that a provision for the payment of alimony in an interlocutory judgment of divorce cannot be enforced unless it is carried into the final decree. Such is not the law. The trial court's order was erroneously made, and is reversed."

In Taylor v. Talbert, 134 Cal.App. 595, at page 597, 25 P.2d 888, the court said:

> "Respondent argues that, notwithstanding this ruling we should affirm the judgment because of the equities supporting it, basing her argument on the evidence that, without legal advice,

> she was induced to part with her separate property through the creation of the joint tenancy. It may be that the transactions were a fraud upon the wife under the terms of section 2235, Civil Code, as interpreted in McKay v. McKay, 184 Cal. 742, 195 P. 385, but that issue was not tried because the trial court limited respondent to the theory of the original Siberell decision [Siberell v. Siberell, Cal.App., 295 P. 385]. Hence the record does not present a case where this court could affirm the judgment upon the evidence before us; it is one where the issue should be fully tried in the trial court.
>
> "The judgment is reversed."

And in Kyne v. Kyne, 60 Cal.App.2d 326, at page 333, 140 P.2d 886, at page 890, 141 P.2d 221, the court said:

> "We hold, therefore, that in view of the fact that the trial court specifically stated it was not passing upon the issues of fraud, unclean hands and misconduct injected into the proceeding by respondent, on all of which issues the evidence was conflicting, but was basing its decision entirely upon the view that the existence of the contingent fee agreement precluded the allowance of attorneys' fees and costs, the order must be upheld, if at all, upon the correctness of that view. An appellate tribunal should not support the order upon the ground that counsel may have been guilty of fraud or misconduct when the trial court specifically declined to do so. Issues of fact are properly tried and determined in the trial court.
>
> "In our opinion the trial court erred in its view that it was precluded by the contingent fee agreement from making an allowance to appellant for supplemental attorneys' fees and costs and the order must therefore be reversed."

[4] In view of the fact that the court concluded that the credit entry made in the book account after the commencement of the action was conclusive and refused to consider and weigh the evidence as to the nature of the entry, and decided the case upon that erroneous theory, we conclude that under the authorities hereinbefore cited the judgment must be reversed.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

140 Cal.App.2d 703

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul Robert BENJAMIN, Defendant and Appellant.

Cr. 3209.

District Court of Appeal, First District, Division 1, California.

April 12, 1956.

Hearing Denied May 9, 1956.

Defendant was convicted of a felony. The Superior Court, City & County of San Francisco, Orla St. Clair, J., entered judgment, and defendant appealed. The District Court of Appeal, Peters, P. J., held that where felony prosecution, with consent of defendant, was continued many times, and, when case finally came on for trial, apparently everyone involved assumed, contrary to fact, that there had been a waiver of a jury trial, when, in fact, there had been no waiver by defendant personally, but only an ambiguous waiver by defendant's counsel, conviction would be reversed.

Judgment reversed and cause remanded for new trial.

1. Jury 🔑29(6)

Constitutional provision that trial by jury may be waived in all criminal cases, by consent of both parties, expressed in open court by defendant and his counsel, requires personal waiver by defendant, and waiver by defendant's counsel is insufficient. West's Ann.Const. art. 1, § 7.

2. Criminal Law ⇐1166½(1)

Where felony prosecution, with consent of defendant, was continued many times, and, when case finally came on for trial, apparently everyone involved assumed, contrary to fact, that there had been a waiver of a jury trial, when, in fact, there had been no waiver by defendant personally, but only an ambiguous waiver by defendant's counsel, conviction would be reversed. West's Ann.Const. art. 1, § 7.

◆

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Emmet J. Seawell, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

[1] The defendant, after a trial before the court without a jury, was convicted of a felony. He appeals, contending that the record shows that at no time did he personally waive a jury trial. There is no need to summarize the record in detail because both appellant and respondent agree upon what occurred. Suffice it to say that the case, with appellant's consent, was continued many times. At one of these hearings the appellant personally waived his right to go to trial within 60 days. Thereafter, with consent, several other continuances were granted. When the case finally came on for trial apparently everyone involved assumed, contrary to the fact, that there had been a waiver of a jury trial. At most, the record shows an ambiguous waiver by appellant's counsel, but it fails to show a waiver by appellant, personally. Such personal waiver is essential. Article I, Section 7, of the state Constitution provides, in part, that:

> "* * * A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel."

The cases decided under this section hold that the constitutional mandate requires an express waiver by the defendant personally and by his counsel, and that the section prohibits any implied waiver being found by the courts. People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Spinato, 100 Cal.App. 600, 280 P. 691; People v. Barba, 100 Cal.App. 557, 280 P. 549; People v. Woods, 126 Cal.App. 158, 14 P.2d 313; People v. Wilkerson, 99 Cal.App. 123, 278 P. 466; People v. Wyatt, 101 Cal.App. 396, 281 P. 629; People v. Washington, 95 Cal.App.2d 454, 213 P.2d 70; People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570.

There are no cases to the contrary.

[2] The judgment is reversed and the cause remanded for a new trial.

FRED B. WOOD, J., concurs.

BRAY, Justice (concurring).

I reluctantly concur because of the many cases narrowly construing article I, section 7 of the Constitution. The right to jury trial is one of the most important and valuable rights guaranteed to a citizen and should not be denied. However, when, as here, it is obvious that everyone at the trial, judge, counsel and the defendant, assumed that a trial by jury had been waived, and the plaintiff's counsel and the defendant and his counsel proceeded to trial before the judge and without calling the court's attention to the error, it seems to me that a reasonable interpretation of their acts is that the jury was waived "by the consent of both parties, expressed in open court by the defendant and his counsel * * *". No one is more anxious than I to protect the rights of a defendant who has been forced to a trial without a jury or who unknowing of his rights or through inadvertence, has consented to a trial without a jury. But society itself needs some protection from a defendant who, as here, was content to be tried (and his lawyer was content to have him tried) by the judge until he found the judge's decision adverse to him, and then for the first time calls attention to the fact that he had not formally waived a jury trial. To hold that the language of the Constitution was not met by the action of all concerned, is as technical and unrealistic as the holding in People v. Aro, 6 Cal. 207, 208, where although the indictment charged that the accused did "with a Colt's pistol and dirk-knife, willfully, feloniously, and with malice aforethought, kill, murder, and do to death one (name unknown) a Chinaman," the court held the indictment defective because it contained no "statement that the deceased came to his death by the wounds inflicted * * *". 6 Cal. at page 209.

A reappraisement of the meaning of article I, section 7 should be made so that it is impossible for a defendant and his lawyer to cause a judicial farce, as here.

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140 Cal.App.2d 688

Matter of the ESTATE of Edward M. KEENEY, Deceased.

Helen FRAZIER, Doris Line and Blanche Stephens, Contestants-Respondents,

v.

Julia McMANN, Proponent-Appellant.

Civ. 5302.

District Court of Appeal, Fourth District, California.

April 11, 1956.

Rehearing Denied May 9, 1956.

Hearing Denied June 7, 1956.

Proceeding to admit will to probate. The Superior Court, Fresno County, Milo Popovich, J., entered a judgment on a verdict in favor of contestants and denied a new trial, and appeal was taken. The District Court of Appeal, Mussell, J., held that evidence on the issue of undue influence was insufficient to sustain the jury's finding that undue influence was exercised by the testator's sister.

Reversed; attempted appeal from order denying new trial dismissed.

1. Wills 🔑394

Order denying motion for new trial in will contest was not appealable, and attempted appeal therefrom was dismissed.

2. Wills 🔑155(1)

The "undue influence" which will justify setting aside a will must have been such as, in effect, to destroy testator's free agency and substitute another person's will for his own.

See publication Words and Phrases, for other judicial constructions and definitions of "Undue Influence".

3. Wills 🔑163(1)

In action to set aside will for undue influence, evidence must be produced that pressure was brought to bear directly on the testamentary act.

4. Wills 🔑155(1)

Mere general influence, however strong and controlling, will not authorize setting aside will for undue influence, if it does not bear on testamentary act, and the influence must be used directly to procure the will and must amount to coercion destroying testator's free agency.

5. Wills 🔑155(1)

Mere opportunity to influence mind of testator, though coupled with an interest or motive to do so, will not authorize setting aside will for undue influence

6. Wills 🔑166(1)

To justify setting aside will on ground of undue influence, circumstances inconsistent with voluntary action by testator must be shown, and merely proving circumstances consistent with exercise of undue influence is not sufficient.

7. Wills 🔑163(2)

Presumption of undue influence raised by proof of a confidential relationship is rebuttable.

8. Wills 🔑163(2)

In proceeding to admit will to probate, evidence was sufficient to overcome any presumption of undue influence raised by proof of confidential relationship between testator and his sister.

9. Wills ⚿166(1)

Mere suspicion that undue influence may have been used is not sufficient to warrant setting aside a will on that ground.

10. Wills ⚿166(1)

In proceeding to admit will to probate, evidence on issue of undue influence was insufficient to sustain jury's special verdict to effect that undue influence was exercised by testator's sister.

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Douglas A. May and Harvey E. Burnett, Fresno, for appellant.

L. Kenneth Say and Lewis W. Boies, Jr., Fresno, for respondents.

MUSSELL, Justice.

[1] Proponent in this will contest appeals from a judgment entered on a verdict in favor of contestants. An attempt is made to appeal from an order denying proponent's motion for a new trial and since such an order is not appealable, the attempted appeal therefrom is dismissed. In re Estate of Dopkins, 34 Cal.2d 568, 569, 212 P.2d 886.

The decedent, Edward M. Keeney, died on January 11, 1954, leaving a will executed on February 21, 1953, in which he bequeathed the sum of $100.00 to each of his three adult daughters and all of the remainder of his estate to his sister, Mrs. Julia McMann, proponent of said will and named therein as executrix. The three daughters, Helen Frazier, Doris Line, and Blanche Stephens, contested the probate of the will on the grounds that the deceased, at the time of the execution thereof, was not of sound and disposing mind; that the will was not executed in a manner and form required by law and that it was procured by undue influence of Julia McMann. A jury trial was had and two interrogatories were submitted to the jury, as follows: (1) Was the testator of sound mind at the time he executed the will?; and (2) Was undue influence exercised in the execution of the will? The jury was unable to reach a verdict as to the first interrogatory but answered the second in the affirmative. The trial court thereupon rendered judgment that the will was executed under and by virtue of the undue influence of Julia McMann and by reason thereof the will was denied admission to probate. Julia McMann appeals from the judgment on the grounds that there is no substantial evidence to support the allegations of undue influence at the time the will was executed; that prejudicial error was committed by the trial judge; that the court erred in restricting proponent's examination of witnesses for contestants; and that the court erred in the giving and refusing of certain instructions.

Edward M. Keeney was a pensioned Spanish-American War veteran. At the time of his death he was approximately 75 years of age and was then residing alone in the city of Fresno. In 1946, at Keeney's request, Julia McMann came to California and took care of him at his home for several months during the illness of his wife. In February, 1952, his wife died and on August 14, 1952, he suffered a coronary attack and was taken to the Veterans' Hospital in Fresno, where he remained until December 22, 1952. Upon his discharge on that date he returned to his home where his meals and personal needs were taken care of by Julia McMann, who was then living in an apartment house in Fresno with her husband. On January 14, 1953, Helen Frazier, one of the contestants, filed a petition in the superior court seeking her appointment as guardian of the person and estate of her father. A hearing was had on this petition on January 21, 1953, and the court found that Keeney was competent and denied the petition. On January 23, 1953, Keeney executed a will leaving one-fourth of his estate to each of his three daughters and one-fourth to his sister, Julia. This will was destroyed on February 21, 1953, and on that date the will which is the subject of this controversy was executed. It was offered for probate by Julia McMann on January 20, 1954, and this contest resulted.

Henry O. Smith, a close friend of the decedent, testified at the trial that he visited Keeney many times at his home; that on or about January 15, 1953, he stopped in to see Keeney and Keeney showed him a paper that had been served on him and stated that his daughters wanted to have him declared incompetent and a guardian appointed; that he seemed deeply hurt about it and asked what he should do, stating that he wanted help, that he could manage his own affairs and did not want a guardian. Smith further testified that he told Keeney he was going to need an attorney and that he would help him; that he suggested that he (Smith) talk with Julia McMann and see what he (Keeney) should do about it; that he discussed the matter with Julia and she asked him to recommend an attorney; that he recommended Mr. Douglas May, an attorney in Fresno, and arranged for an appointment for Mrs. McMann. At the request of Mrs. McMann, Mr. May called upon Mr. Keeney at his residence and was employed by him to contest the application for appointment of guardian.

Mr. May testified that when he was employed in the guardianship proceedings Keeney told him he did not want his daughters to handle his property; that they were trying to put him in a rest home and get his money and that he did not like it. May further testified that when he was taking Keeney home after the guardianship hearing Keeney stated he wanted to make a will leaving everything to his sister, Julia; that his children had taken him into court and that he was through with them. May suggested to Keeney that he was "just peeved" at his daughters and would get over it and that he had better think it over; that Keeney said he would and no definite instructions were given as to the preparation of a will on that date. May further testified that he talked to Keeney on the telephone and Keeney stated he had made up his mind and wanted a will made out giving one-fourth to each of his daughters and one-fourth to his sister, Julia; that he (May) prepared a will in accordance with these instructions and it was executed on January 23, 1953; that when this will was executed, Keeney stated that it would be "all right for the time being"; that two or three days prior to February 21, 1953, his secretary informed him that Mr. Keeney wanted him to come out to his home, that he wanted to rewrite his will; that he telephoned Keeney's home and Mrs. McMann, who answered the 'phone, stated that Keeney wanted to rewrite his will and wanted him to come out and talk to him about it; that he did not want to keep coming out and asked Mrs. McMann if Keeney would state the changes he desired to be made so he, May, would not have to make an extra trip; that Mrs. McMann then told him how Keeney wanted the will changed and he drafted the will with the suggested changes and put it in his pocket; that on the morning of February 21, 1953, Mrs. McMann 'phoned him at his home and stated Mr. Keeney wanted him to bring the will right over that morning because he had a heart "spell" and was going to the hospital; that he immediately went to the house and in the presence of Albert Mankini, one of the subscribing witnesses, a Mrs. Ramsey, and Mr. McMann, read the will to Mr. Keeney, calling his attention to the changes made in it; that Mr. Keeney stated it was exactly what he wanted and that he had changed his will because his sister had been good to him and that since he was in court, his daughters had not been near him. The will was then signed by the testator and the subscribing witnesses.

Shortly thereafter Keeney was taken to the Veterans Hospital where he was examined by Dr. Cheu. The doctor, after examining the patient and talking to him, determined he should be accepted immediately as a patient in critical condition. Keeney was placed in an oxygen tent and sedatives were prescribed. He remained a patient at the hospital until May 4, 1953. He was then discharged and returned to his home, where he remained until May 15, 1953, when he was again taken to the hospital and there remained until his death on January 11, 1954.

The record shows without question that the decedent was in a critical condition when received at the hospital on February 21, 1953. He was suffering from severe heart failure, resulting in shortness of breath and an edematous condition. However, there is evidence that he was in full possession of his mental faculties at the time he executed his will and stated that it was exactly what he wanted. The doctor who examined him at the hospital, H. O. Smith, a personal friend, Mr. May, his attorney, Albert Mankini, his next door neighbor, Mrs. Ramsey, Julia McMann, and Dr. Callaway, his personal physician, all testified he was competent. While contestant Doris Line and her husband testified he was forgetful, they did not testify he was mentally incompetent. Helen Frazier testified that on December 22, 1952, her father told her he had never made a will and did not intend to make one because everything would go to his three daughters if he made no will. However, this statement was made long before she filed a petition to be appointed his guardian and the evidence clearly indicates that the reasons Keeney made the changes in his will on February 21, 1953, were that he resented the attempt to declare him incompetent, that his daughters had left him alone, and that his sister had taken care of his person and property.

[2–6] Appellant's principal contention is that the evidence was insufficient to support the jury's finding of undue influence and we are of the opinion that this contention must be sustained. The rules applicable are stated in Re Estate of Welch, 43 Cal.2d 173, 175–176, 178, 272 P.2d 512, 514, as follows:

> "In Re Estate of Arnold, 16 Cal.2d 573, at page 577, 107 P.2d 25, at page 27, the rules governing the determination of whether a testamentary instrument is the product of undue influence are stated as follows: 'In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. In re Estate of Motz, 136 Cal. 558, 583, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator. In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. * * * mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. In re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.
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> "' "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.' " In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872.' [Citations.]
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> "It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be *inconsistent* with voluntary action on the part of the testator. In re Estate of Donovan, 114 Cal.App. 228, 233, 299 P. 816."

In Re Estate of Greenhill, 99 Cal.App.2d 155, 221 P.2d 310, 318, in a will contest, it was held that the trial court properly granted a nonsuit on the issue of the widow's undue influence over the testator, although she made active efforts to secure the execution of the will, where the testator had selected the attorney who prepared it, and the evidence failed to show pressure by the widow on the testator's testamentary act. In that case, as here, the testator was critically ill at the time the will was executed and in that connection the court said, "The claimed infirmities of mind or body must be shown to have had a direct bearing upon the testamentary act", and held that there was no evidence presented showing any irrationality on the part of the testator or that he was not conscious of his surroundings or acts either before or during the time of the execution of his will. It was further held that nothing more was shown than the presence of an opportunity for appellant to influence the testator's mind with a possible interest or motive so to do; that this was totally insufficient, and that before a testamentary document will be overthrown because of the exercise of undue influence, the proven circumstances must be inconsistent with voluntary action on the part of the testator and that substantial evidence must be produced that pressure was brought to bear directly upon the testamentary act.

[7–9] The presumption of undue influence raised by proof of a confidential relationship is rebuttable, In re Estate of Lombardi, 128 Cal.App.2d 606, 613, 276 P.2d 67, and the evidence here produced was sufficient to overcome any such presumption. While the evidence indicates the appellant had an opportunity to influence the testator, there is no evidence that she did do so. As is said in Re Estate of Lombardi, supra, 128 Cal.App.2d 611, 276 P.2d 70, " '[the] mere suspicion that undue influence may have been used is not sufficient to warrant the setting aside of a will on that ground.' "

[10] In the instant case, the will was prepared by an attorney selected by the testator on the recommendation of his friend, H. O. Smith. There is no showing that appellant brought any pressure to bear upon the testamentary act of the decedent. The will was read to and executed by him in the presence of several witnesses and the reasons for its provisions were stated by him at the time and were substantially as stated by him on other occasions to his attorney and his friend, Mr. Smith. The record shows that the decedent lived for several months after the execution of the will involved and there is no evidence that he was dissatisfied with its provisions or that he suggested changes therein. It is apparent from the record that the action of the contestant, Helen Frazier, in attempting to have the testator declared incompetent resulted in the changes made in the will of February 21, 1953. Under the rules announced in the foregoing decisions and the circumstances shown, it must be held that there is no sufficient evidence in the record on the issue of undue influence to sustain the jury's verdict. In view of this conclusion, it is unnecessary to pass upon the claimed errors of the trial court in his ruling as to the admissibility of evidence or in instructing the jury.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied: CARTER, TRAYNOR and McCOMB, JJ., dissenting. For dissenting opinion of CARTER, J., see *297 P.2d 636*.

140 Cal.App.2d 512

In the Matter of the ESTATE of Sadie PELTON, Deceased.

Tony MARTINOVICH, Petitioner and Appellant,

v.

Norman PELTON et al., Contestants and Respondents.

Civ. 21255.

District Court of Appeal, Second District, Division 1, California.

April 5, 1956.

Proceeding in the matter of the decedent's estate. The Superior Court of Los Angeles County, Thomas J. Cunningham, J., entered judgment denying a petition to have admitted to probate a document offered as the last will and testament of the decedent, and the petitioner appealed. The District Court of Appeal, Nourse, J. pro tem., held that it is exclusive province of trial court to pass upon the credibility of witnesses, and in so doing it may, in its discretion, believe testimony given at trial, even though witnesses may have been conclusively shown to have perjured themselves in their depositions.

Affirmed.

1. Appeal and Error 🔑994(3)
Trial 🔑140(1)

It is exclusive province of trial court to pass upon credibility of witnesses, and in so doing it may, in its discretion, believe testimony given at trial even though witnesses may have been conclusively shown to have perjured themselves in their depositions.

2. Wills ⚷302(1)

Evidence sustained finding that decedent had not signed purported will in presence of attesting witnesses or either of them, that she had not requested said witnesses or either of them to witness her will, and that she had not declared to them that it was her last will and testament.

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Sarah V. Ross, Henry P. Goodwin, Los Angeles, for appellant.

Herbert Gall, John U. Gall, Glen A. Duke, Los Angeles, Edward Fitzpatrick, Los Angeles, of counsel, for respondents.

NOURSE, Justice pro tem.

The appellant, Tony Martinovich, as a legatee and devisee of Sadie Pelton, appeals from a judgment denying his petition to have admitted to probate a document offered by him as the last will and testament of said decedent. The respondent Norman Pelton is the son of decedent. He filed a written opposition to appellant's petition. His second ground of contest was that the instrument offered as the last will of Sadie Pelton had not been executed in the manner or form required by law for the execution of a will.

The trial court found that the decedent has not signed the will in the presence of the attesting witnesses or either of them, had not requested said witnesses or either of them to witness her will, and had not declared to them that it was her last will and testament; and upon these findings made the judgment appealed from.

The appellant attacks the judgment on the sole ground that "there was no substantial evidence to justify or support the judgment."

The following facts are established by substantial evidence. The will in question is a carbon copy of a typewritten instrument. It bears the signature of the decedent, and after her signature there is set forth an attestation clause in the usual form, which is signed not only by the testatrix but by two witnesses.

After the appellant's petition was filed and the will filed for probate, the depositions of both attesting witnesses were taken. In their depositions they testified that the decedent had requested them to witness her will, that she had signed it in the presence of both witnesses, and that each witness had signed in the presence of the testatrix and in the presence of the other attesting witness. They testified that this took place in an automobile at the home of the witness Kaitis. The witness Kaitis signed her deposition, but the witness Buddin did not sign hers. The deposition of the witness Kaitis was taken in December of 1953, and that of the witness Buddin in February of 1954.

The case was set for trial on October 6, 1954, before a jury. At that time counsel for the proponent was unable to find the attesting witnesses, and the matter was continued at his request and was again called for trial on January 6, 1955, at which time the parties waived trial by jury.

Shortly prior to January 6 counsel for the proponent was able to contact the two witnesses and subpoena them. They advised him that they would not go through with the matter and that Mrs. Pelton was not present when they signed the will. The two witnesses then went to the bar association and were referred by the association to a member of the bar who at the opening of the trial appeared and stated to the court that the witnesses were present in the courtroom at his insistence; that they had told him that they did not see the testatrix sign the will although they thought she did sign it.

Both attesting witnesses were then called by the proponent. Each of them testified that the will had been brought to them by the proponent Martinovich, who had requested them to sign as witnesses; that they knew the testatrix' signature and they did sign at proponent's request; that this was not done at the request of the testatrix or in her presence, and she had never declared to them that the instrument was her will. They both testified that they had lied in their depositions, but desired to recant.

The proponent testified that after the death of the testatrix he had received the will through the mail from one Acuna. He produced the envelope in which he had received it.

The witness Acuna testified that on the day of testatrix' death and after her funeral, the proponent had come to his home and handed him a plain, sealed envelope which contained some matter, the character of which the witness did not then know, and asked the witness to address the envelope to the proponent and send it to him by registered mail; that the witness did address the envelope to the proponent and he and the proponent took it to the post office and sent it by registered mail to the proponent, proponent paying the registry fee. Several days later the witness questioned the proponent concerning the contents of the envelope. The proponent then stated that it had contained Mrs. Pelton's will and asked the witness to tell the story that the testatrix had left the document with him and told him to mail the document to the proponent after her death, and that the proponent then handed him an issue of the Los Angeles Times containing the notice of Mrs. Pelton's death, stating that this would be the evidence the witness would have to show the manner in which he learned of the death. The witness was corroborated by the testimony of his wife.

At the close of the trial the court, without causing any affidavits to be filed or having an order to show cause issued, found both of the attesting witnesses in contempt for having perjured themselves, and sentenced them to jail or in the alternative to pay substantial fines.

It is appellant's position that the court having found the witnesses to be perjurers, the evidence given by them at the trial does not constitute substantial testimony to uphold the findings of the trial court; and that the signature of the testatrix having been proven and the will being proper in form as to attestation, that it is presumed that the instrument is the last will and testament of Mrs. Pelton and that that presumption could not be overcome by the testimony of two perjurers. He further argues that the court must have found that the witnesses perjured themselves at the trial rather than in the testimony given in their depositions because, he says, it would be only testimony given at the trial that would constitute a direct contempt rather than a constructive one and permit the court to fine them and sentence them for a contempt without proceedings had in accordance with the second paragraph of section 1211 of the Code of Civil Procedure.

[1, 2] Appellant's position cannot be sustained. It is the exclusive province of the trial court to pass upon the credibility of witnesses, and in so doing it may, in its discretion, believe the testimony given at the trial although they may have been conclusively shown to have perjured themselves in their depositions. No citation of authority is necessary to support this proposition.

In the case at bar the evidence so clearly shows the fraud attempted by the proponent of the will that the court was fully justified in believing that the witnesses had been led by proponent into perjuring themselves in their depositions, but that their consciences had not permitted them to perpetuate their perjury.

If the trial court had reached the conclusion that no credence should be given to any of the testimony given by the attesting witnesses it could have admitted the will to probate, basing its finding of due execution solely on the presumption that arises from proof of the signature of the testatrix and the signatures of the attesting witnesses. In re Estate of Pitcairn, 6 Cal.2d 730, 732 et seq., 59 P.2d 90; In re Estate of Braue, 45 Cal.App.2d 502, 505, 114 P.2d 386. The trial court, however, was not obligated to disbelieve the testimony given by the witnesses at the trial, because of their admissions of perjury in their depositions. It was the exclusive province of the trial court to winnow the grains of truth from the chaff of falsehood in the testimony of these witnesses, and its determination of what was true and what was false cannot be reviewed by this court. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Bechtold v. Bishop & Co., 16 Cal.2d 285, 291, 105 P.2d 984; Wright v. Delta Properties, Inc., 79 Cal.App.2d 470, 476, 180 P.2d 57.

It is not necessary for us to decide here whether the giving of perjured testimony in a deposition constitutes a direct or a constructive contempt, or either of them, or to decide whether the trial court erred in sentencing the witnesses for contempt without complying with the provisions of the second paragraph of section 1211 of the Code of Civil Procedure. Those questions in no wise affect the question which we have determined here.

Appellant assigns as error certain remarks of the trial court made during the course of the trial. We have examined the record and find nothing erroneous in the remarks made by the trial court, nor anything subject even to criticism.

The testimony of the attesting witnesses as given at the trial fully supports the findings of the trial court, and there the matter ends.

The judgment is affirmed.

DORAN, Acting P. J., and FOURT, J., concur.

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140 Cal.App.2d 647

PEOPLE of the State of California, Plaintiff and Respondent,

v.

ONE 1950 FORD SEDAN, ENGINE NO. BORH124104, License No. 1E28527. Defendant,

The Anglo California National Bank, Claimant and Appellant.

Civ. 16611.

District Court of Appeal, First District, Division 2, California.

April 10, 1956.

Rehearing Denied May 10, 1956.

Hearing Denied June 6, 1956.

Proceeding for forfeiture of automobile used in transportation of contraband alcoholic beverage. The Superior Court, Alameda County, Richard H. Chamberlain, J., rendered a judgment for plaintiff and the legal owner of the automobile appealed from the judgment and order insofar as costs were taxed against him. The District Court of Appeal, Nourse, P. J., held that award of costs was proper but storage costs were not a proper item thereof.

Modified, and as modified affirmed.

1. Judgment 🔑250

Where party is before court in a proceeding in rem, court has power to render judgment in personam against him.

2. Forfeitures 🔑5

The general rule authorizing judgment in personam against a party before court in proceeding in rem is applicable to allowance of costs in forfeiture proceedings against party claiming the forfeited property.

3. Intoxicating Liquors 🔑254

In proceeding for forfeiture of automobile used for transportation of contraband alcoholic beverage, costs were properly allowed against legal owner of automobile who had not participated in illegal transportation, and who filed answer but did not introduce any evidence. West's Ann.Bus. & Prof.Code, §§ 25350, 25362, 25367, 25370; West's Ann.Code Civ.Proc. §§ 739, 1032; West's Ann.Health & Safety Code, § 11625.

4. Intoxicating Liquors 🔑254

In proceeding for forfeiture of automobile used in transportation of contraband alcoholic beverage, costs of storage of automobile were not taxable against owner, though storage was reasonably necessary, especially in view of owner's unsuccessful answer. West's Ann.Bus. & Prof.Code, § 25370; West's Ann.Code Civ. Proc. §§ 1021, 1022, 1032, 1033; West's Ann.Health & Safety Code, § 11625.

5. Costs 🔑12

Although costs are left mainly to discretion of trial court, court may not allow costs not properly chargeable as such.

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Severson, McCallum & Davis, James B. Werson, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The appeal in this case, in which the entitled automobile was forfeited to the state because of its use for transportation of contraband alcoholic beverage seizable under Business and Professions Code, § 25350, is restricted to the part of the judgment adjudging that plaintiff recover its costs from the appellant, the legal owner of the automobile, who filed an answer, Bus. & Prof. Code, § 25362, but did not introduce any evidence so that there was no proof of due investigation, Bus. & Prof. Code, § 25367. Appeal is also taken from the order taxing said costs. Whether and how far costs were recoverable from appellant are the only questions involved. (The registered owner, who used the car for the illegal transportation, defaulted.)

[1-3] Appellant does not deny that the forfeiture proceedings are within the range of actions and special proceedings for which Code of Civil Procedure, § 1032 provides for awarding of costs, but contends that said forfeiture proceedings are an action in rem, in which the costs can be recovered from the automobile, the res, only, not in personam from the claimant. The contention that in a forfeiture procedure in rem the court had no jurisdiction to adjudge costs in personam was rejected by the U. S. Supreme Court in Hipolite Egg Co. v. United States, 220 U.S. 45, 58 et seq., 31 S.Ct. 364, 55 L.Ed. 364. It was there said 220 U.S. at page 59, 31 S.Ct. at page 368: "It may be * * * that 'in a suit *in rem*, unless someone intervenes, the power and process of the court is confined to the thing itself, and does not reach either the person or property of the owner.' If, however, the owner comes in, or an intervener does, his appearance is voluntary. He becomes an actor and subjects himself to costs * * *." In United States v. 184 Barrels Dried Whole Eggs, D.C., 53 F.Supp. 652, 654 the Hipolite Egg Co. case, supra, is cited for the rule: "Where a party is before the court in an in rem proceeding, the court has the power to render an in personam judgment against him." Although there is in this state no case applying the latter rule to costs in forfeiture proceedings, the general rule applies here also, (see Brown v. Campbell, 100 Cal. 635, 641, 35 P. 433; 13 Cal.Jur.2d 596, where said rule is applied to a non-resident whose property in this state has been seized and who appears although he was not personally served). If the court has jurisdiction over his person no good reason appears why an unsuccessful claimant of an interest in property subject to forfeiture should be in a better position with respect to costs than other unsuccessful claimants of interests in property, against whom costs can be awarded. In quiet title suits those only who disclaim interest or default are exempt from costs. Code Civ.Proc. § 739. Costs can be recovered against a third-party claimant of property under execution. Maguire v. Corbett, 119 Cal.App. 2d 244, 251-252, 259 P.2d 507. Appellant contends that the legislative intent not to subject the claimant in forfeiture proceedings to costs is shown by section 25370 of the Business and Professions Code, regulating the disposal of seized property, in connection with section 11625 of the Health and Safety Code which provides that proceeds of the sale of a vehicle seized by the State Division of Narcotic Enforcement, insofar as not ordered distributed to persons who have a bona fide interest in them, will be distributed to certain state agencies for expenditures in relation with the sale, forfeiture proceedings, storage, etc. of the vehicle, the remainder only going to the State Treasury. Section 25370, supra, does not contain anything relating to costs. Section 11625, supra, relates to forfeiture in relation to narcotics only and is not here applicable, but even if it were applicable, the provision made for reimbursement of costs out of the proceeds would not necessarily prove that costs could not be recovered in any other manner. Even if a right to recover costs from unsuccessful claimants is recognized the provision for payment of expenses out of the proceeds remains of importance in all cases where no claimant appears or payment of costs cannot be obtained from him. We hold that awarding of costs against the appellant was legal.

[4, 5] The second contention is that, even if recovery of costs against appellant

in the judgment was correct, the storage costs of the automobile, assessed against appellant from the date of its answer, were not a proper item of such costs. The Code of Civil Procedure in the general sections 1021 and 1033 provides for recovery of costs and disbursements but the code does not define these terms or specify what can be recovered under them. Section 1022 distinguishes between costs and disbursements. Section 1032, the section relating to costs in the Superior Court here applicable, mentions costs without mentioning disbursements. With respect to said costs Moss v. Underwriters' Report, Inc., 12 Cal. 2d 266, 274, 83 P.2d 503, 507 holds as follows: "The term 'costs', it has been said, means 'those fees and charges which are required by law to be paid to the courts, or some of their officers, or the amount of which is expressly fixed by law'. [Citation.] The words 'necessary disbursements' should be similarly construed. Certainly the statute does not contemplate that a defendant must pay all of the successful plaintiff's expenses in connection with the litigation. The code authorizes the allowance of costs only, and the inclusion of 'necessary disbursements' in the section requiring one who claims costs to file a memorandum of them does not authorize a litigant to collect from his unsuccessful adversary the amount of any expense which is not allowable as an item of 'costs'. [Citation.]" The disbursements of plaintiff for the storage of the seized automobile are not taxable costs under the above rule: they were not to be paid to the court or any of its officers and their amount is not expressly fixed by law. It is true that the storage may have been reasonably necessary and that it was necessitated by appellant's unsuccessful answer, but under the above rule not all reasonable expenses are necessarily recoverable as costs. Respondent relies on Maguire v. Corbett, supra, 119 Cal.App.2d 244, 259 P.2d 507 in which this court held that storage costs of an automobile on which execution was being levied could be taxed against the unsuccessful third-party claimant insofar as her claim necessitated the storage. The case can be distinguished because the storage costs in that case were costs in aid of execution regulated in sections 1032.6 and 1033.7 of the Code of Civil Procedure which expressly permit the recovery of costs and disbursements reasonably and necessarily incurred in aid of collection of judgment and because said costs were incurred by the sheriff and had to be paid to him. Respondent also relies on some federal cases which assess storage costs of a seized automobile in forfeiture proceedings. In 20 C.J.S., Costs, § 214, p. 450 expenses for care of property are treated as particular disbursements not included in the ordinary fixed items of taxable costs and it is stated that the decisions regarding the right to tax such expenses as costs, even if made by an officer, are not harmonious. Under these circumstances the federal cases cited cannot be decisive. Under the rule of the Moss case, supra, we must hold that the storage costs were not taxable. Although the Code of Civil Procedure leaves the question of costs mainly to the discretion of the trial court, it does not justify the court in allowing costs not properly chargeable as such. Bathgate v. Irvine, 126 Cal. 135, 149–150, 58 P. 442.

The order taxing costs is modified by striking therefrom the sum of $74.50 for automobile storage expenses and is affirmed as modified. The judgment is affirmed with the exception of the inserted amount of costs which is ordered modified in accordance with the modification of the order.

DOOLING and KAUFMAN, JJ., concur.

140 Cal.App.2d 816

Murray D. PRICE, Plaintiff and Respondent,

v.

Bernice M. PRICE, Defendant and Appellant.

Civ. 21262.

District Court of Appeal, Second District, Division 3, California.

April 16, 1956.

Action by husband against wife for annulment of marriage. The Superior Court, Los Angeles County, Henry M. Willis, J., entered judgment for husband, and wife appealed. The District Court of Appeal, Shinn, P. J., held that where complaint alleged and court impliedly found that decree of Mexican Court was not a valid decree of divorce, that question could not be re-examined on appeal, and transcript of trial proceedings and statement in wife's brief which were foreign to record were disregarded.

Affirmed.

1. Appeal and Error ⚿865

Upon appeal by defaulting party from a default judgment, question of sufficiency of evidence to support implied findings may not be raised and the court may consider only the judgment roll and the question of jurisdiction.

2. Marriage ⚿66

On appeal by wife from default judgment entered in action brought by husband for annulment of marriage, where complaint alleged and court impliedly found that decree of Mexican court was not a valid decree of divorce, that question could not be examined, and transcript of trial proceedings and statements in wife's brief which were foreign to record were disregarded.

◆

Frank R. Davis, Hollywood, for appellant.

Ray H. Enter, Los Angeles, for respondent.

SHINN, Presiding Justice.

The complaint in this action filed by Murray D. Price against Bernice M. Price contained a cause of action for divorce and one for annulment of marriage. The ground of annulment was that at the time of the purported marriage of the parties Bernice had another living husband, Joseph Anthony Volk. Process was served and Bernice defaulted. The cause was tried as a default and a decree of annulment entered. Bernice gave notice of appeal and has presented a record of a copy of the judgment roll, a clerk's and a reporter's transcript. The ground of the appeal is claimed insufficiency of the evidence to prove invalidity of the marriage.

Attached to the complaint was a copy of a purported decree of divorce granted to Volk against Bernice, issued by "Citizen Licentiate Jesus Barba Cornejo, Judge of the Civil Court of First Instance, Bravos District" of the State of Chihuahua, Republic of Mexico. Upon its face it appears to be a final and absolute decree of divorce.

Appellant says the court construed the decree to be interlocutory only, relying upon the testimony of Dr. Wm. B. Stern, an authority upon Mexican law, to the effect that under the laws of Chihuahua such a decree does not dissolve a marriage unless it is followed by a further decree declaring it to be final. Appellant heretofore made application to this court to add to the record on appeal a copy of a final decree which she had discovered was entered a few days after the interlocutory. Her application was denied.

[1] Upon an appeal by the defaulting party from a default judgment the question of the sufficiency of the evidence to support the implied findings may not be raised. The court may consider only the judgment roll and the question of jurisdiction. Crackel v. Crackel, 17 Cal.App. 600, 121 P. 295; Reed Orchard Co. v. Superior Court, 19 Cal. App. 648, 662, 128 P. 9, 18; San Gabriel Valley Bank v. Lake View, etc., Co., 4 Cal. App. 630, 89 P. 360; Lukasik v. Lukasik, 108 Cal.App.2d 609, 239 P.2d 497; Line v. Line, 75 Cal.App.2d 723, 728, 171 P.2d 733.

[2] The complaint alleged and the court impliedly found that the decree of the Mexican court was not a valid decree of divorce. That question may not be re-examined upon this appeal.

We must disregard the transcript of the trial proceedings and the numerous statements in the briefs of appellant that are foreign to the record.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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140 Cal.App.2d 765

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Louis COLONNA, Defendant and Appellant.
Cr. 5509.**

District Court of Appeal, Second District,
Division 1, California.
April 12, 1956.

Defendant was prosecuted for the unlawful possession of flowering tops and leaves of Indian Hemp. Judgment of conviction in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., and the defendant appeals. The District Court of Appeal, White, P. J., held that defendant was not deprived of a constitutional guarantee of an unreasonable search and seizure because he was a guest in the apartment searched.

Judgment reversed.

1. Searches and Seizures 🔑7(26)

Defendant prosecuted for unlawful possession of Indian Hemp was entitled to avail himself of the constitutional guarantees against unreasonable searches and seizures, though he was a guest in the apartment unlawfully searched. U.S.C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19.

2. Criminal Law 🔑394

Where search as to the occupant of an apartment was unlawful and in violation of the defendant's constitutional rights, the court erred in overruling the defendant's objections to the introduction of evidence obtained by the unlawful search. U.S.C.A. Const. Amend. 4; West's Ann.Const. art. 1, § 19.

◆

John G. Thorpe, Roger M. Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles county, defendant was charged with a violation of Health and Safety Code section 11500, a felony, in that he "did willfully, unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (cannabis sativa)". It was also charged that on or about March 12, 1953, defendant was convicted of a violation of the aforesaid code section, a misdemeanor. Defendant pleaded not guilty and denied the prior conviction. By stipulation, the People's case was submitted on the transcript of the preliminary examination, with the reservation that both the prosecution and defense might submit further testimony. Defendant also reserved the right to object to any testimony contained in the transcript of the preliminary hearing. When the trial judge announced he had read the transcript, the defendant objected "* * * to the admission of any evidence or any testimony obtained by the officers as a result of their entry of Apartment No. 5 on the basis that it was an illegal search and seizure as is prohibited in the rule of evidence of the case of People versus Cahan." The objection was overruled, the court adjudged the defendant guilty and found the allegation of a prior conviction true. Subsequently the court ordered that its finding of the truth of the prior conviction be stricken, and defendant was sentenced to six months in the county jail. From the judgment of conviction he prosecutes this appeal.

Concerning the factual background surrounding this prosecution, the record reveals that on the evening of April 9, 1955, officers of the Los Angeles Police Department entered the premises of the Nineford Apartments in the city of Los Angeles. Officer O'Grady talked to the landlady and inquired as to who lived in apartment 5. The officers then went to that apartment. Officer O'Grady then "tried the handle (of the door) to see whether or not it would open", inserted a pass key, then "went straight through the (opened) door", and "charged in" the room.

Inside, Officer O'Grady first observed defendant seated on a divan, in front of a coffee table, where he then observed, "* * * six white wrapped paper cigarettes and a quantity of loose green leafy material and a paper bag containing some additional green leafy substance * * *" which was later analyzed and determined to be cannabis sativa (marihuana). The officer then said: "Well, Red, what about it?" Defendant replied: "Well, you got me, you got me. I am dead * * *."

Officer O'Grady then searched defendant's person. Defendant "* * * reached in his right coat pocket and threw a cigarette down on the coffee table and then said, 'It is all mine * * *. Take me over. All of it belongs to me.'" The cigarette was also analyzed and determined to contain marihuana. The search of the apartment continued.

Apartment No. 5 of Nineford Apartments was leased to one Joy Belle Sanzone, also known as Joy Belle Noble. Miss Sanzone was observed by Officer O'Grady, for the first time, a few seconds after his "charge" into the apartment. The officers then took defendant and Miss Sanzone to the Narcotic Division Station where the former freely and voluntarily executed a written confession.

Upon the conclusion of the People's case in chief, defendant rested his case without offering any testimony.

The sole question presented on this appeal is whether the evidence objected to was obtained in violation of the 4th Amendment to the Constitution of the United States, Article I, section 19 of the Constitution of the State of California, and was therefore inadmissible under the exclusionary rule announced in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

The evidence disclosed that the arresting officers had no search warrant, no warrant of arrest for anyone, did not know whether the apartment was occupied at the time they "went straight through the door". No attempt was made by the prosecution to prove that the officers were in pursuit of a suspected law violator, or were acting on information or belief that required immediate action and precluded the possibility of obtaining a search warrant.

[1] It is respondent's contention that appellant could not avail himself of the constitutional guarantees by reason of his status as a guest in the apartment. That in order to have standing enabling him to object to the admissibility of evidence seized during an unreasonable search, the objector must "at least be dwelling" in the premises illegally searched, and that one who is not the owner, lessee or lawful occupant of the premises searched cannot raise the question under the federal and state constitutions of unlawful search and seizure.

However, this contention was rejected by the Supreme Court in the case of People v. Martin, 45 Cal.2d 755, 290 P.2d 855, at page 856, wherein the court stated:

"*The Attorney General contends that since defendant disclaimed any interest in the premises searched and the property seized, his constitutional rights could not have been violated and that therefore he has no standing to challenge the legality of the searches and seizures.* [Citing cases.] We cannot agree with this contention.

"It is true that in Goldstein v. United States, 316 U.S. 114, 62 S.Ct. 1000, 86 L.Ed. 1312, the United States Supreme Court recognized that the rule is well established in the lower federal courts that only those whose constitutional rights have been violated may object to the introduction of illegality obtained evidence against them. In the light of that rule it held that the federal wire-tapping statute should not be interpreted as forbidding the use of wire-tap evidence against a person not a party to the conversation. It was careful to point out, however, that it had never decided that the rule applied in the lower federal courts with respect to unconstitutionally obtained evidence was correct. There are several United States Supreme Court decisions cited below, however, that are logically inconsistent with the rule applied in the lower federal courts, and it is impossible to reconcile that rule with the reasons that compel the exclusion of the evidence.

"Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. Connolly v. Medalie, supra [2 Cir.], 58 F.2d 629, 630.

"In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, People v. Cahan, 44 Cal.2d 434, 443, 282 P.2d 905, *and based its decision on the ground that 'other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activity of law enforcement officers.'* 44 Cal.2d at page 445, 282 P.2d at page 911. *This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them.*

"The United States Supreme Court has clearly recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law. 'The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. (Citation.) Nor can the Government make indirect use of such evidence for its case (citation), or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. (Citation.) All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men.' [Citing cases.] In McDonald v. United States, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153, it gave effect to this policy by reversing the conviction of both defendants although only the rights of one had been violated. It pointed out that had the evidence been returned to the defendant from whom it was illegally taken, it would not have been available for use against the other defendant, and held therefore that its admission was prejudicial as to both. [Citing cases.] It is true that in the McDonald case a pretrial motion for the return of the evidence by the defendant whose rights were violated had been erroneously denied. There is no basis for concluding, however, that a defendant whose rights have not been violated should have standing to challenge a pretrial ruling against his codefendant, if he has no standing to challenge the legality of the original seizure. In either situation his right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law.

"Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights." (Emphasis added.)

[2] At the trial it was stipulated that the search as to the occupant of the apartment was unlawful, but that because appellant was a guest in the apartment his constitutional rights were held by the court not to have been violated. Upon the authority of, and for the reasons stated in People v. Martin, supra, it must be held that the court erred in overruling appellant's objection to the introduction of the evidence

obtained in violation of his constitutional rights, and that the error was prejudicial.

The foregoing conclusions at which we have arrived render it unnecessary to consider or decide other issues presented on this appeal.

The judgment is reversed.

DORAN and FOURT, JJ., concur.

140 Cal.App.2d 613

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas C. JOHNSON, Defendant and Appellant.

Cr. 5506.

District Court of Appeal, Second District, Division 1, California.

April 9, 1956.

Prosecution for murder. The Superior Court, Los Angeles County, Clement D. Nye, J., denied defendant's application for probation, and upon defendant's plea of guilty to manslaughter entered judgment of conviction. Defendant appealed. The District Court of Appeal, White, P. J., held where no facts surrounding homicide charge against defendant were presented, and trial court made no finding as to whether charge to which defendant pleaded guilty was voluntary or involuntary manslaughter, and court was without knowledge as to whether defendant used a knife in his possession upon the deceased, or merely held the knife without due caution, it was error for trial court to refuse to permit the filing of or to consider an application for probation.

Judgment reversed and cause remanded with directions.

1. Homicide 🔑16

A knife is not inherently a dangerous or deadly weapon as a matter of law though it may assume such characteristics depending upon the manner in which it is used.

2. Criminal Law 🔑982

Where no facts surrounding homicide charge against defendant were presented, and trial court made no finding as to whether charge to which defendant pleaded guilty was voluntary or involuntary manslaughter, and court was without knowledge as to whether defendant used a knife in his possession upon the deceased, or, merely held the knife without due caution, it was error for trial court to refuse to permit the filing of or to consider an application for probation. West's Ann.Pen.Code, § 1203.

3. Criminal Law 🔑982

Where defendant's victim was killed with a knife, and defendant filed plea of guilty to manslaughter, if defendant used knife upon victim application for probation must be denied, but if defendant did not use the knife upon the deceased then court could grant or deny probation as might appear proper under all the circumstances. West's Ann.Pen.Code, § 1203.

◆

E. V. Cavanaugh, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of murder. It was further alleged that he had previously been convicted in the District Court of Grady County, Oklahoma, of the crime of assault with intent to kill, a felony, for which he served a term of imprisonment in the state prison.

Defendant entered a plea of not guilty and denied the prior conviction. Thereafter, and with his counsel present, defendant withdrew his plea of not guilty and entered his plea of guilty to the crime of manslaughter, a felony and a lesser and necessarily included offense. He also thereupon admitted the prior conviction. Defendant was sentenced to state prison and judgment entered accordingly. From such judgment he prosecutes this appeal.

The record reveals that at the time defendant withdrew his not guilty plea and entered his plea of guilty to the lesser offense of manslaughter, the following proceedings occurred:

> "The Court: Thomas C. Johnson.
>
> "Mr. Crail [Deputy District Attorney]: In this case, if the Court please, the defendant has indicated his willingness to enter a plea of guilty to manslaughter, a lesser and necessarily included offense.
>
> "The Court: I notice you are the attorney of record in this matter, Mr. Werner. Have you advised the defendant of his responsibility, his rights and liabilities, and so forth?
>
> "Mr. Werner: I have your Honor. I also want to state I did so several weeks ago, and the defendant here seemed to be a little disturbed about my recommendation and attempted to employ other counsel. Realizing my obligation to the Court, I have returned here, but I do recommend that he change his plea and admit the prior. Is that correct?
>
> "Mr. Crail: Yes.
>
> "The Court: Now, Mr. Johnson, do you want to plead guilty to the crime of manslaughter?
>
> "The Defendant: Yes, your Honor.
>
> "The Court: I beg your pardon?
>
> "The Defendant: Yes, your Honor.
>
> "The Court: Are you satisfied with the advice that Mr. Werner has given you?
>
> "The Defendant: I am.
>
> "The Court: There is no disagreement between you and Mr. Werner?
>
> "The Defendant: No, sir.
>
> "Mr. Werner: And I want him to understand I have no supervision or control over the punishment. That came up in the argument, your Honor.
>
> "The Court: You understand, Mr. Johnson, that if you enter this plea of guilty to manslaughter, you are doing that freely and voluntarily, because you believe you are guilty of that offense; is that right?
>
> "The Defendant: Yes.
>
> "The Court: Has anybody forced you or persuaded you to plead guilty to this charge?
>
> "The Defendant: No, sir; your Honor.
>
> "The Court: I didn't hear you.
>
> "The Defendant: No, your Honor.
>
> "The Court: Has anybody given you any promise of reward or hope of leniency for pleading guilty?
>
> "The Defendant: Oh, no.
>
> "The Court: You understand nobody is authorized to promise what your sentence will be?
>
> "The Defendant: No."

Defendant thereupon entered his plea of guilty to the crime of manslaughter and admitted the prior conviction as charged. The following proceedings then occurred:

> "Mr. Werner [attorney for defendant]: May we file an application for probation?
>
> "The Court: What was the means employed in the killing?
>
> "Mr. Werner: A knife, your Honor.
>
> "The Court: The defendant is not eligible for probation."

Time for sentence was fixed for June 29, 1955, upon which date it was pronounced.

The sole issue presented on this appeal is the contention of appellant that the trial court erred and abused its discretion in concluding that he was not eligible for probation and on that ground alone, denying him the right to file an application for probation.

Section 1203 of the Penal Code provides, as to eligibility for probation, that "probation shall not be granted to any defendant * * * who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted * * *."

[1] A knife is not inherently a dangerous or deadly weapon as a matter of law though it may assume such characteristics, depending upon the manner in which it is used, People v. McCoy, 25 Cal.2d 177, 188, 153 P.2d 315, and in People v. Southack, 39 Cal.2d 578, 591, 248 P.2d 12, 20, our Supreme Court stated, "The fact that the fatal wound was inflicted by a deadly weapon does not compel the conclusion, as a matter of law, that defendant was 'using' the weapon and was therefore ineligible for probation." In the case just cited defendant was accused of the crime of murder and a jury found him guilty of manslaughter. The weapon used was a 12-gauge shotgun with a "hair trigger". The trial court concluded that defendant was not eligible for probation. In commenting upon the evidentiary features of the case, the Supreme Court stated 39 Cal.2d at page 591, 248 P.2d at page 20: "As previously indicated, *ante* [39 Cal.2d at pages 583, 584] 248 P.2d at pages 15–16, there is evidence from which it could be inferred that defendant 'used or attempted to use' the loaded gun upon Ellsworth, and there is also evidence from which it could be inferred that defendant, as he himself testified, 'did not use the gun,' but merely held it without due caution. * *

"Remarks of the trial court at the time it was considering defendant's application for probation indicate that it was of the opinion that the jury must have convicted defendant of voluntary manslaughter and that it overlooked the possibility that, under the evidence and the instructions, defendant could have been convicted of involuntary manslaughter. If defendant's crime was voluntary manslaughter, then the trial court was correct in its stated conclusion that 'there is nothing further the court can do but send this man to the penitentiary.' But, since the court could have resolved in defendant's favor, the question of fact as to whether the manslaughter involved the use of the weapon upon Ellsworth and, hence, could have considered and, conceivably, granted his application for probation on the merits, it was error to refuse to consider the application at all."

[2] In the case at bar we are confronted with a situation wherein the court made no finding as to whether the charge to which appellant pleaded guilty was voluntary or involuntary manslaughter. Indeed, the court could make no such finding because the facts surrounding the homicide were not presented. The court was not apprised of the surrounding facts and circumstances of the offense and was without knowledge as to whether appellant "used" the knife upon the deceased, or, as in the case of People v. Southack, supra, 39 Cal.2d at page 591, 248 P.2d at page 20 "merely held it without due caution". We are satisfied that the reasoning and conclusion reached in the case of People v. Southack, supra, compels the conclusion in the case now engaging our attention, that it was error for the trial court to refuse to permit the filing of or to consider an application for probation at all. Since an application for probation must be considered "before any judgment is pronounced", Penal Code, § 1203, the judgment herein must be reversed.

[3] For the foregoing reasons the judgment is reversed and the cause remanded for further proceedings in accordance with the law, and with specific directions to the court below to entertain an application for probation and to determine, in accordance with the views herein expressed, whether appellant used the knife upon the deceased; if it determines that appellant did use the knife upon the victim, the application must be denied; if it determines that appellant did not use the knife upon the deceased, then it may grant or deny probation as may appear proper under all the circumstances.

DORAN and FOURT, JJ., concur.

140 Cal.App.2d 412

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

John Steven RYAN, Jr., Defendant and Appellant.

Cr. 3106.

District Court of Appeal, First District, Division 1, California.

April 2, 1956.

Rehearing Denied April 17, 1956.

Hearing Denied May 2, 1956.

Defendant was convicted of first degree robbery. The Superior Court, County of San Mateo, Edmund Scott, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that District Attorney was not guilty of misconduct.

Judgment and order affirmed.

1. Criminal Law 🔑1173(2)

In prosecution for first degree robbery, alleged failure of trial court to instruct appropriately on the subject of claimed unconsciousness during alleged robbery was not reversible error.

2. Criminal Law 🔑489

In a criminal prosecution, a wide latitude is permitted the District Attorney in cross-examination of an expert witness in all matters tending to test his credibility so that jury may determine the weight to be given the testimony.

3. Criminal Law 🔑485(2)

In robbery prosecution, wherein defendant relied on defense of insanity, and wherein defendant's medical expert testified that in his opinion defendant was unable to comprehend the nature or quality of his acts and was equally unable to comprehend whether or not it was wrong and the consequences, it was proper for the District Attorney in cross-examination of the medical expert to interrogate him by asking his opinion of a hypothetical case though the hypothetical case in certain respects involved different facts than the robbery case.

4. Criminal Law 🔑489

In robbery prosecution, wherein defendant relied on defense of insanity, and wherein defendant's medical expert on direct examination discussed quite fully the requirements of the McNaughton rule in relation to various types of mental illness, including type of mental illness that medical experts felt that defendant was suffering from at time of the burglary, District Attorney was not guilty of misconduct in referring to the McNaughton rule in hypothetical case presented to medical expert on cross-examination.

5. Criminal Law 🔑1037(2)

In robbery prosecution, wherein defendant relied on defense of insanity, and wherein defendant's medical expert was cross-examined by District Attorney by asking the medical expert's opinion concerning a hypothetical case, failure of defendant to request admonition to jury to disregard remark of District Attorney that the man involved in the hypothetical case had been found guilty was a waiver of the error, and it was too late for defendant on appeal to make objection for the first time because of such remark by the District Attorney.

6. Criminal Law 🔑706

In robbery prosecution, wherein defendant relied on defense of insanity, cross-examination of psychiatrist by District Attorney was not improper, on ground that District Attorney allegedly ridiculed psychiatrist.

7. Criminal Law 🔑720(8)

In robbery prosecution, wherein defendant contended that he was not sane at time of robbery because of overwork as a full time deputy sheriff and a full time student, and wherein defendant admitted that to some extent he took the time off from his work as deputy sheriff to study, it was proper for District Attorney in argument to jury to state that defendant had no right to take time off from his job as deputy sheriff.

8. Criminal Law 🔑720(3)

District Attorney in prosecution for first degree robbery had the right in his argument to state his view as to what the evidence showed and the conclusions that might fairly be drawn therefrom.

9. Criminal Law ⚿730(1)

In robbery prosecution, it was within sound discretion of trial court to determine whether District Attorney stayed within permissible range of discussion of evidence in argument to jury.

10. Criminal Law ⚿1037(1)

Failure of defendant to object to statement of District Attorney in argument to jury was a waiver by defendant of right to contend on appeal that such statement was improper.

11. Criminal Law ⚿720(1)

Where at least four lay witnesses testified in robbery prosecution that defendant was sane or was not insane, and several lay witnesses testified that defendant appeared to be normal, and one lay witness testified that defendant appeared to be in full contact with reality, it was proper for District Attorney in argument to jury to state that a number of lay witnesses had testified that in their opinion defendant was sane.

12. Criminal Law ⚿662(4)

In robbery prosecution, wherein defendant relied on defense of insanity, and wherein three of defendant's medical experts made use of report by psychologist, cross-examination of one of the medical experts concerning the psychologist's report and introduction of the report into evidence without objection by defendant, and without request by defendant for a limiting instruction, was not an infringement of defendant's constitutional right to confront the psychologist as a witness.

13. Criminal Law ⚿773(1)

In robbery prosecution, wherein defendant relied on defense of insanity, and wherein the State produced evidence tending to show that defendant was sane, giving of instruction that the law entertains a rebuttable presumption that defendant was sane was not improper.

14. Constitutional Law ⚿70(1)

In view of the fact that the McNaughton test has been used for insanity in criminal cases in the state for many years, it was not for the District Court of Appeal, a mere intermediate court, to reject the test and to require some other test, and proposal should probably be addressed to the Legislature and not to the Judiciary.

15. Criminal Law ⚿1172(2)

In robbery prosecution, wherein defendant relied on defense of insanity, giving of instruction that the law presumed that robbery was committed during a lucid interval was not reversible error under circumstances.

Lewis H. Butler, Clayton R. Janssen, Jr., San Francisco, for appellant.

Lawrence Vold, San Francisco, of counsel, amicus curiæ in support of appellant's contentions.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of first degree robbery, defendant has appealed from the judgment and from the order denying his motion for new trial. He does not question the sufficiency of the evidence to sustain the verdict. He claims an erroneous instruction was given upon the trial of the issues presented by his "not guilty" plea, and that upon the trial of the issues presented by his plea of "not guilty by reason of insanity" the district attorney committed prejudicial misconduct and the court erred in the admission of certain evidence and in the giving of certain instructions.

Inasmuch as no one questions the sufficiency of the evidence to support the verdicts, the testimony need not be summarized in as great detail as otherwise might be necessary.

The offense was committed on March 22, 1954. Defendant was attending law school and also held a full time position as deputy sheriff serving civil process. His wife also was employed, as a teacher in the public schools. They lived in the same apartment building as did Mrs. McKernan, the victim of the robbery.

That afternoon he was at home studying. Suddenly he left his desk, picked up his service revolver and effected a disguise consisting of a towel wrapped around his head, sunglasses and a handkerchief over his face. He then proceeded downstairs to the McKernan apartment and knocked on the door. It was approximately three o'clock and Mrs. McKernan was at home alone. When she opened the door defendant pointed the revolver at her and announced "This is a robbery." He demanded her money and she gave him all that she had, about $14. He then told her she would have to disrobe because he did not want her to follow him. She partially disrobed and he gagged her and taped her hands together. He left the McKernan apartment, returned to his own apartment and with the exception of his shoes changed into a different suit of clothes.

When the police arrived to investigate the robbery, defendant accompanied them to the McKernan apartment. Mrs. McKernan recognized his voice as being strikingly similar to the voice of the man who had robbed her and informed the police thereof, adding that the robber had been wearing shoes exactly like the defendant's.

On April 26th, he was arrested and charged with the crime. At that time he was interviewed by the chief of police and by the sheriff in the office of the chief of police. He related to them in considerable detail what he could remember of the circumstances surrounding the crime. The interview was recorded.

Upon the witness stand he remembered but a few of the events which occurred on the afternoon of March 22nd. He testified that after completing his work of serving papers that day he came home, changed his clothes and started to study. He had a severe headache and took some aspirin. The next thing he remembered was a door opening and a woman standing there. He did not remember the location of the door. He remembered something "about a television set, just the idea of a television set, and something about venetian blinds." He remembered saying something about five children, but couldn't remember in what connection—"It was just an isolated statement, and the first lucid memory I have, the first thing I can remember fairly distinctly is I was standing in this room and a woman was across the bed from me on the floor, and she was praying; and I looked up and saw a crucifix on the wall and I looked down at my hand and I saw a gun in my hand, and it just seemed as though I —well, it was like walking out of darkness into the light. It seemed as though I had just wakened, and I was petrified. I didn't know where I was or what had happened, or what had occurred at all. It just terrified me, so I turned and ran out. * * * Well, when I got out, when I got out to the hallway, I had an idea where I was and I don't know why, I guess I happened to turn to the right, I noticed I was on the back stairway, and I was familiar with the stairway, and I realized that it was the stairway to my apartment house, and I got upstairs. I got into my apartment and I realized I was in my apartment. * * * Well my mind was just in a turmoil. I was just petrified. I didn't know where I had been or what had happened, and I was just in a cold sweat and just shaking all over. I didn't know what had happened. I took my clothes off and took a cold shower. * * * I got out of the shower; I dressed in my normal clothes that I worked in [which were different from the clothes which he had been wearing before he took his shower], and I sat down and I lit a cigarette and I sat by the front window in the apartment and tried to figure out what had happened."[1]

Defendant exhibited a similar lack of memory of the details of the crime when severally interviewed by the psychiatrists who testified at the second trial concerning his sanity, interviews which they indicated formed in part the basis for their opinions.

In explanation of the much more complete memory of the events which transpired upon the afternoon of March 22nd which he exhibited earlier when interviewed by the sheriff and the chief of police, defendant testified that his own recollection had been confused with facts which the chief of police and a detective sergeant had severally told him and accounts of the crime which had appeared in the newspapers. The detective sergeant testified that he did not discuss with the defendant any of the details of the crime.

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[1] This testimony was given upon the second trial. It is substantially the same as that given by the defendant upon this subject at the first trial.

(There appear to have been two trials under the plea of "not guilty by reason of insanity," the first of which did not culminate in a verdict. For the sake of convenience, we refer to the last trial as the "second trial.")

Upon the first trial the defense was unconsciousness during the time of the commission of the crime; upon the second trial, temporary insanity during that period.

I. The Instructions Given Upon the Trial of the "Not Guilty" Plea.

[1] Defendant claims prejudicial error in the asserted failure of the court to instruct appropriately on the subject of his claimed unconsciousness during the commission of the acts charged. He says, in his closing brief, that in this regard the court should have instructed substantially as follows: "If you find that the defendant was not conscious of taking property from Mrs. McKernan by force or violence or of using a deadly weapon in so doing, you must find him not guilty even though you find that at other times during his stay in the apartment he was partially or fully conscious."

But defendant did not present this issue with any such clarity during the trial. He requested and the court gave CALJIC Nos. 71–C and 71–D except that the court omitted the concluding portion of 71–D which reads: "and if you should find that the defendant committed an act, which, if he was conscious, would have constituted the crime charged against him or have been an element of that crime, and if you should not be convinced beyond a reasonable doubt that he then was conscious, you shall find that he then was *un*conscious."

Later, the jury returned to the courtroom and the foreman asked: "In arriving at a verdict, are we to consider to what degree defendant knew what he was doing?" Thereupon the court, outside the presence of the jury, discussed with counsel what instructions should be given. Defendant's counsel said "I think the instruction that would cover that would be consciousness," and later "Re-read the two instructions on consciousness and any instructions you give on intent," whereupon there ensued a discussion[2] during the course of which defendant's counsel had an opportunity to present the issue he now presents but failed to do so. At the conclusion of that discussion, the court again read to the jury Instruction No. 71–C and the same portion of 71–D previously given, plus the full text of No. 71–C, Alternate. When the court during the discussion outside the presence of the jury stated, in effect, that it was excluding the indicated portion of No. 71–D because it was in the nature of a formula instruction (the court saying, "that is stereotyped—'if you should find'—") was the time and the opportunity for defendant's counsel to direct attention to the phase thereof ("or have been an element of that crime") to which he now attaches pivotal significance. If counsel had done so, we have no reason to doubt that the court would have covered the point by some appropriate addition to the instructions which it did give on the subject of unconsciousness. It would hardly seem reasonable to hold the trial judge solely responsible for failing to perceive the asserted significance of the words "or have been an element of that crime," virtually buried in the "If you should find" clause, when counsel, whose advice and assistance the court has especially invited, failed to direct attention to those words and failed to mention their claimed significance. See a discussion of this principle in Jensen v. Southern Pacific Co., 129 Cal.App.2d 67, 77–79, 276 P.2d 703, and cases there cited. Indeed, there is a fair basis for an inference that the asserted significance of the words "or have been an element of that crime" did not occur to defendant's counsel until after oral argument upon this appeal.

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[2] That discussion, as it appears in the reporter's transcript, pages 464–466, was as follows:

"The Court: I think I should give them your No. 18, which is unconscious act, and follow up with your No. 17, which is: If the person acts as if he was conscious, the law presumes he was conscious.

"Mr. Hartley [counsel for The People]: Just those two?

"The Court: We might go into intent, but does the word 'consciousness' used there mean a realization of what has happened?

"Mr. Callaghan [defendant's counsel]: Awareness?

"The Court: A realization of what has happened.

"Mr. Callaghan: The latter part, you didn't give anyway.

"The Court: No, no.

"Mr. Callaghan: I would think those two instructions would cover it.

"The Court: That is stereotyped—'if you should find'—I don't like those things. I will give that one. I think it is safe to tell them that the word 'consciousness' as used, means awareness of what is happening.

"Mr. Callaghan: And then you would supplement that remark by these instructions?

"The Court: I will give these too—using the word 'consciousness' means knowingly or an awareness. But does that answer the question? Apparently they think he was somewhat conscious but somewhat unconscious.

"Mr. Hartley: Don't you think we can ask the juror to ask the question in another form, so we are sure we have the question in mind? We are not sure of the question. It is an ambiguous question.

"Mr. Callaghan: I think it is rather queer.

"The Court: I have never heard a question put like that. I can't imagine 12 intelligent people—

"Mr. Callaghan: I think his term—the wording is an unfortunate choice of words.

"Mr. Hartley: That is the heart of what he says.

No mention of any phase of this subject was made in defendant's opening brief upon this appeal. That brief, in the words of counsel, was "directed solely to errors committed at the second trial on the issue of insanity."

Later, amicus curiæ filed a brief "directed to [the question as to] how prejudicially erroneous were the supplementary instructions, relating to unconsciousness, that were given at the trial of appellant's plea of 'Not Guilty.'" The essence of the argument presented in that brief seems to be that defendant's testimony showed that defendant during the commission of the offense, experienced "intervals of intermittent total unawareness punctuated by fleeting glimmers of hazy partial awareness"; that Mrs. McKernan's testimony showed that essential elements of the crime of robbery occurred during a time which, according to defendant's testimony, he was "totally unaware"; and that the instructions given the jury on the subject of unconsciousness did not present clearly this theory of the defense of unconsciousness. In presenting this argument, amicus curiæ conceded that defendant did not request instructions covering this precise point, saying: "Neither counsel, so far as appears, suggested as an answer to the jury's problem that the court give, in addition, a statement about 'semi-conscious' and the stereotyped sec. 71–C Alternate, which in some particulars differs from the regular sec. 71–C. It appears, however, that the court's idea took shape in the term 'semi-conscious' and in the statement: 'If he is aware at all of what is going on, he is conscious.' To that way of putting it, defendant's counsel refused to agree, but at the moment could not develop his objections without getting into the sanity phase of the question, which, of course, had been reserved for the second phase of

"Mr. Callaghan: I think that what they actually mean is the extent of his awareness.

"The Court: Isn't it true that, if he is aware at all, that he is conscious?

"Mr. Callaghan: I think these two instructions—

"The Court: Let's answer that question. If he is aware at all of what is going on, he is conscious.

"Mr. Callaghan: If he has an awareness.

"The Court: Do you agree with that?

"Mr. Callaghan: No, I can't agree with that. That is too limited, because we get into the question there as to whether or not—let's take that case—whether or not he was aware of it. Well, I guess I am getting into the sanity phase of it.

"The Court: I think we should also instruct them that this question has nothing to do with insanity. He is presumed to be sane.

"Mr. Callaghan: That is right in the instructions."

the trial." If counsel for defendant "could not [at the moment] develop his objections," it would not seem reasonable, under the circumstances described, to cast the entire burden upon the trial judge and hold him solely responsible for the failure to see and draw the fine distinctions which many months later were perceived and developed by amicus curiæ.

Still later, in the reply brief jointly filed by defendant and amicus curiæ, we received the benefit of a draft of an instruction (quoted above, at the beginning of the discussion of this point) which counsel say the trial judge should have conceived and delivered sua sponte.

At oral argument, we directed attention to the fact that the record before us did not clearly indicate who, if either party, requested the instructions now claimed to have been inadequate or incomplete. Subsequently, the parties filed a stipulation clarifying the record in that record. Not until after that did the defendant direct our particular attention to the omitted portion of Instruction No. 71–D and claim that it contained the missing feature of the instructions on unconsciousness, seeking for the first time to base the urge for a reversal upon an erroneous rejection of a proper instruction instead of a mere failure of the trial court in the absence of such a request to give such an instruction.

We conclude that upon this point defendant has not furnished a sufficient basis for a reversal.

We should add that it is not altogether clear that if defendant had made an appropriate and timely request the evidence is of such a character as to require a reversal. The evidence of unconsciousness came in through defendant's testimony. As we read it, he in effect said he was unconscious during the commission of all of the elements of the crime, not just one or more, less than all, of those elements. If the jury were to believe him, they would conclude that he was unconscious during the periods of which he had no recollection and find that he was unconscious at the time that he asked Mrs. McKernan for the money, at the time that he pointed the gun at her, and at the time that he received the money. Although he was conscious at a time when he had the gun in his hand, he does not state whether he was conscious of the fact that he was pointing it at her. In any event, that consciousness of the gun in his hand occurred after he had forced her with the gun to give him the money. Therefore, that conscious act could not be an element of the crime of robbery since the crime was already completed.

We can predicate no reversal upon this phase of the trial.

II. As To Asserted Errors Upon the Trial of the "Not Guilty by Reason of Insanity" Plea.

A. Asserted Misconduct of the Prosecutor.

One of the defendant's experts, Dr. Kelley, testified that in his opinion defendant "was unable to comprehend the nature and the quality of his acts and was equally unable to comprehend whether or not it was wrong, and the consequences."

Upon cross-examination the district attorney interrogated the witness in the terms of a hypothetical case stated by the cross-examiner.[3]

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[3] The passage under consideration reads as follows:

"Mr. Hartley [the prosecutor]: Q. One question, Doctor. I want to ask you what your opinion is about the following set of facts, talking about a man who, during a particular period of what they call pathologic intoxication went to a back yard and tried to rape a child. When she screamed the parent came out of the house. The assailant jumped the fence and fled. He displayed great ingenuity in escaping and eluding capture, gained his own home and went to bed. He was awakened by the police officer, seemed genuinely confused by the charge, and insisted he had been home all the time.

"In response to positive identification, he would not allow his attorney to introduce any evidence of intoxication. He kept repeating, in a hurt and bewildered tone, that he had not been near the scene of the crime.

"In this case considering the question of responsibility within the framework of the intoxication, using the McNaughton formula, since he tried to flee, and carefully eluded capture, it is apparent that

[2, 3] Defendant contends this was improper because facts expressed in the hypothesis were different from the facts in the instant case in certain respects. That rule does not with strictness apply when testing an expert as to his competency. "A wide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony * * *." People v. Tallman, 27 Cal.2d 209, 214, 163 P.2d 857, 860. We think that in this case the prosecutor did not exceed permissible bounds. At least the facts of the hypothetical case were sufficiently similar to the case at bar to present a question for the trial court's decision, if when the question was first asked objection had been made on the ground that it was not a proper hypothetical question.

[4] Nor do we see misconduct in the reference the cross-examiner here made to the McNaughton rule. The witness had upon direct examination discussed quite fully the requirements of the McNaughton rule in relation to various types of mental illness, including the type of mental illness from which he felt defendant was suffering at the time of the offense.

[5] However, the district attorney should not have informed witness in the presence of the jury that the man involved in the hypothetical case had been found guilty. But defendant made no objection upon the ground of alleged misconduct, nor did he ask that the remark be stricken, nor did he request that the jury be instructed to disregard this remark. Indeed, his counsel's statement "let him answer," while somewhat ambiguous, is suggestive of an invitation to the district attorney to continue. It is too late now to make the objection for the first time because there is nothing to indicate that the asserted harmful effect of the statement would not have been removed by an admonition to the jury. The failure to request such admonition in such a case is regarded as a waiver. See People v. Sykes, 44 Cal.2d 166, 172, 280 P.2d 769; People v. Meichtry, 37 Cal.2d 385, 390, 231 P.2d 847; People v. Sieber, 201 Cal. 341, 355–356, 257 P. 64.

Defendant assigns as misconduct the fact that the district attorney in his argument to the jury spoke disparagingly of psychiatrists and, during the course of those remarks, went outside the evidence to some extent. Most of it was within bounds and any of it that was questionable could have been cured if defendant's counsel had objected and asked that the jury be admonished to ignore it. This he did not do.

[6] Defendant claims that in the cross-examination of Dr. Wilder, psychiatrist, the district attorney ridiculed psychiatrists. We do not so view it. It happened that some of the psychiatric witnesses had asked that certain psychological tests be made and they were made by a Dr. Hamister who, in his report, indicated he was persuaded that the defendant was sane. Upon cross-examination of Dr. Wilder, the district attorney interrogated at some length concerning the different conclusions which the two had drawn. We see nothing irregular about it; certainly nothing that a timely objection with a proper admonition to the jury would not have cured.

Defendant assigns as misconduct a statement by the district attorney in his argument to the jury that defendant had no right to take time off from his county job. Defendant says that the state thereby implied that defendant was cheating the county and the state thus prejudiced defendant's case in the minds of the jurymen as taxpayers.

during that period, he was conscious he had done something wrong.

"Now, in that particular case, just to recapitulate, we have a man who committed a crime, claimed not to have been there, cleverly evaded pursuit, and then denied the crime.

"A. [Dr. Kelley] Claimed a blackout?

"Mr. Callaghan [defense counsel]: Let him answer.

"Mr. Hartley: Q. He denied it. A. You say he denied it?

"Q. He was held to have been responsible for his act, although he had a genuine lack of memory.

"Mr. Callaghan: If it please the Court, I don't know whether this is a question or not. It is not proper cross-examination."

[7–10] However, his claim of overwork as a full time deputy sheriff and a full time student, thus working from early in the morning until early the next morning, appears to have been a factor considered by the psychiatrists who diagnosed defendant's mental and physical condition and concluded he was not sane at the time of the offense. The state adduced evidence that defendant quite regularly worked at home studying in the afternoons. Defendant admitted he did this to some extent but that it represented compensating time off for overtime in his work for the county; but his superior, Mr. Cerqui, testified that there was such an arrangement conditioned upon the deputy in question arranging with Cerqui in advance for his compensating time off and he recalled no such advance notice or arrangement upon the part of defendant. We deem the prosecutor's statement fair comment. He had the right in his argument to state his view as to what the evidence showed and the conclusions that might fairly be drawn therefrom. People v. Hoyt, 20 Cal.2d 306, 318, 125 P.2d 29. Also, it is within the sound discretion of the trial court to determine whether counsel stays within the permissible range of discussion. People v. Eggers, 30 Cal.2d 676, 693, 185 P.2d 1. Defendant failed to give the court an opportunity to rule on the alleged misconduct. He made no objection and thereby waived the point, if any he might otherwise have had.

[11] Next, it is said the district attorney several times told the jury in his argument that a number of lay witnesses had testified that in their opinion defendant was sane. Defendant incorrectly assigns this as a misstatement of the evidence because at least four lay witnesses testified that he was sane, or not insane, several that defendant appeared to be normal, and one that he appeared to be in full contact with reality.

B. Asserted Denial of Due Process.

[12] Five psychiatrists called by the defendant testified as expert witnesses to the effect that defendant was insane at the time of the commission of the acts charged. Three of them, including Dr. Wilder, took into consideration, in formulating their opinions, certain psychological tests of the defendant which had been made and reported by a psychologist, Dr. Hamister.

Dr. Hamister stated in his report, among other things: "Mr. Ryan's offense, in my opinion, resulted from a temporary breakthrough of repressed impulses, but did not involve a psychotic loss of reality contact." During cross-examination Dr. Wilder explained that Dr. Hamister meant that he thought that defendant was sane at the time of the offense, and stated why he did not accept Dr. Hamister's opinion as to defendant's sanity. Later, The People introduced the Hamister report into evidence as an exhibit.

Defendant now claims that such cross-examination of Dr. Wilder and the introduction of the Hamister report into evidence constituted an infringement of his constitutional right to confront Dr. Hamister as a witness, even though defendant interposed no objection of any kind at the time, not even a suggestion that the Hamister report be limited in its scope as evidence.

In view of the use made of the Hamister report by three of the experts, including Dr. Wilder, the use made of it in cross-examination was proper. If the defendant wanted the report kept out of evidence he should have interposed an appropriate objection. If he wanted the jury to consider it only in respect to its effect as impeachment of Dr. Wilder and the other experts, he should have asked for a limiting instruction. See People v. Northey, 77 Cal. 618, 631, 19 P. 865, 20 P. 129; People v. Pollock, 25 Cal.App.2d 440, 443–444, 77 P.2d 885, and cases collected in 18 Cal.Jur.2d 564–567, Evidence §§ 124 and 125.

Furthermore, it is worthy of note that Dr. Wilder brought Dr. Hamister's opinion into the case during his own direct examination, adding that as a psychologist Dr. Hamister could not give a valid opinion as to sanity.

C. Instructions Criticised by the Defendant.

[13] The giving of an instruction to the effect that the law entertains a rebuttable presumption that the defendant was sane

is assigned as prejudicial error predicated upon the fact that the state produced evidence tending to show that defendant was sane.

Defendant invokes the asserted rule in civil cases that a disputable presumption " 'is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. * * * When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption * * *.' " Cole v. Ridings, 95 Cal.App.2d 136, 139, 212 P.2d 597, 600. This rule in civil cases may not be that broad. See Scott v. Burke, 39 Cal.2d 388, 394–395, 247 P.2d 313.

However, the instant case is a criminal case. We had occasion in People v. Harmon, 110 Cal.App.2d 545, 243 P.2d 15, to consider whether this rule applies to the issue of sanity in a criminal case in a situation quite similar to that which obtains in the instant case. We there concluded: "Upon the trial of this issue, defendant had the burden of proving his asserted insanity. The state had the benefit of the disputable legal presumption that he was sane, a presumption that remained in to be weighed by the jury with all evidence adduced pro and con. We cannot say *as a matter of law* that the testimony of the alienists overcame this presumption. The jury had before it not only the presumption of sanity but also the conduct and demeanor of the defendant during both trials. In addition, certain portions of defendant's confession tended to indicate a consciousness of guilt and an awareness of the rightness or wrongness of his conduct." 110 Cal.App.2d at page 553, 243 P.2d at page 19.

In the Harmon case there was no opinion evidence (as there is in the instant case) that the defendant was sane but we do not see in that a basis for drawing a different conclusion.

[14] The trial court in defining insanity for the jury applied the McNaughton test, which defendant concedes has been used by the courts of this state, commencing at least as early as 1874. Yet, he contends we should reject it and require a new trial with directions that the test recently recommended in Durham v. United States, 94 U.S. App.D.C. 228, 214 F.2d 862, 874–875 be used. It is not for us as a mere intermediate court to undertake any such innovation; indeed, it is a proposal which probably should be addressed to the Legislature, not to the judiciary.

Moreover, defendant's medical witnesses explained their opinions, as to his sanity, in terms of the McNaughton rule. For example, Dr. Kelley, speaking of defendant's sanity on the day of the crime, said: "at that time, under the McNaughton structure of the Rule of the State of California, he would be declared legally insane." He also said that defendant had "hysterical dissociation, and a hysterical dissociation is one of the very few mental illnesses which fit the McNaughton rules completely, in which he doesn't know the nature and quality of his act, and is unable to comprehend sanely and evaluate right from wrong." He further testified that of the very few mental illnesses "that specifically fit the McNaughton formula all the way" hysterical or fugue states are one. Finally, he observed that "on that specific date [the afternoon of March 22, 1954], John Ryan was unable to comprehend the nature and quality of his acts, and was equally unable to comprehend whether or not it was wrong, and the consequences."

This testimony indicates that defendant tried the case upon the theory that the McNaughton rule was the rule to apply.

[15] Finally, defendant takes exception to the statement, in the following instruction, that the law presumes that the offense was committed during a lucid interval: "When a person charged with crime interposes the defense of insanity, and the proof shows that he was afflicted with a form of insanity wherein, at one time, he was insane and irresponsible and, at other times, he had lucid or clear intervals, at which times he was able to distinguish between right and wrong, and to know the nature and quality of his acts, the law if and after finding that he committed the act, presumes that it was committed during one of the Defendant's lucid intervals. That presumption may be rebutted, but is controlling until overcome by a preponderance of evidence, showing

that the Defendant was insane at the time when the offense was committed."

Defendant correctly claims that this instruction does not find support in the evidence. Testimony pertinent to this issue was not that defendant had an intermittent type of insanity but, as stated in defendant's opening brief, that he "had a temporary, uninterrupted mania during the commission of the crime." That is not a "form of insanity, wherein, at one time, he was insane and irresponsible, and, at other times, he had lucid or clear intervals," the predicate for the giving of the instruction.

However, this was not prejudicial error. In substance this instruction stated in another way the general presumption of sanity upon which the jury was instructed, but it is improbable that such repetition changed the result, which we believe was reached by weighing the conflicting evidence on the issue of sanity at the time of the commission of the offense, not by giving undue weight to the presumption because of the repetition in the instructions. The psychiatrists only examined defendant for a few hours some months after the commission of the offense, the earliest of such interviews having occurred on July 7, 1954. Several of them stated that their opinions were based upon the assumption that defendant was telling the truth at the time of their interviews with him and that he was unable to recall many of the details of the crime. The record shows that defendant recalled more of the details of the crime when he confessed to the police than later when interviewed by the psychiatrists. He also remembered more of those details when he confessed than when he testified at the trial. There was also evidence from which it could be inferred that he remembered the crime and was conscious of his guilt. The jury could have inferred that defendant was not truthful about his memory of the details of the crime. Also, the lay witnesses as to his sanity, including friends and acquaintances who had known him for some time, who had observed him immediately after the commission of the offense, and the victim herself, testified that he at all times appeared normal and sane. We conclude that it is improbable that the instruction under discussion affected the result.

The judgement and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

140 Cal.App.2d 438

The PEOPLE of the State of California, Plaintiff and Appellant,
v.
Joseph A. NOVELLI, Defendant and Respondent.
Cr. 5421.

District Court of Appeal, Second District, Division 2, California.
April 2, 1956.

Rehearing Denied April 16, 1956.

Hearing Denied May 2, 1956.

Defendant was prosecuted for grand theft in the taking of certain oil tanks and other oil well equipment. Judgment of conviction in the Superior Court, Los Angeles County, Aubry N. Irwin, J., and the court granted the defendant's motion for new trial and the state appealed. The District Court of Appeal, Moore, P. J., held that a new trial was properly granted for the insufficiency of evidence to sustain the conviction.

Order affirmed.

1. Larceny 🔑3(3)

Where defendant repossessed tank in accordance with conditional sales contract and title to tanks remained in corporation through which defendant operated, defendant's act in having his employee repossess the tanks was authorized by the contract and hence did not constitute grand theft. West's Ann.Pen.Code, §§ 487–495.

2. Fixtures 🔑22

The delivery of steel tanks to a well on another's property did not vest the owner of the property with title to them where title to the tanks was retained by defendant under conditional sales contract.

3. Fixtures 🔑22

Where by conditional sales contract the parties intended that steel tank sold another should remain personalty, the delivery of the tanks to another's well did not make them a part of the realty or of the lease but they became appurtenant to the mineral rights in the land.

4. Sales 🔑66

Where lessee acted for himself in executing conditional sales contract for the purchase of steel tanks for use in oil development and the owner of the property was not a party to the contract, the owner was not bound by the contract unless he ratified it and the lessee only was bound by its terms.

5. Fixtures 🔑22

Where oil lessee acted for himself in executing conditional sales contract for steel tanks for use in oil development and owner of the property was not a party thereto so that he was not obligated thereon, the owner could have no claim to the equipment therein and his assertion of such claim was of no more effect than the claim of a stranger.

6. False Pretenses 🔑7(1)

In prosecution for grand theft of oil tanks sold by defendant under conditional sales contract and repossessed by the defendant, defendant did not commit the crime by alleged false representations that oil well was indebted to corporation through which the defendant operated in a much larger sum than actually was the case, on the theory that it was the intent of the defendant to take from the owner of the property his interest in the well or any part thereof that the defendant could get. West's Ann.Pen.Code, §§ 487–495.

7. Larceny 🔑62(1)

In prosecution for grand theft of oil tanks sold by defendant under conditional sales contract and repossessed by him, evidence failed to support conviction on the theory of trick or device in that title to the tank passed from the defendant when the purchase price had been allegedly overpaid. West's Ann.Pen.Code, §§ 487–495.

8. Larceny 🔑3(3)

In prosecution for grand theft by allegedly taking oil tanks conditionally sold by the defendant and repossessed by him, where the tanks were repossessed by the defendant openly and in good faith and with the sincere belief that they belonged to his corporation, the taking could not have been with felonious intent so as to sustain conviction. West's Ann.Pen.Code, §§ 487–495.

9. Criminal Law 🔑935(1), 1156(2)

In the matter of granting a new trial for insufficiency of evidence, the trial court is vested with a broad discretion with respect to an issue upon which the reviewing court cannot pass unless it clearly appears that such discretion was abused.

10. Criminal Law 🔑1158(1)

In the matter of granting a new trial for insufficiency of evidence, the appellate court cannot appraise the weight of the evidence and such function is within the exclusive province of the trial court.

11. Criminal Law 🔑935(1)

When there is a substantial conflict in the evidence the granting of a new trial is largely within the discretion of the trial judge.

12. Criminal Law 🔑1158(1)

If there is any appreciable conflict in the evidence, the order granting a new trial is not open to review.

13. Criminal Law 🔑964

The losing litigant on his motion for new trial is entitled to a decision by the trial judge on the sufficiency of the evidence.

14. Criminal Law 🔑935(1)

While it is exclusive province of the jury to find the facts, the trial judge must see to it that such function of the jury is intelligently and justly exercised.

15. Criminal Law 🔑935(1)

In prosecution for grand theft by taking steel oil tanks sold by defendant under conditional sales contract and repossessed by him, trial court properly granted a new trial for insufficiency of evidence to sustain conviction. West's Ann.Pen.Code, §§ 487–495.

◆

S. Ernest Roll, Dist. Atty., Edward L. McLarty, Deputy Dist. Atty., Los Angeles, for appellant.

Clifford E. Enger, Beverly Hills, for respondent.

MOORE, Presiding Justice.

Respondent was accused by information of grand theft, Penal Code, §§ 487–495, in that he feloniously took two certain 1,000-barrel steel oil tanks and other oil well equipment of the value of more than $2,000, the property of Lyndon R. Foster.

He was convicted by a jury but the court granted his motion for a new trial on the grounds that the verdict was against the weight of the evidence and certain instructions were contrary to the law.

The judge observed that the title to the property remained in respondent at all times; that therefore by his act of repossessing it, grand theft could not have been committed. "These matters could have and should have been developed a little sooner through the civil courts. I do not feel that a crime in the sense of grand theft as alleged was committed according to all the evidence submitted here." We are now called upon to determine that the court's order granting a new trial was error. We shall reject such plea on two grounds, namely, (1) the record discloses proof of such quality as reasonably warranted the trial court in concluding that respondent removed the tanks in question from the land of Mr. Foster in the sincere belief that he was entitled to their possession; (2) in the exercise of a sound discretion the court found the conflicts in the evidence and in the inferences fairly deducible therefrom were such as to induce the conclusion that the jury had not clearly comprehended the evidence favorable to Novelli.

Certain Facts Indicate Respondent Innocent

The transcript and appellant's briefs are so voluminous that a fair analysis and an elucidation of the pertinent facts are rendered difficult. It is our purpose to endeavor to inject into the picture only the salient events that transpired and to demonstrate that only by a misinterpretation thereof could respondent have been found guilty.

In June 1948 Lyndon Foster purchased a parcel of land, 1/10 acre in Placerita Canyon in Los Angeles County. In August 1949 Foster leased the land to one Morse for oil development. That lease conveyed to Morse 5/6 interest in the oil and gas that underlay the parcel, leaving Foster a landowner's royalty interest of 1/6 of such oil and gas, or 1/6 of the proceeds derived from the sale of such products.

On September 22, 1949, an "operating agreement" was executed by Foster in favor of "Ethyl-Jean Corporation" for the development of his parcel, but since that corporation did not exist, Foster still held his title unimpaired. On the same day of Foster's abortive attempt at procuring the operating agreement, Mr. Morse undertook the development of Foster's parcel by procuring the necessary equipment for drilling a well. Thereupon, he encountered Novelli who operated Ben Hur Refining Corporation, herein referred to as Ben Hur although it subsequently changed its name to Eureka Oil and Refining Corporation. It entered into a contract with Morse to furnish casing for the "Foster No. 1 Well" for a 15% gross royalty. Also, on the same day Ben Hur executed a "conditional sales contract"[1] with Morse, in evidence as Exhibit 6A, herein referred to as "6A." It was an agreement to sell Morse a number of items such as tubing, float collar, pump valves, etc., and also two oil tanks, all to cost $10,670.71. The two oil tanks listed on 6A are the identical tanks referred to in the accusation of Novelli. They were valued by Ben Hur at $2,193.35 and $1,912.28. By the terms of 6A, 85% of the proceeds of the production of Foster No. 1 was to be paid Ben Hur until the total of $10,-

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[1] Morse signed as agent for Foster, but the latter denied Morse's agency and never signed the contract 6A.

670.71 should be paid, but it was subordinated to the payment of $4,276.51 due Ben Hur on the oil casing from Foster. The total equipment was delivered at Foster No. 1 well and in due season the well was placed on production.

The contract 6A declared time to be the essence thereof, and that upon buyer's failure to comply with the conditions or terms of the contract, the "Seller at his option, and without notice to the Buyer may elect to declare all the rights of the Buyer hereunder terminated and take possession of the said property, wheresoever found, and hold the same discharged from any further liabilities under this contract, and the Buyer hereby waives all claims for damages growing out of such taking."

[1] The foregoing discloses that Novelli repossessed the steel tanks in accordance with his conditional sales contract made prior to their installation on the Foster well. The title to each item remained at all times in respondent's Ben Hur. His act in having his employee repossess them was authorized by the terms of his contract. Such taking was not felonious. Therefore, it was not grand theft. In re Bayles, 47 Cal. App. 517, 520, 190 P. 1034. Novelli's repossession of the tanks was merely a legal, good faith attempt to liquidate the unpaid balance due his corporation. He made no effort to do so before he had negotiated with the attorney for Kia-Ora, successor of Northridge, which accepted the $2,400 credit for the tanks. There is no evidence that he did anything more than what he thought his contract authorized him to do.

In August 1949 Northridge Oil Corporation was organized. It executed a new "operating agreement" with Foster but the record contains no assignments of interest to Northridge. Ben Hur treated Northridge as the partner or general agent of Foster and they modified the terms of 6A with respect to the method of payment of the balance due thereon. In 1951 Ben Hur caused its comptroller, Mr. Adkins, to audit the accounts of Foster No. 1 well. He discovered that funds which should have been credited to its open account had been erroneously credited to the conditional sales contract 6A. By reason of the result of the new entries then made, the balance due on 6A was $10,670.71. In other words, nothing had been paid on the drilling equipment including the two steel tanks and the well was not then on production.

The Kia-Ora Oil Company then succeeded to the interests of Northridge subject to the amount due on 6A. Having failed to restore the well to production, Kia-Ora agreed with Novelli that Ben Hur might repossess the two steel tanks and credit 6A in the sum of $2,400. Acting upon such agreement, Ben Hur dismantled the tanks, had them and certain other items moved in the day time by Moberly Jones Tank Construction Company to a different location. Two years later, June 1954, Foster filed a complaint against Novelli, charging him with grand theft.

The hold on the tanks claimed by Foster is very tenuous. In his letter to Novelli, Foster claimed that his interest in the tanks and drilling equipment arose out of his contract with "Helen-Jean." But such contract was not received in evidence; neither was its loss or destruction proved. Code Civ.Proc. §§ 1855, 1937.

[2, 3] In fact, no basis for such claim as Foster makes can be found prior to his agreement with Northridge, January 9, 1950, or three months after the conditional sale by Ben Hur whereby the allegedly stolen tanks had been delivered to Foster No. 1 well on a contract between Ben Hur and Morse, the lessee of Foster. The latter denied that he had authorized Morse to make a contract. The delivery of the tanks to Foster's well did not serve to vest Foster with title to them. They did not become a part of the realty or of the lease. By the contract of sale (6A), the parties intended that the items should remain personalty. They became appurtenant to the mineral rights in the land. Wagner Supply Co. v. Bateman, 118 Tex. 498, 18 S.W.2d 1052; Son v. Adamson, 188 Cal. 99, 102, 204 P. 392.

[4, 5] Since, according to the record, Morse acted for himself in executing 6A, Foster was not a party to the conditional sales contract. Morse only was bound by its terms. While he claimed to be Foster's

agent at the time, Foster denied the agency. Therefore, if Foster is correct, he is not bound by the contract unless he has ratified it. But Morse is bound by its terms. Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 777, 135 P.2d 569. In that event, the "operating agreements" of Foster are all junior to the conditional sales contract which did not convey title to Foster or to any other but reserved it in Ben Hur. If Foster was not obligated by reason of the conditional sales contract (6A), he could have no claim to the equipment described therein. His assertion of such claim is of no more effect than the claim of an utter stranger.

For still another reason Foster's asserted claim of title to the tanks is without right. While Northridge was "operating" Foster No. 1 well as Foster's managing partner, Northridge effected an agreement with Ben Hur to the effect that the "total balance due on October 17, 1951, will be $10,670.71. * * * Upon the payment in full" of that sum Ben Hur agrees to give to Northridge a "bill of sale and full clear title to all the equipment and machinery covered by" the conditional sales contract. Inasmuch as Foster was a party to neither the conditional sales agreement 6A nor the contract of October 1951 modifying the method of paying the balance due, his intention in respect to the matter is not to be considered.

[6] Appellant contends that respondent committed theft by his false representations that Foster No. 1 well was indebted to Ben Hur in the sum of $10,670.71 when in fact the true balance due was $1,425.51; that the documents in evidence and the books of account prove that it was the "intent of Novelli to take from Mr. Foster his 39% interest in the well or any part thereof that he could fraudulently get." Counsel follows the foregoing with the statement that Foster was defrauded of his ownership of 39% of said equipment in that the attorney of Kia-Ora Oil Corporation relied upon Novelli's false representations in assuming the obligation of $10,670.71. Appellant contends that the transfer of the credits that had been entered upon Foster No. 1 well account to the operating expense account was fraudulently caused by respondent. But the explanation of Ben Hur's accountant that the credits had been made erroneously to contract 6A was a rational explanation, as well as the accountant's testimony that he, on his own account in the performance of his duty, had caused the transfer to be made. Such testimony appears to be a thoughtful and true account of the transactions prior to the transfer of such credits. But if the "true balance" due Ben Hur at the time of reclaiming the tanks had been only $1,425.51, that balance unpaid would have justified the repossession of the tanks. No offer to pay Ben Hur that sum has been disclosed and the account had continued for two years after the acquisition of the equipment and much oil had been sold from the well.

[7] Appellant contends that the evidence supports a verdict of theft on the theory of trick and device; that the "title to the tank passed from Novelli * * * on February 29, 1952, when the purchase price had been overpaid." Such contention is disposed of by the above review of the facts and the correction of Ben Hur's account to show no credits at all on the account of 6A.

Also, appellant insists that respondent was guilty of grand theft under the theory of embezzlement; that he had possession of the equipment and "fraudulently removed credits from the conditional sales contract account * * * thereafter releasing custody and control of the equipment to Kia-Ora Oil Corporation"; that the release of the equipment by Kia-Ora "placed the lawful possession of the tanks and equipment in defendant." The fact appears to be that Kia-Ora took a definite credit of $2,400 for the tanks.

In view of the fact that Foster was not a party to any one of the three agreements with respect to the purchase of and the payment for the equipment placed on Foster No. 1 well by Novelli and his corporation, it is definitely established that Foster never became owner of and entitled to such equipment.

Aside from the foregoing which demonstrates (1) that Foster was never owner of the equipment, and (2) that the title thereto was always vested in Novelli or his corporation, the order granting a new trial cannot be disturbed for two additional reasons:

[8] (1) The equipment was repossessed by Novelli openly, in good faith and with the sincere belief that it belonged to the Eureka Oil Corporation. In re Bayles, 47 Cal.App. 517, 520, 190 P. 1034. Hence, he could not have taken it with felonious intent. People v. Sheasbey, 82 Cal.App 459, 463, 255 P. 836; People v. Rosen, 11 Cal.2d 147, 149, 78 P.2d 727, 116 A.L.R. 991; People v. Photo, 45 Cal.App.2d 345, 353, 114 P.2d 71; People v. Henry, 132 Cal.App. 557, 560, 23 P.2d 77; Burke v. Watts, 188 Cal. 118, 125, 204 P. 578.

[9–13] (2) In the matter of granting a new trial on the basis of the insufficiency of the evidence, the trial court is vested with a broad discretion with respect to an issue upon which the reviewing court cannot pass unless it be made clearly to appear that such discretion was abused. The appellate court cannot appraise the weight of the evidence. That function is within the exclusive province of the trial court. "So also, the *effect* of error, under the evidence, is primarily for the trial court and its determination on that question is usually conclusive." People v. Sarazzawski, 27 Cal.2d 7, 15, 161 P.2d 934, 939; People v. Busby, 40 Cal.App.2d 193, 204, 104 P.2d 531; People v. Espinola, 38 Cal.App.2d 482, 485, 101 P.2d 545. When there is a substantial conflict in the evidence, the granting of a new trial is largely within the discretion of the trial judge. People v. Simpson, 134 Cal.App. 646, 649, 25 P.2d 1008; People v. Driggs, 111 Cal.App. 42, 45, 295 P. 51. If there is any appreciable conflict in the evidence, the order granting a new trial is not open to review. People v. Wilson, 100 Cal. App. 397, 402, 280 P. 137; People v. Prudencio, 93 Cal.App. 241, 247, 269 P. 698; People v. Baker, 39 Cal. 686, 687. The losing litigant, on his motion for a new trial, is entitled to a decision by the trial judge on the sufficiency of the evidence. People v. Navarro, 74 Cal.App.2d 544, 554, 169 P.2d 265.

[14, 15] Counsel for appellant conceded in oral argument that there is conflict in the evidence of sufficient substantiality to warrant the granting of a new trial, if the trial judge has the power to reweigh the evidence and grant the motion in the face of a conflict. The argument then made by appellant's counsel to the effect that the court has no power to set aside a verdict and reverse the judgment is not only novel but is contrary to the cited decisions by which we are bound. The right and duty to make final decision on factual questions has always reposed in the heart of one who is learned in the law and who has heard all the evidence. " 'While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised.' " People v. Prudencio, supra, 93 Cal.App. at page 247, 269 P. at page 700.

In view of the foregoing a discussion of the other points will not be necessary. Order affirmed.

ASHBURN, J., concurs.

FOX, J., did not participate in this decision.

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140 Cal.App.2d 392

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
David Lee JAMES, Defendant and
Appellant.
Cr. 1052.**

District Court of Appeal, Fourth District,
California.
March 30, 1956.

Hearing Denied April 27, 1956.

Defendant was convicted on charge of taking wallet and money from another by force and fear. From judgment of Superior Court of San Diego County, John A. Hewicker, J., and order denying motion for new trial, defendant appealed. The District Court of Appeal, Griffin, J., held, in part, that where prosecuting attorney asked prospective juror if fact that jury had been 11 to 1 for conviction in prior trial of case would influence her decision, though juror had previously informed court that she had not heard or read anything about case, question was objectionable, but in view of admonition of court that jury should disregard such matter, and apparent good faith of prosecuting attorney, no prejudicial misconduct resulted.

Judgment and order affirmed.

1. Robbery ⚷24(1)

Evidence sustained conviction of offense of taking wallet and money from another by means of force and fear.

2. Criminal Law ⚷1166½(6)
Jury ⚷131(6)

Where prosecuting attorney asked prospective juror if fact that jury had been 11 to 1 for conviction in prior trial of case would influence her decision, though juror had previously informed court that she had not heard or read anything about case, question was objectionable, but in view of admonition of court to disregard such matter, and apparent good faith of prosecuting attorney, no prejudicial misconduct resulted.

3. Criminal Law ⚷772(1)

Instruction to effect that witness need not positively identify defendant as perpetrator of crime and that jury need only be satisfied beyond reasonable doubt that defendant committed crime, was proper.

4. Criminal Law ⚷656(3)

Defendant's counsel was entitled to know to what certainty complaining witness identified defendant as perpetrator of crime, and he was entitled to question whether witness could positively identify defendant as criminal, without modification of answer by trial judge in form of admonition that witness need not positively identify defendant.

5. Criminal Law ⚷656(3), 1166½(12)

Where defendant's counsel asked witness whether he was absolutely positive that defendant was man who robbed him, statement by court that witness need not be positive, though improper, was not prejudicial in view of witness' answer that he was not absolutely positive.

6. Witnesses ⚷372(1)

Considerable latitude should be allowed to show a witness' state of mind and possible bias.

7. Witnesses ⚷344(2)

Though considerable latitude is allowed to show a witness' state of mind and possible bias, independent evidence of immoral character of witness may not be introduced for purpose of impeaching the witness.

8. Witnesses ⚷344(2)

Sustention of objection to question asked state witness on cross-examination, whether she had lived with person then confined in county jail, as impeachment, though witness had testified on direct examination relating to her acquaintance with such person and with defendant, was not undue limitation upon scope of cross-examination.

9. Criminal Law ⚷656(3)

Where trial judge, upon sustaining objection to question seeking to impeach state witness by showing her immoral character, after making proper statement of rule that impeachment must be on material matter, deviated to explain in lay terms meaning of term material, explanation, though unsupported by legal or dictionary authority, was not necessarily confusing to jury.

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William B. Enright, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

A trial by jury resulted in the conviction of defendant and appellant on a charge that he did, on April 4, 1955, take a wallet and money from the complaining witness B. C. Sullivan, by means of force and fear. He admitted a previous conviction of a felony (burglary) for which he served a sentence in State's prison. His motion for a new trial was denied.

About 7:30 p. m. on April 4th, Sullivan, a bakery driver, was in Linda Vista. He stopped his bakery truck about 250 feet from a street light and blew his whistle announcing his presence to the customers. A colored man approached him and when about 8 to 15 feet from him, asked for one dozen doughnuts. Sullivan went to the rear of the truck, opened the doors, and as he did so he was struck several times with a wooden club on the head and hands from behind, by an assailant, as he raised his hands to protect his head. He fell to the ground but was not knocked unconscious. The assailant took his wallet, containing checks and bills, and his money changer, which contained about $12 in small change—quarters, dimes, nickels and pennies. Sullivan later identified defendant in the jail lineup and in court. His identification was based on the fact that he was colored, about 6 ft. 1 in. tall, medium build, and weighed about 165 to 170 pounds. At the trial he testified that although he was not "absolutely positive" of his identification, he said "It looks like him, more so than anybody I have ever seen".

The police officers searched the neighborhood and found Sullivan's wallet in the front yard of a neighbor, with $40 in bills and checks still in it. The money changer was empty, and was found near the steps of another house. A split board about 1 inch by 3 inches and 16 inches long, with blood and hair upon it was found about 5 feet back of the truck.

A Mrs. Stewart, a friend of defendant for some years, lived in that vicinity. About 8 p. m. on April 4th defendant came to her home and gave her six children 30¢ each in small change, which he had just taken from his pocket and had stacked on the table. She testified he had about $6 or $7 in pennies, dimes, nickels, quarters and a few half dollars; that defendant asked if he could sleep there on the couch the rest of the night, and she let him. She then said after that occasion she learned of the robbery of the bakery man from the neighbors and of the taking of considerable small change from him; that later, she told her sister of the facts and when defendant visited her two sisters, in her presence, one sister asked defendant if he "held up the bread man" and defendant said "no" at first and then later said "yes"; that he was asked as to how he did it and defendant replied: "I asked him if he had any doughnuts—He said 'yes'," and he told the driver to give him some; that he got out of the bread wagon and "I hit him over the head with a 2 x 4"; that he hit him once and he didn't fall, so he hit him a few more times and then he fell; and that on a later occasion, in their presence, he said if the police were looking for him he would tell them he hadn't been in Linda Vista since 1950. This testimony was corroborated by the two sisters.

Defendant told the officers he had not been in Linda Vista for three or four months, and denied the attack on the "breadman". He denied being at the Stewart home on April 4th; and denied that he had any conversation with Mrs. Stewart or the sisters about the affair.

[1] At the trial defendant admitted he had known Mrs. Stewart prior to his imprisonment and saw her two times after his release from prison, once at her house and again downtown; that on the first occasion she asked him to come back and live with her but he refused on account of being on parole; that he had lived with her and her children in 1952 and 1953, and with her sisters and father in a two-room house in Linda Vista. Mrs. Stewart denied these facts. Defendant could not say where he was on April 4th, and denied generally the testimony of the prosecution's witnesses. There is no question about the sufficiency of the evidence to support the findings of the jury.

[2] Defendant's main contention is that the prosecuting attorney committed prejudicial error in his voir dire questioning of one of the members of the jury, after all of the prospective jurors had been generally examined by the trial judge and defendant's counsel had passed the jurors for cause. Counsel for the prosecution propounded this question to one prospective juror, after asking her if she had served on this jury panel before and receiving an affirmative answer: He asked: "Q. The fact it was eleven to one for conviction in a prior trial of this case would not influence

your decision in any way, would it? A. No." Objection was made to this line of inquiry as being improper, and the court sustained the objection and admonished the jury to disregard it. Out of the hearing of the jury, defendant's counsel moved for a mistrial. The motion was argued and the court held it was an improper question but was not grounds for a mistrial. It then instructed the jury that any statements made in reference to a previous trial or what happened there was of no concern to this jury, and admonished them to disregard it. It does appear that the deputy district attorney was acting in good faith, believing that he had this right under the decision in People v. Carmichael, 198 Cal. 534, 246 P. 62, in which the court seemingly held this was a right that the defendant had under somewhat similar circumstances, as bearing upon the possible effect on the jurors' minds of the standing of a former jury in the case. The question, as propounded, was objectionable because there was no showing that the juror knew about this case or in any way had knowledge of a former verdict. In fact, the juror had previously informed the court that she had not heard nor read anything about the case. The prosecutor was volunteering the information to the juror and the entire panel that the former jury stood 11 to 1. The trial court was justified in its ruling. In view of the admonition and apparent good faith of the prosecutor we conclude that no prejudicial misconduct resulted. People v. Sutter, 125 Cal.App. 28, 13 P.2d 745; People v. Morlock, 46 Cal.2d 141, 292 P.2d 897.

The next contention is that the trial judge was guilty of prejudicial misconduct throughout the trial and in instructing the jury. It appears that during the trial the prosecuting attorney asked the complaining witness, after he had given his reasons for identifying defendant: "Q. Could you be absolutely positive this was the man that hit you when you made the original identification at the police lineup? A. No. * * I cannot say I am absolutely positive, but to me it looks like him. * * *" The court then volunteered the statement: "He doesn't have to be positive". Later, defendant's counsel asked the witness: "Can you be absolutely positive this was the man that robbed you?" An objection was made and overruled with the statement: "As I have said, he doesn't have to be positive." The witness answered: "I am not absolutely positive". This was followed by an instruction by the court:

> "In all these trials when we come to a matter of identification we usually have counsel on both sides ask the complaining witness whether he is sure that the defendant was the one that was at the scene at the time of the incident. Of course, the law isn't that you have to be sure. I have an instruction here which I will give you which reads as follows:
>
> "'In connection with this case you are instructed that it is not necessary that an identifying witness positively identifies a defendant as the perpetrator of the crime if from an examination of the evidence you are convinced beyond a reasonable doubt that the defendant was the perpetrator of the crime charged.'"

The court then volunteered the further information:

> "I would say that probably the only time that a witness could honestly say that he was positive that a defendant in a criminal case was the person that had perpetrated the crime or the incident would be if the defendant was a friend or relative of long acquaintance of the witness. Many people look familiar to other people. It has been suggested that with colored people the hair is usually the same, * * * and with other people sometimes you have gray hair and sometimes the women have lavender hair."

[3-5] This latter statement probably only tended to confuse the jury or was intended to bring about unnecessary levity which may have been amusing to some, but probably not to the defendant who was facing a very serious charge. The claim is that the trial judge was unduly stressing the fact that the identification of the de-

fendant did not need to be positive to assure conviction. The main portion of the instruction, as given, to the effect that the jury only need be satisfied beyond a reasonable doubt that defendant was the perpetrator of the crime, was a proper relation of the law. Defendant's counsel was entitled to know to what certainty the complaining witness did identify the defendant, and he was entitled to an answer thereto unaided by any modification of the answer by the trial judge. Since the witness did fully answer the question and left no doubt in the minds of the jurors in this respect, no prejudicial error resulted.

It is next argued that the trial judge committed prejudicial error in sustaining an objection to a question propounded to the witness Mrs. Stewart, on cross-examination, as to whether or not she ever lived with one Griffith, who was then confined in the county jail. The ruling was followed by the remark: "That has nothing to do with it," and that if it was for the purpose of impeachment it had to be on a material point. The claim is that defendant wished to show that Griffith and the witness had a close relationship; that Mrs. Stewart did not desire to have defendant resume their former relationship after his release from prison, and that this furnished a motive for the witness to testify falsely about him. The court denied an offer of proof in respect to this line of evidence.

[6–8] It is the general rule that considerable latitude should be allowed to show a witness's state of mind and possible bias. People v. Pantages, 212 Cal. 237, 297 P. 890; People v. Evans, 113 Cal.App.2d 124, 127, 247 P.2d 915. Nevertheless, independent evidence of the immoral character of a witness may not be introduced for the purpose of impeaching him or her. People v. Harlan, 133 Cal. 16, 65 P. 9; People v. Burrows, 27 Cal.App. 428, 150 P. 382; Sec. 2051, Code Civ.Proc. It appears that the defendant did take the witness stand and testified generally that he formerly lived with the witness. She denied this fact and testified generally as to her acquaintance with Griffith and said that he never became the cause of a quarrel between her and the defendant. It does not appear that the cross-examination was unduly limited.

Further complaint is made because the trial judge, after stating the proper rule that impeachment must be on a material matter, deviated to explain his version of the meaning of the words "material" and "immaterial" in "lay language", and said: "* * * if you go to the jury room and you say that so and so testified so and so, but if you can say to yourself about any of that testimony 'So what? what difference does it make?' why then it would be immaterial. If it is material and makes an impression on you and is vital to the case, why then it is material testimony."

[9] Our research of books of learned authors and text writers, including Webster's Collegiate Dictionary and Words & Phrases, offers no assistance to us in giving approval to these definitions of the particular words related. We will conclude, however, that the jurors possessed a true understanding of the words in the first instance and were not necessarily confused by the court's interpretation. It does not affirmatively appear that the trial court's comments and rulings are similar to those condemned in People v. Mason, 72 Cal.App.2d 699, 165 P.2d 481, in which case it was held (quoting from the syllabus):

> "A judge's power of commenting on the facts is not plenary and without restriction or limitation. The discretion of the judge is to be exercised in conformity with the standards governing judicial office. The judge may not assume the role of a witness. He may analyze and dissect the testimony, but may not distort it or add to it."

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 370

Daniel ROBERTS, Plaintiff and Appellant,

v.

CARTER & POTRUCH, a co-partnership, Findlay A. Carter, Frederick A. Potruch, and H. Burdette Fredericks, Defendants and Respondents.

Civ. 21393.

District Court of Appeal, Second District, Division 3, California.

March 30, 1956.

Rehearing Denied April 20, 1956.

Hearing Denied May 29, 1956.

Seller's action against escrowees who allegedly received and retained payments made by buyer on note, which escrowees had delivered to seller upon closing of escrow. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgments for defendants on an order sustaining a demurrer, and plaintiff appealed. The District Court of Appeal, Vallée, J., held that escrowees' liability, if any, for damage sustained by seller by reason of escrowees' refusal to turn over to seller payments made by buyer after escrow had been declared closed, arose not later than date on which seller assigned buyer's note to third party; and held that statute of limitations was not tolled by acts of defendants in keeping escrow open after declared closing date and receiving buyer's payments on note after close of escrow.

Affirmed.

1. Escrows ⚷8(1)

Escrowee is agent of parties to escrow.

2. Escrows ⚷3

Escrowee must comply strictly with instructions of parties.

3. Escrows ⚷3

Escrowee must be stranger to transaction which is subject matter of escrow.

4. Escrows ⚷9

On close of escrow, dual agency of escrowee changes to that of agency not for both but for each party to transaction, in respect to those things placed in escrow to which parties respectively become entitled.

5. Limitation of Actions ⚷24(2)

Escrowees were not parties to written agreement for sale, even though buyer and seller agreed in connection therewith that there should be an escrow arrangement; and escrow instructions not being in writing, seller's cause of action against escrowees, for wrongfully receiving and retaining payments made by buyer, was not governed by four-year statute applicable to actions founded on written instruments. West's Ann.Code Civ.Proc. § 337.

6. Limitation of Actions ⚷46(6)

Escrowees' liability, if any, for damage sustained by seller by reason of escrowees' refusal to turn over to seller payments made by buyer after escrow had been declared closed, arose not later than date on which seller assigned buyer's note to third party; and statute of limitations was not tolled by acts of escrowees in keeping escrow open after declared closing date and receiving buyer's payments on note after close of escrow. West's Ann.Code Civ. Proc. § 339, subd. 1.

J. A. Coleman, Los Angeles, for appellant.

H. Burdette Fredericks in pro. per.

VALLÉE, Justice.

Appeal by plaintiff from a judgment for defendants entered on an order sustaining their demurrer to the second amended complaint without leave to amend. The demurrer was sustained on the ground the action is barred by the statute of limitations.

The second amended complaint alleges: At all times mentioned defendants were attorneys at law in partnership. On May 1, 1952 plaintiff entered into a written agreement with Boulevard Motors, Inc., whereby plaintiff sold to Boulevard the personal property and good will of a wrecking yard for $5,000, payable $3,000 at close of escrow and $2,000 in installments of $100 a month for 20 months. Buyer and seller agreed that defendants would act as escrowee and defendants accepted such duty and obligation. Plaintiff caused a notice of intended sale to be published which stated the sale would be made and the consideration paid at 10 a. m. on June 1, 1952 at the escrow department of defendants. At that time and place plaintiff received from defendant Fredericks, acting for Boulevard, $3,000 on the purchase price, a note executed by Boulevard payable in installments of $100 a month for 20 months, and the first payment of $100 on the note. At that time plaintiff paid defendant Fredericks, representing the escrowee, $100 as attorneys' and escrow fees, and Fredericks declared the escrow was closed. Plaintiff was the owner of the note until September 1, 1952.

The second amended complaint alleges further: After the close of the escrow Boulevard, without the knowledge or consent of plaintiff, paid the $100 monthly installments to defendants during the period from June 1, 1952 to September 1, 1952. Defendants failed and refused to pay the same to plaintiff. On September 1, 1952 plaintiff assigned the note to Roberts. Roberts brought an action on the note against Boulevard in the municipal court. Boulevard answered, denying the sale had been completed and filed a cross-complaint naming plaintiff as a cross-defendant. On February 3, 1953 judgment was rendered in that action in favor of Roberts for the full amount of the note and in favor of plaintiff as a cross-defendant. Defendants had received the monthly payments from Boulevard for 13 months and failed to pay them to plaintiff or his assignee. Roberts was compelled to, and did, recover the payments received by defendants by levying a writ of execution. Defendants intentionally, maliciously, with intent to embarrass and harass plaintiff, and without cause, received and retained the $100 payments from June 1, 1952 to September 1, 1952 to plaintiff's damage. Plaintiff is in the business of buying and selling wrecked and used automobiles and parts thereof. On June 1, 1952 he entered into a contract with one Baker for the purchase of Baker's automobile wrecking yard for $2,700 and agreed to pay part down and the balance at the rate of $100 a month. The Baker yard was a going concern and was capable of, and did, make returns of $200 to $300 a week. Plaintiff relied and depended on receiving the monthly payments from Boulevard to consummate the purchase of the Baker yard. By reason of the acts of defendants in failing and refusing to pay plaintiff the $100 payments they received, he was financially embarrassed and forced to cancel the Baker contract to his damage in the amount of $5,000 for loss of certain and definite profits from the yard. By reason of the acts of defendants, plaintiff suffered great mental anguish and worry, by reason of which he suffered a nervous breakdown which affected his health for six months to his damage in the sum of $25,000. The prayer is for $30,000 actual damages and $25,000 exemplary damages.

[1–5] The action was commenced February 7, 1955. It is contended the cause of action is founded on a written instrument and that the 4-year statute applies, Code Civ.Proc. § 337. The argument appears to be that defendants in some fashion were parties to the written agreement between plaintiff and Boulevard because they were the escrow holders. An escrow holder is the agent of the parties to the escrow. He performs agency functions. His duty is to comply strictly with the instructions of the parties. He must be a stranger to the transaction which is the subject matter of the escrow. On close of an escrow the dual agency of the escrow changes to that of an agency not for both but for each party to the transaction in respect to those things placed in escrow to which the parties respectively become entitled. (18 Cal.Jur.2d 321, §§ 12–14.) Defendants were not parties to the written agreement between plaintiff and Boulevard.

[6] It is argued that the statute of limitations was tolled by the acts of defendants in keeping the escrow open after June 1, 1952. The averments of the complaint are that the escrow was closed on June 1, 1952 and that it was after close that defendants received the $100 monthly payments. The escrow instructions were not in writing. The fact that defendants received the payments from Boulevard after close of the escrow did not toll the statute. On receipt of such payments it was the obligation of defendants to pay them to plaintiff until September 1, 1952 and thereafter to his

assignee on notice of the assignment. Law v. Title Guarantee & Trust Co., 91 Cal. App. 621, 628, 267 P. 565; Tumansky v. Woodruff, 14 Cal.App.2d 279, 283, 57 P.2d 1372. Defendants' liability to plaintiff for the monthly payments arose between June 1 and September 1, 1952. Their liability, if any, for damage sustained by reason of their refusal to turn over such payments to plaintiff arose not later than September 1, 1952.

Since the action was not commenced until February 7, 1955, more than two years after the liability arose, it was barred by the provisions of section 339(1) of the Code of Civil Procedure which provides that an action on a liability not founded on an instrument in writing can only be commenced within two years after the cause of action accrued.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert BURKE, Defendant and Appellant.*

Cr. 5497.

District Court of Appeal, Second District, Division 1, California.

April 3, 1956.

Hearing Granted May 2, 1956.

Defendant was charged with a narcotics violation and with a prior conviction. Judgment of conviction in the Superior Court of Los Angeles County, John G. Barnes, J., after the court struck the prior conviction and sentenced defendant to imprisonment in the county jail and defendant appealed. The District Court of Appeal, Fourt, J., held that the evidence established that defendant consented to search of his apartment so as to be precluded from complaining of an unreasonable search and seizure and that the trial court erred in striking the prior conviction and should have sentenced defendant to imprisonment in the State Prison.

Judgment modified and as modified affirmed.

Doran, J., dissented.

1. Arrest 🔑63(4)

Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt.

2. Searches and Seizures 🔑7(12)

A search and seizure incident to a lawful arrest is not unreasonable.

3. Searches and Seizures 🔑7(28)

Whether consent to search and seizure is freely given or under a coercion is a question of fact to be determined in light of all the surrounding circumstances.

4. Searches and Seizures 🔑7(28)

Evidence established that the defendant freely consented to the entry and search of his apartment so as to preclude complaint that search and seizure of the narcotics found therein was unreasonable. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law 🔑1211

The statute providing with respect to a narcotics violation that if such person has previously been convicted of any offense described, the previous conviction shall be charged in the information and if admitted by the defendant he shall be imprisoned in the state penitentiary is mandatory, in view of the use of the word "shall." West's Ann. Health & Safety Code, § 11712.

See publication Words and Phrases, for other judicial constructions and definitions of "Shall".

6. Statutes 🔑227

In common and ordinary use, the word "shall" has a mandatory meaning and excludes the idea of discretion and operates to impose a duty, particularly if public policy is in favor of such meaning or one addressed to public officials or where public interest is involved, or where public persons have rights which ought to be enforced unless an intent to the contrary appears.

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* Opinion vacated 301 P.2d 241.

7. Criminal Law ⚷1211

In narcotics prosecution charging a prior conviction, where defendant admitted the prior conviction, trial court erred in ordering the prior conviction stricken and in sentencing the defendant to the county jail, but was required under the mandatory terms of the statute, to sentence defendant to the state prison in view of the public policy and public interest involved. West's Ann.Health & Safety Code, §§ 11500, 11712.

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Cletus J. Hanifin, El Monte, for appellant.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information filed by the District Attorney of the county of Los Angeles, appellant Robert Burke, was charged with a violation of section 11500, Health and Safety Code, a felony, in that he "did willfully, unlawfully and feloniously have in his possession flowering tops and leaves of Indian Hemp (cannabis sativa)". The information also charged the appellant with a prior conviction of a violation of section 11500, Health and Safety Code, a misdemeanor.

Appellant was arraigned in Superior Court on April 18, 1955, where he entered his plea of "not guilty" and admitted the prior conviction as alleged. Following a trial before the court without a jury, appellant was found guilty as charged.

When the matter came on for hearing on the appellant's application for probation, and the pronouncement of judgment, the court struck the prior conviction and sentenced the appellant to imprisonment in the county jail for the term of one year. Appellant has appealed from the judgment.

A fair resume of the facts of the case are as follows: Sometime prior to 11:00 p. m., March 28, 1955, Officer John E. Storer, a narcotic inspector for the State of California, received information that narcotics were being used on the premises at 2064 North Argyle Street, Hollywood, California. At approximately 11:00 p. m. on that date, Officer Storer, in the company of officers Hollingsworth and Jensen of the State Narcotics Bureau and officer Hall of the Los Angeles Police Department, arrived at the 2064 North Argyle Street address. Inspector Hollingsworth knocked on the door. The appellant opened the door in response to the knock. Inspector Hollingsworth then identified the officers and stated: "We would like to talk to you." The defendant stepped back and said, "Just a moment." After the door had been fully opened and appellant had turned the lights on, the officers walked into the apartment.

Officer Hall asked appellant, "Do you have any narcotics here at the present time?" The defendant replied "No", and officer Hall then said, "You don't mind then if we search your apartment do you?" The defendant said, "No, go ahead." The officers then proceeded to search the apartment. In a wooden box located at the foot of appellant's bed the officers found a paper sack containing a quantity of green leafy material and six partially smoked cigarettes. The parties stipulated that if Daniel C. McCalley, a qualified forensic chemist, had been called as a witness he would testify that in his opinion the green leafy material contained cannabis sativa, or marijuana.

Inspector Hall asked the defendant what it was. The appellant stated: "It's marijuana." Appellant then stated that he had purchased it from two negro men in the city of Pasadena about one week previously. Subsequently Officer Storer conversed with appellant and the appellant said that he knew it was illegal to smoke marijuana but he didn't feel it was immoral.

[1] Appellant contends that the search and seizure was unreasonable and the evidence, therefore, erroneously admitted. It is not disputed that Storer had received information prior to the arrest that narcotics were being used on the premises in question. In People v. Boyles, 45 Cal.2d

652, 290 P.2d 535, at page 537, the court said, "It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. Brinegar v. United States, 338 U.S. 160, 171–176, 69 S.Ct. 1302, 93 L.Ed. 1879; United States v. Li Fat Tong, 2 Cir., 152 F.2d 650, 652; Aitken v. White, 93 Cal.App.2d 134, 145, 208 P.2d 788; Cook v. Singer Sewing Machine Co., 138 Cal.App. 418, 422–423, 32 P.2d 430."

In People v. Michael, 45 Cal.2d 751, 290 P.2d 852, at page 853, the court said:

> "To protect his right to object to an unreasonable search or seizure a defendant need not forcibly resist an officer's assertion of authority to enter his home or search it or his person, United States v. Di Re, 332 U.S. 581, 594, 68 S.Ct. 222, 92 L.Ed. 210; Amos v. United States, 255 U. S. 313, 317, 41 S.Ct. 266, 65 L.Ed. 654, but if he freely consents to an entry or search, or voluntarily produces evidence against himself, his constitutional rights are not violated and any search or taking of evidence pursuant to his consent is not unreasonable. Zap v. United States, 328 U. S. 624, 628, 66 S.Ct. 1277, 90 L.Ed. 1477; Davis v. United States, 328 U.S. 582, 593–594, 66 S.Ct. 1256, 90 L.Ed. 1453; In re Dixon, 41 Cal.2d 756, 761, 264 P.2d 513. Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances.
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> "* * * Thus, it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority."

It is at once apparent from the facts of this case that when the appellant opened the door in response to the knock, no constitutional right of the appellant had been infringed upon and there did exist probable cause to arrest him.

[2] The search was made contemporaneously with the arrest and involved the immediate premises. A search and seizure incident to a lawful arrest is not unreasonable. People v. Simon, 45 Cal.2d 645, 290 P.2d 531.

In this case the officers, in addition to having probable cause, gained entrance to the apartment of the appellant by an implied consent. Appellant now contends that his consent was given under coercion and submission to authority and was not a waiver of his constitutional right, and cites as authority for his position the cases of Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 370, 92 L.Ed. 436, and Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 267, 65 L.Ed. 654. In the Johnson case the government conceded that, under Washington law, "the arresting officer did not have probable cause to arrest petitioner" and admittance was demanded "under color of their police authority, on which they made the arrest". In the Amos case, the arresting officers told the defendant's wife that "they * * * had come to search the premises 'for violations of the revenue law.'" Thereupon the defendant's wife submitted to the official demands and the court held that she had acquiesced under an implied coercion.

In any event the California Supreme Court, in adopting the exclusionary rule of evidence, left open "* * * the door to the development of workable rules governing searches and seizures", and expressly reserved the right of the courts of this state to reject those federal decisions which impose "* * * needless limitations on the right to conduct reasonable searches and seizures * * *". People v. Cahan, 44 Cal.2d 434, 450, 451, 282 P.2d 905, 915.

In two recent decisions, the Supreme Court has enunciated the rule that if a defendant "* * * freely consents to an entry or search * * * his constitutional rights are not violated and any search or taking of evidence pursuant to his consent is not unreasonable." People v. Michael, supra, 45 Cal.2d 751, 290 P.2d 852, 853; People v. Gorg, 45 Cal.2d 776, 291 P.2d 469.

[3, 4] Whether consent was freely given or under coercion is a question of fact to be determined in the light of all the surrounding circumstances. The appellant herein did not testify. We believe the facts disclose that the appellant freely consented to the entry and search of his apartment.

It is the contention of respondent that the court erred in ordering the prior conviction stricken and sentencing appellant to one year in the county jail. We are satisfied that this contention must be sustained. Conceding that the court has the power to strike its own findings, we are not here confronted with a situation wherein the court ordered its own finding stricken because the truth of the allegation of the prior conviction was not found by the court, but *admitted* by the accused himself. And where an accused admits the prior, the court is directed by the statute to impose the sentence prescribed therein. The appellant's admission of the truth of the alleged prior conviction was not a finding by the court, but amounted to a pleading of a party and may not be stricken for the purpose of circumventing the mandatory provisions of the statute.

At the time of the hearing on the application for probation and the pronouncement of judgment, among other things, the following was said:

> "Mr. Karch (Defendant's counsel): * * * Now, I realize that the man does have a prior. I also realize that in the past there have been cases where a prior has been struck just for the purpose of sentencing. I humbly request that the Court in this particular case strike the prior for the purpose of sentencing, and give this man a short period of incarceration in the County Jail, followed by a probationary period.
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> "The Court: Well, I don't think he is entitled to probation, frankly. According to what he has told the probation officer, he didn't live up to the terms of probation when he had it before.
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> "Mr. Karch: If the Court please * * *
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> "The Court: He was on probation for a period of three years. And that occurred—what was that, 1950?
>
> "The Defendant: That's right.
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> "The Court: And for the last five years, with the exception of six months, he's still been smoking marijuana. He was on probation for three years.
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> "* * *
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> "The Court: * * * Probation is denied. Is there any legal cause to show why sentence should not now be pronounced?
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> "Mr. Karch: None, your Honor.
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> "The Court: Mr. Crail (the Deputy District Attorney), the Court has jurisdiction in this case to send the man to the County Jail, does he not?
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> "Mr. Crail: Not with a prior narcotic.
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> "The Court: It's possession and not sale.
>
> "Mr. Crail: That doesn't make any difference.
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> "* * *
>
> "The Court: Yes, in reference to the striking of the prior. I wasn't quite sure. In the interest of justice, I am going to strike the prior. Are you ready for sentence?
>
> "Mr. Karch: Yes, your Honor.
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> "The Court: It is the judgment and sentence of this Court that for the offence of which you have been convicted that you spend one year in the County Jail. Good time will be allowed if earned. Road camp is recommended.
>
> "If you have another one, you are bound to go to the penitentiary."

The Health and Safety Code, section 11712, provides as follows:

> "[*Imprisonment in county jail or State prison.*] Any person convicted under this division for having in pos-

session any narcotic, or of violating the provisions of Section 11530 or 11557 shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.

"[*Effect of prior conviction.*] If such a person has been previously convicted of any offense described in this division or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years."

The history of this section indicates that the legislature is fully cognizant of the narcotic problem in this state, and having the matter in mind, has from time to time provided for more severe penalties for violations of the laws with reference to narcotics. In 1939 the section read in part: "If such a person has been previously convicted of a felony * * * and if * * charged in the indictment or information and is * * * admitted by the defendant, he shall be imprisoned in the State prison for not less than six months nor more than six years." In 1940, the last clause was amended to read, "he shall be imprisoned in the State prison for not more than 10 years". In 1953, the statute was amended to read, "If such a person has been previously convicted of *any offense* described in this division * * * the previous conviction *shall* be charged in the * * * information and if * * * admitted by the defendant, he *shall* be imprisoned in the state prison for *not less than two years nor more than 20 years.*" (Emphasis added.)

[5, 6] The language used by the legislature in the section in question is mandatory; that is, if a prior conviction of an offense described in Division 10 (Narcotics) is 'admitted', the defendant "shall be imprisoned in the state prison for not less than two years nor more than 20 years." The legislature did not use such words as "may", "might", "should", or "ought", nor any other equivocal words or phrases in the section in question. In common and ordinary usage "shall" has a compulsory or mandatory meaning. In this sense "shall" is inconsistent with and excludes the idea of discretion and operates to impose a duty—particularly if public policy is in favor of this meaning, or when addressed to public officials or where public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless an intent to the contrary appears; but the context ought to be very strongly persuasive before it is softened into a mere permission. 80 C.J.S., Shall, p. 137.

[7] In the instant case the appellant was convicted in 1950 of a violation of section 11500 Health & Safety Code, and he was apparently placed on probation. The transcript discloses that during most of the probationary period and thereafterwards, he continued to engage in the narcotic traffic and was finally caught and properly convicted.

A recital of the facts demonstrates that public policy and public interest, for all intents and purposes, demand the construction which we are placing upon the words used in the section.

Traffic in narcotics is of most serious concern to the state. The addict, for all intents and purposes, becomes worthless to himself and his family—he loses his sense of decency, his sense of honor and integrity. He degrades and demoralizes the very health and safety of the whole community. It is obvious that ordinarily a user in a short period of time is unable to finance the purchase of needed narcotics from his ordinary income and as a consequence, resorts to all sorts of criminal activities to get the money to pay the peddler. Ultimately and finally, he sinks into the abyss of degradation and is lost to society forever.

The court said, in People v. Rose, 26 Cal. App.2d 513, 518–519, 79 P.2d 737, 739: "* * * The legislature of this state has said that one who commits a crime after having been convicted of another crime is a greater offender than as though he had not previously been convicted, and the punishment inflicted therefor is solely for the second offense, to which a greater degree of criminality is thus attached. * * It is true that a police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion, but nevertheless a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. In criminal cases it must be remembered that the offense is against the state, and it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed. The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course. 8 R.C.L. 271. When a person has proved himself immune to the ordinary modes of punishment inflicted upon first offenders, then it becomes the duty of government not only to seek some other method to curb his criminal propensities, that he might not continue to further inflict himself upon law-abiding members of society (In re Rosencrantz, 205 Cal. 534, 537, 538, 539, 271 P. 902), but as well, by example, to deter others in like situations from committing second offenses. In enacting that upon conviction for a second or subsequent offense against the laws, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. People v. Biggs, 9 Cal.2d 508, 71 P.2d 214 [116 A.L.R. 205]; People v. Dutton, 9 Cal.2d 505, 71 P.2d 218."

The judgment is modified by deleting the portion thereof ordering that the prior conviction be stricken in the interest of justice and that defendant be punished by imprisonment in the County Jail of the County of Los Angeles for the term of one year and inserting in lieu thereof that defendant has admitted the prior conviction and that defendant be confined in the state prison of the State of California for the term prescribed by law, and that he be delivered into the custody of the Director of Corrections at the state prison at Chino, California (California Institution for Men), and as so modified the judgment is affirmed.

WHITE, P. J., concurs.

DORAN, J., dissents.

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140 Cal.App.2d 599

Harley H. BAKER et ux., Plaintiffs, Cross-Defendants and Appellants,

v.

Edward COMMEFORD et al., Defendants, Cross-Complainants and Respondents.

Civ. 21247.

District Court of Appeal, Second District, Division 1, California.

April 9, 1956.

Action by employers for a declaratory judgment determining that certain employees' rights to commission terminated upon termination of their employment, and for a determination of the meaning of the term gross sales as used in the parties' agreement of employment. The Superior Court, Los Angeles County, Philbrick McCoy, J., dismissed the action, and employers appealed. The District Court of Appeal, White, P. J., held that where employer's action for declaratory relief involved no issues other than those to be determined upon retrial, pursuant to directions of District Court of Appeal, of employees' action against employer, dismissal of action for declaratory relief was not an abuse of discretion.

Judgment affirmed.

1. Declaratory Judgment ⚿2

Purpose of declaratory relief is to liquidate uncertainties which might result in future litigation. West's Ann.Code Civ. Proc. § 1061.

2. Declaratory Judgment ⚿5, 394

Whether a determination is proper in an action for declaratory relief is a matter within trial court's discretion, and court's decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown that such discretion was abused. West's Ann.Code Civ.Proc. § 1061.

3. Stipulations ⚿14(8)

Where at commencement of trial of former employees' action against employer for commission it was stipulated that evidence taken upon issues in case could be considered by court as evidence in employer's action for declaratory judgment but after nonsuit as to employees' second cause of action, meaning of term "gross sales" was no longer a question to be decided, judgment, in declaratory relief action, as to meaning of "gross sales" could not be based on evidence taken in employees' action.

4. Declaratory Judgment ⚿389

Where employer's action for declaratory relief involved no issues other than those to be determined upon retrial, pursuant to directions of District Court of Appeal, of employees' action against employer, dismissal of action for declaratory relief was not an abuse of discretion. West's Ann.Code Civ.Proc. § 1061.

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Eugene L. Wolver, Los Angeles, for appellants.

S. V. O. Prichard, Beverly Hills, for respondents.

WHITE, Presiding Justice.

Plaintiffs have appealed from the judgment dismissing the instant action, No. 590,386. The complaint alleges the existence of a controversy as to the meaning of a written contract whereby plaintiffs employed defendants, and seeks a declaratory judgment that: (a) Defendants' right to receive a percentage of the gross sales ceased and terminated upon the termination of their employment; and (b) "The term 'gross sales', as used in said written covenant and defined in their prior negotiations, dealings and accountings, means and should be defined to provide that the same applies only to orders theretofore fulfilled and delivered, less the amount of any rejections by the respective purchasers or vendees".

The complaint also alleges in haec verba the agreement between the plaintiffs and defendants, whereby plaintiffs employed the four defendants for "plant superintendent", "engineering and sales", "engineering and sales", and "manager and sales", respectively; and that the employment was terminated by the mutual consent of all parties.

Respondents, by their answer, admit that "an actual controversy has arisen and now exists" between the parties; allege that respondents have filed action No. 590,482, setting forth their position and contentions; and attach a copy of their complaint in said action No. 590,482.

Respondents' cross-complaint in the instant action contains two causes of action, which are identical with the two causes of action stated in their complaint in said action No. 590,482. The first seeks judgment for 6% of the orders fully completed, delivered and paid for prior to the date upon which the employment of respondents ended; and the second seeks compensation for respondents' services rendered in securing an additional $596,000 of orders not then delivered or paid for. Appellants' answer to the complaint in action No. 590,482, and their answer to the cross-complaint in the instant action are identical.

At the commencement of the trial, it was stipulated "that there being no order of consolidation in these two cases, the matter may proceed to trial on the cause of Commeford v. Baker, being case No. 590,482, that the evidence taken upon the trial of the issues raised in that case may be deemed and considered by the court as evidence" in the instant action No. 590,386.

After two days of trial, motion for nonsuit was granted as to repsondents' second cause of action. The trial of the first cause of action to collect the commissions due them on sales delivered and paid for prior to the termination of their employment continued for about 12 days and resulted in a judgment for respondents for $8,823.33, from which no appeal has been taken, and which has been satisfied.

At the termination of the trial, the court stated: "* * * upon the settling of findings and judgment in one case (590,-482) the other will parallel. There is no need of drawing them both now, until we settle the one, because for all practical purposes, except the declaratory relief, they will be identical, substantially identical in language, so there will be separate Findings and separate Judgment, since the cases were not consolidated for trial. * * * we will settle Findings in 590,482, and then the other can just automatically follow that."

Respondents in the instant action then appealed from the judgment entered after nonsuit as to their second cause of action in No. 590,482. Pending the determination of that appeal, it was stipulated that no findings of fact, conclusions of law or judgment shall be signed, entered or made a part of the court's record in the instant action; but that "at the conclusion of such appeal and the decision therein becoming final, any of the parties hereto may request the trial court therein to proceed to sign and enter such Findings of Fact, Conclusions of Law and Judgment. That each and all of the parties do hereby agree that the periods of any time limitation, established by statute or otherwise, for the doing of any of the aforesaid acts is hereby waived, and do further hereby agree that the period of time between the date hereof and the date when the decision on said appeal becomes final, shall be excluded from all statutory periods of time."

The judgment as to said second causes of action was reversed on appeal, Commeford v. Baker, 127 Cal.App.2d 111 at page 121, 273 P.2d 321, at page 327, and it is said:

> "The foregoing considerations lead us to the conclusion that there must be a retrial of the action for a decision on the merits. No just decision of the cause is possible without a determination by a trial court, after the receipt of all proper evidence, as to the meaning the parties attributed to the term 'gross sales' as used in the contract. Such a finding will determine whether plaintiffs have been awarded all they have earned or still have a substantial amount due them."

When the decision of the District Court of Appeal in said action No. 590,482 became final, appellants moved that the court sign and file in the instant action its findings of fact, conclusions of law and judgment in accordance with the court's decision at the end of the trial. Appellants then urged and now contend on this appeal that respondents have had their day in court, that all their evidence is in, and that the decision on appeal in case No. 590,482 does not preclude the making of a finding in the instant action as to the meaning of the term "gross sales" and the entry of a judgment in the instant action declaring the meaning of the contract of employment involved in both actions.

The motion that the court sign the findings, conclusions and judgment was denied and it was adjudged "that the instant action be dismissed without prejudice to the rights of the parties, or either of them, to have each and all of the matters determined which require determination as outlined by the decision of the District Court of Appeal in said action number 590,482."

From said judgment it appears that each and all of the issues presented in the instant action "were presented and fully determined by the court in said action number 590,482, * * * [wherein] * * * the court rendered judgment in which it fully declared the rights of the parties as far as that was legally possible upon the evidence presented * * * and * * * that no further determination of the right of the parties as between themselves is necessary other than the trial and determination of the issue of fact outlined upon said appeal by the District Court of Appeal, and that as a consequence there is no longer any necessity to make any determination by declaration of the rights of the parties hereto other than to conduct the trial directed to be conducted by the opinion of the District Court of Appeal, and that no controversy exists as between the parties except said controversy."

The appeal now engaging our attention is from that judgment dismissing the action for declaratory relief.

The court may "refuse to exercise the power granted * * * in any case where its declaration or determination is not necessary or proper at the time under all the circumstances". Section 1061, Code of Civil Procedure.

[1, 2] "The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation. * * * Whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion, however, and the court's decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown * * * that the discretion was abused. California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422." Hannula v. Hacienda Homes, 34 Cal.2d 442, 448, 211 P.2d 302, 306, 19 A.L.R.2d 1268; Cutting v. Bryan, 206 Cal. 254, 274 P. 326.

[3] It is contended by appellants that the continued trial after the granting of the nonsuit from which the former appeal was taken was a complete trial of the issue as to the meaning of "gross sales", that additional findings should have been made from the evidence then taken and the declaratory judgment sought by them should have been given. There is some conflicting testimony in the record concerning later conversations about the term "gross sales", but nothing as to the intention of the parties when the agreement was made. However, after the nonsuit was granted as to the second cause of action, the meaning of the term "gross sales" was no longer a question to be decided. The subsequent days of the trial concerned only the amount due respondents for sales completed and delivered prior to the termination of the employment, which sales were conceded by all parties to be included in "gross sales" as used in the agreement. We cannot assume that a matter not in issue was fully tried.

[4] The trial court, by dismissal of the instant action, has disposed of an extra action involving no question other than those already determined in said action No. 590,482 and the one therein to be determined upon a retrial pursuant to the directions of the District Court of Appeal in Commeford v. Baker, supra. Under these circumstances, the dismissal of the instant action was not an abuse of discretion.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

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140 Cal.App.2d 585

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Clarence HOOD, Defendant and Appellant.

Cr. 1201.

District Court of Appeal, Fourth District, California.

April 6, 1956.

Defendant was convicted of armed robbery. The Superior Court, Fresno County, Strother P. Walton, J., denied defendant's motion for new trial and entered judgment on verdict, and from such judgment and the order denying a new trial, defendant appealed. The District Court of Appeal, Mussell, J., held that sufficiency of identification of defendant was a question of fact for jury under the evidence.

Judgment and order affirmed.

1. Criminal Law 🔑1159(2, 4, 5)

The strength or weakness of the identification of defendant in a criminal case, any incompatibility of or inconsistencies in the testimony, and the uncertainties of witnesses in giving their testimony are matters solely for the observation and consideration of jurors in the first instance, and for the consideration of the trial court on motion for new trial.

2. Criminal Law 🔑1160

Verdict of jury in a criminal case, approved by trial court, will not be disturbed on appeal, unless reviewing court can say as a matter of law that there was no evidence to support conviction.

3. Robbery 🔑24(1)

Conviction for armed robbery was not without support in the evidence.

4. Robbery 🔑26

In prosecution for armed robbery, sufficiency of identification of defendant was a question of fact for jury under the evidence.

5. Criminal Law 🔑419(1)

Testimony of complaining witness in prosecution for armed robbery as to his identification of defendant at city jail shortly after robbery was not inadmissible as hearsay.

6. Criminal Law 🔑553

Testimony of one witness when believed by jury is sufficient to support conviction, if such testimony is not inherently improbable.

7. Criminal Law 🔑1159(4)

Uncertainties in the testimony of witnesses in a criminal case are matters to be directed to the attention of jury and trial court and cannot be urged on appeal.

8. Robbery 🔑26

Where there was substantial evidence to support conviction for armed robbery and defendant made no motion or request for a directed verdict, failure to direct such a verdict for defendant was not error.

9. Criminal Law 🔑651(1)

In prosecution for armed robbery, whether jury should be ordered to view scene of crime was within the discretion of trial court. West's Ann.Pen.Code, § 1119.

10. Criminal Law 🔑651(1)

In prosecution for armed robbery failure to order jury to view scene of crime was not abuse of discretion. West's Ann. Pen.Code, § 1119.

11. Criminal Law 🔑339

The "line up" is designed to assist the jury in weighing evidence relating to identification, and there is no legal requirement that defendant be identified by complaining witness at a police "line up" rather than while alone.

12. Criminal Law 🔑859

That trial court by agreement of counsel in prosecution for armed robbery in response to inquiry by jury concerning identification of defendant at police station read testimony with regard to such identification without instructing jury as to usual "line-up" procedure was not error.

13. Criminal Law 🔑1144(14)

Where instructions to jury were not included in record on appeal from conviction, reviewing court could not presume that erroneous instructions were given.

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Clarence Hood in pro. per. and LeRoy Snyder, Jr., Fresno, for appellant.

Edmund G. Brown, Atty. Gen., and Arthur L. Martin, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with armed robbery in an information containing two counts, in the first of which it was alleged that on or about August 1, 1955, he, while armed with a deadly weapon, did wilfully and unlawfully rob one Buddy Glendale Boggess. In count two similar armed robbery of one Robert R. Araujo was alleged to have been committed by appellant on or about June 20, 1955. A jury trial was had which resulted in a verdict of guilty as to count two and a disagreement as to count one. The trial court ordered a mistrial as to count one and judgment of conviction was entered by the court as to count two. A motion for a new trial was made and denied. Defendant appeals from the judgment thereupon entered and the order denying the motion for a new trial.

On June 20, 1955, Robert L. Araujo was working as a service station attendant on the 3:00 p. m. to midnight shift at a station in Fresno. He testified at the trial that at about 11:30 p. m., while he was in the process of closing up and was near the front door of the station, he saw "this fellow" approach him from the back; that the man was about two feet away and told him to open the door to the office. Araujo hesitated and he was again ordered to open the door. After he had opened it, he entered the office and the man followed directly behind him. Araujo walked to the cash box and the man at the time had his hands on a revolver under his shirt. Araujo was ordered to open the cash box and when he hesitated, the man said "Damn it, open it." After Araujo had opened the cash box, he was ordered to step back and the man then started taking the money out of the cash drawer. Araujo further testified that he had about $50 in the cash box; that the man was holdin gthe gun "right out in front of him but aiming it right at me"; that after taking the money out of the cash box, the man ordered him to sit down, facing the wall, and said, "Don't make a funny move or I will blow your brains out", and then left the station; that while the gun was being pointed at him, he observed that it was a small nickel plated revolver. When asked if he would know the man who "put the gun on him and took his money" if he saw him again, he answered in the affirmative and pointed out the defendant to the jury. He stated that he identified the defendant by a black mole on his face and stated he saw him at the city jail while he was being questioned shortly after his arrest; that he recognized the defendant's voice because "he had a stuttering way of talking" and from his observation of him at the jail, he then knew him to be the man who had held him up at the service station on June 20th.

The defendant testified at the trial that he had never seen Araujo before and that he was never in the service station; that he did not remember where he was on the night of June 20, 1955, and stated that he never had a gun in his possession. Several witnesses for the defense testified as to the whereabouts of the defendant on August 1, 1955, to the effect he was gambling near the Hideaway Cafe in Fresno at the time of the alleged robbery. However, no evidence was offered by the defendant as to his whereabouts on the night of June 20, 1955, other than his statement that he probably was at the camp where he resided.

The opening brief herein was filed by the appellant in propria persona and in it he contends that the evidence of his identification by the prosecuting witness at the city jail was inadmissible as hearsay; that there was no proof that the prosecuting witness told the truth; that the prosecuting witness' testimony concerning the defendant's gun was impeached by his own statements at the preliminary hearing; that the court erred in not ordering the jury to view the scene of the crime; that the court should have directed a verdict for the defendant because there was no proof that he committed the crime; that the court erred in not instructing the jury on the usual "line up" procedure and in merely having the testimony regarding the "line up" reread to the jury.

On defendant's application, an attorney was appointed to represent him on this appeal and the closing brief was filed by the attorney so appointed. In it defendant's sole contention is that there was not sufficient substantial evidence to support the verdict in that the defendant was not sufficiently identified as the person who committed the robbery.

[1–4] The rule as to the sufficiency of the identification of a defendant in a criminal case is stated in People v. Farrington, 213 Cal. 459, 463–464, 2 P.2d 814, 815, as follows:

> "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction. People v. Erno, 195 Cal. 272, 283, 232 P. 710." See also People v. Stewart, 96 Cal.App.2d 666, 667, 216 P.2d 80, and People v. Taylor, 136 Cal.App.2d 118, 288 P.2d 312.

We are unable to say, as a matter of law, that there was no evidence to support the conviction of the defendant in the instant case. The question of whether the identification was sufficient was one of fact for the jury and where, as here, its finding is supported by substantial evidence, it will not be disturbed. People v. Newman, 102 Cal.App.2d 302, 305, 227 P.2d 470.

[5] The contention that the testimony of the complaining witness as to his identity of the defendant at the city jail a short time after the robbery was hearsay and therefore inadmissible is without merit. People v. Slobodion, 31 Cal.2d 555, 559, 560, 191 P.2d 1.

[6, 7] Appellant contends that there was no proof that the prosecuting witness told the truth. However, as was held in People v. Newman, supra, 102 Cal.App.2d 305–306, 227 P.2d 470, the testimony of one witness when believed by the jury is sufficient to support a verdict if such testimony is not inherently improbable, and it is further held therein that uncertainties in the testimony of witnesses are matters to be directed to the attention of the jury and the trial court and cannot be urged on appeal.

[8–13] The contentions that the court erred in failing to direct a verdict for the defendant, to order the jury tc view the scene of the crime, and to instruct the jury on the "usual line up procedure" are likewise without merit. The appellant made no motion or request for a directed verdict and where, as here, there was substantial evidence to support it, there was no error in failing to direct such a verdict for the defendant. The question of whether the jury should have been ordered to view the scene of the crime was within the discretion of the trial court, Pen.Code, § 1119, and no abuse of discretion in this connection appears. There is no legal requirement on a "line up" and such a procedure is designed to assist the jury in weighing the evidence of identification. People v. Branch, 127 Cal.App.2d 438, 440, 274 P.2d 31. The record shows that the jury returned into court before reaching a verdict and the foreman stated there was one question or answer relating to the identification of the defendant at the police station that they did not understand. The court then read the previous testimony with regard to a prior identification of appellant by the victim and both counsel agreed to this procedure. Furthermore, the court's instructions to the jury are not included in the record and we cannot presume that erroneous instructions were given.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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140 Cal.App.2d 571

Pearl SIMPSON and Jack Simpson, Plaintiffs and Appellants,

v.

J. Wesley RANDOLPH, Defendant and Respondent.

Civ. 4997.

District Court of Appeal, Fourth District, California.

April 6, 1956.

Action against store owner for injuries to patron who fell after her shoe caught on door latch. The Superior Court of Tulare County, Clark Clement, J., rendered judgment on verdict for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that evidence of admissions made by defendant's son was properly excluded in absence of showing that accident admitted by son occurred under similar conditions.

Affirmed.

1. Appeal and Error ⚷1056(1)

In action against store owner for injuries to patron resulting from condition of door latch in which patron caught her shoe and fell, exclusion of testimony concerning conversation with defendant's son in which son admitted having caught cuff of trousers on such latch on previous occasion was not prejudicial error, where son's agency for defendant at time of catching cuff on latch and similarity of conditions at that time were not shown, and patron was familiar with the premises.

2. Witnesses ⚷387

Trial court properly refused to permit cross-examination to be conducted by reading each question and answer given by witness in previous depositions, where answers in deposition did not appear to be impeaching.

3. Witnesses ⚷254

Where defendant, after being cross-examined as adverse witness, drew picture of door latch on blackboard, court properly refused to permit plaintiffs to refresh defendant's recollection as to appearance of door latch from photograph which had been excluded from evidence because not correctly portraying condition at time of accident. West's Ann.Code Civ.Proc. § 2055.

4. Trial ⚷244(1)

Instructions were not objectionable as overemphasizing defendant's rights as distinguished from his duties, where there was no contention that instructions given contained any misstatement of law and requested instructions were refused because covered by other instructions.

5. Trial ⚷228(3)

As long as instructions cover issues involved and correctly and fully state the law, fact that either party would prefer that they be otherwise expressed or expressed in a repetitious manner or different language is immaterial.

6. Trial ⚷252(8)

Where defendant never claimed that plaintiff demonstrated any want of ordinary care in selection of persons to treat her injury, or that treatment was inadequate, requested instruction that if plaintiff used ordinary care in selection of and submission to treatment it would be no defense that persons selected by her were unskillful or failed to give the best treatment was properly refused.

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Myrtle M. Burgess, Reedley, Richard E. Johnson, Stockton, for appellants.

Crowe, Mitchell & Hurlbutt, Visalia, for respondent.

GRIFFIN, Justice.

Plaintiffs and appellants, husband and wife, brought this action against defendant and respondent to recover for personal injuries alleged to have been sustained by the wife on April 4, 1953, by catching her shoe in a door latch when she, as a customer, was leaving defendant's small grocery store, causing her to fall and injure her back. A jury verdict was returned in favor of defendant and plaintiffs appeal.

The store, that week, was left in charge of defendant's son. Mrs. Simpson made a purchase of a box of groceries. The exit and entrance to the store had two swinging doors about 2½ feet wide with special hinges that would automatically close the doors after they were opened in either direction. Defendant had installed a lock-latch about six inches long which was screwed to the bottom of the right-hand exit door. It protruded about one-half to three-fourths inches therefrom and had a nob at the top. By pushing down on the latch the bar protruded into the door sill and locked it.

It is the testimony of Mrs. Simpson that she approached the closed swinging door, opened it, and as she stepped forward the back of her right casual, low-heel type shoe caught the door latch, tearing the shoe down the back seam and she fell forward flat on the box of groceries. Plaintiffs' niece corroborated this story. She continued on to her car without informing anyone at the store of her fall and went home. Plaintiff Mr. Simpson testified that two days after the accident he had a conversation with defendant's son and told him about it. He claimed the son told him something about the son's previous experience with the same lock. Objection was made to the admissibility of this testimony and it was sustained. An offer of proof was made indicating that the son told him he had prior knowledge of the condition of the lock in that he himself had, prior to the accident, torn the cuff of his trousers on the lock in question.

Plaintiffs claim that the proffered evidence was admissible on the theory that defendant's principal was chargeable with notice to his agent, which notice was received while the agent was acting within the scope of his authority; that this evidence showed prior knowledge of a dangerous condition and of defendant's failure to remedy it, citing such authority as Westman v. Clifton's Brookdale, Inc., 89 Cal.App.2d 307, 200 P.2d 814, and Dressel v. Parr Cement Co., 80 Cal.App.2d 536, 540, 181 P.2d 962.

It is defendant's position that the son was only in charge of sales and of stock in the store on the days in question and his authority was so limited; that he had no authority to make repairs in the building had any repairs been needed; that since the son was not called as a witness at this trial by plaintiffs, this evidence was hearsay and inadmissible against defendant for the purpose of proving previous similar accidents; and that there was no evidence that the claimed previous catching of the son's trouser-cuff on the catch was made under the same or similar circumstances so as to charge defendant with any notice of its claimed dangerous condition.

[1] It may be fairly said that plaintiffs established at least a prima facie showing of the son's agency on the day of the accident and at the time the complaint was made. There is some evidence that defendant returned to the store on or about the day the complaint was made and it may have been a factual question as to whether defendant was in charge at that time. At least, for the purpose of receiving the complaint the evidence would be sufficient to show an authorized agency of the son in this respect. There is no showing that the son was defendant's agent at the time it is claimed he said he tore his trouser-cuff on the clasp. There was no time fixed as to when this was supposed to have happened. Even the testimony of the son may not have been admissible, on this theory, if it were not shown it was under similar circumstances. The condition of the latch, at the time of the alleged accident, was known to defendant personally because he installed it over one year prior to that date. There apparently was no change in that condition until one of the employees of defendant bumped into the door with a hand-truck and loosened the two top screws to some extent. Plaintiffs offered in evidence photographs of this latter condition, which were taken about two or three weeks before trial, i. e., about 18 months after the accident and after the store had been subleased to others on October 31, 1953. Objection was made to their introduction in evidence because of the time limitation and the testimony about the loosening of the two upper screws in the latch after that time. Thereafter Jack Simpson testified the photographs correctly portrayed the conditions as they existed on August 4, 1953, and the photographs were received in evidence. The trial court was justified in believing the proffered statements of the son to the effect that he had caught the cuff of his trousers on this latch on a previous occasion. Because of the fact that there was no offer of proof that it was done under similar conditions as they existed at the time of the plaintiff's claimed injuries, it could not be determined from said offer of proof when this occurred in order that the defendant would be bound by the declaration. 19 Cal.Jur.2d 184, Sec. 433; Hollander v. Wilson Estate Co., 214 Cal. 582, 586, 7 P.2d 177. Plaintiff Mrs. Simpson had been dealing with this particular store and using this particular means of egress and ingress for over two years prior to the accident and was familiar with the premises. Defendant was likewise familiar with them until they were subleased by him.

We therefore conclude that the trial court did not commit prejudicial error in excluding the proffered testimony of plaintiff Jack Simpson in reference to his supposed conversation with the defendant's son.

[2] Next it is claimed that the trial court erred in refusing to permit certain cross-examination of defendant as to claimed former inconsistent statements in his deposition. The facts pertain to whether or not defendant's son was in charge of defendant's market on August 6th, the date of the alleged conversation with the son. Defendant testified he returned about that date. Plaintiffs' counsel cross-examined him as to certain claimed inconsistencies in his testimony in respect to the date when he did return. Counsel for plaintiffs was successful in reading to defendant a portion of his deposition relating to the time he first learned of the supposed accident at the store and the record of what transpired at that time. The court indicated that the testimony therein given was the same as the testimony given at the trial. Counsel for plaintiffs insisted that they were not, and that he was not proceeding under impeachment but under cross-examination, and claimed the right to read each question and answer in defendant's deposition and ask him if he did not so testify when his deposition was taken. The trial court properly refused this procedure and suggested to counsel that he could offer the entire deposition in evidence. He refused and then proceeded to further cross-examine defendant. It is apparently the claim of plaintiffs' counsel that he had the right to ask the same questions propounded in the deposition and to have the defendant state whether or not he made those particular answers even though it did not appear to be impeaching. We see no error in thus limiting the cross-examination. See White v. White, 82 Cal. 427, 450, 23 P. 276, 283, 7 L.R.A. 799, where the court said:

> "The mode of cross-examination was objectionable. It consumed time in doing what was utterly useless in asking the questions as above stated. The court has the power, and should have it, to control the mode of examination of a witness, provided it does not trench on the rights of a party."

It is next argued that plaintiffs were unduly curtailed in their cross-examination of the defendant because, in their attempts to demonstrate his lack of proficiency as a blackboard artist, they were denied the right to refresh his recollection with a photograph which the trial court had considered inadmissible because it did not correctly portray the appearance of the latch as it existed at the entrance to the respondent's grocery store at the time the appellant Mrs. Simpson was supposed to have been injured.

[3] At the beginning of plaintiffs' case they called defendant as an adverse witness, under Section 2055 of the Code of Civil Procedure. In the course of cross-examination he testified that certain photographs, including one then marked for identification, did not correctly portray the appearance of the entrance to his store on August 4, 1953, because, among other things, the latch in question had been pulled or bent out from its normal position. On the basis of such testimony the trial court refused to receive the photographs in evidence, in the absence of some further showing as to their admissibility. Defendant's counsel then requested defendant to draw a picture of the latch in question on the blackboard. He protested on account of his inability as an artist but sought to comply with the request and made two drawings. Plaintiffs' counsel then sought to refresh his recollection from the photograph marked for identification. Objection was made to this photograph for the purpose of refreshing the witness' recollection, and the trial court ruled that it could not be employed for this purpose. We see no apparent objection to the court's ruling. Thereafter the photograph was received in evidence. Shaver v. United Parcel Service, 90 Cal.App. 764, 771, 266 P. 606; Matteoni v. Pacific Gas & Electric Co., 53 Cal.App.2d 260, 266, 127 P.2d 574.

[4, 5] It is next argued that the *rights* of the defendant were over-emphasized as distinguished from his *duties* in the court's instructions to the jury. They do not maintain that there is any misstatement of law contained in them. We see no merit to the contention. It is true that a great number of instructions were requested both by plaintiffs and by defendant, which the court re-

fused to give, principally on the ground that they were covered by other instructions. An examination of the instructions given sufficiently cover those that were refused, and it does not affirmatively appear that any instruction given was overemphasized. As long as the instructions cover the issues involved and correctly and fully state the law, the fact that either party would prefer that they be otherwise expressed or expressed in a repetitious manner or different language is immaterial. Wilson v. Kopp, 114 Cal. App.2d 198, 208, 250 P.2d 166

Finally, it is claimed that the court erred in refusing to give plaintiffs' proffered instruction to the effect that if it found that Mrs. Simpson was injured through any negligence on the part of the defendant and that if she used ordinary care in the selection of and the submission to any treatment by chiropractors, physicians or surgeons for the purpose of treating her injuries, if any, it will be no defense to show that the chiropractors, physicians or surgeons thus selected by the plaintiff were unskillful or failed to give her the best or proper treatment provided she complied with the directions and submitted to the treatment supplied by such chiropractors, physicians or surgeons.

It does appear from the evidence that Mrs. Simpson, shortly prior to her claimed fall at the defendant's store, had undergone a serious major operation; that about two days after her alleged fall she went to see her own family physician, and for a period of approximately 18 months she was treated by a number of eminent physicians and surgeons and chiropractors, none of whom was called to testify as to her condition when she was treated by him or for what he was treating her. The only medical testimony offered on her behalf was the testimony of a doctor who did not see her until 18 months after her alleged fall. His examination disclosed that she did have an arthritic condition and was then suffering from a ruptured intervertebral disc. He testified that her condition was the result of normal physical changes and that her ruptured disc could have been caused by lifting some heavy object or by twisting her back in a fall. It is true that counsel for defendant, in cross-examining this doctor, asked if a "popping" of the back by manipulation, such as is done by a chiropractor, "could conceivably do that very damage to a disc" and he answered "Yes it could if it is not properly carried out". It is plaintiffs' contention that under the evidence they were entitled to this instruction.

[6] It is defendant's position that he, at no time, claimed that Mrs. Simpson demonstrated any want of ordinary care in her selection of the various men who treated her, or contended that any of the treatment accorded her was unsuccessful or other than the best and proper treatment for her then condition; that accordingly, her selection of physicians and chiropractors and the skill with which she was treated by them was not an issue in the cause and that the trial court properly refused to instruct the jury on said issue. The trial court was justified in refusing said instruction.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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140 Cal.App.2d 732

G. M. SANSTRUM, Plaintiff and Respondent,

v.

Ina GONSER, Defendant and Appellant.

Civ. 5314.

District Court of Appeal, Fourth District, California.

April 13, 1956.

Rehearing Denied May 9, 1956.

Hearing Denied June 6, 1956.

Broker's action for commission. The Superior Court, Kings County, Clark Clement, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Conley, J. pro tem., held that where only written memorandum of brokerage agreement was contained in escrow agreement, which provided that broker should be paid and which imposed conditions upon sale, including time limitation, and vendor, without fraud on her part, broke off negotiations so that escrow agreement was never executed, broker was not entitled to commission.

Reversed.

1. Brokers 🔑43(2)

A contract authorizing or employing an agent or broker to purchase or sell real estate for commission or compensation is void unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or his agent. West's Ann.Civ.Code, § 1624, subd. 5.

2. Brokers 🔑43(3)

Letter to broker wherein landowner stated that she had set a price on land, that another realtor would like to handle property, and that owner wished to know more about broker's client was not a sufficient memorandum of brokerage contract to entitle broker to recover commission. West's Ann.Civ.Code, § 1624, subd. 5.

3. Brokers 🔑43(3)

Letter from realty owner to broker wherein owner asked whether broker had heard from a named person and that another realtor was anxious to try to sell property was not a sufficient memorandum of an oral brokerage contract to entitle broker to commission. West's Ann.Civ.Code, § 1624, subd. 5.

4. Brokers 🔑43(1)

To satisfy statute of frauds provision requiring that brokerage contracts be in writing, the writing must unequivocally show on its face the fact of employment of broker to act or to negotiate a sale of property for owner. West's Ann.Civ.Code, § 1624, subd. 5.

5. Brokers 🔑43(3)

A statement in an escrow agreement, where the agreement is executed and the sale effected, that purchaser, as a condition of sale, should pay broker's fees to named broker is a sufficient memorandum of brokerage contract to satisfy statute of frauds. West's Ann.Civ.Code, § 1624, subd. 5.

6. Brokers 🔑60

Where a broker relies upon escrow instruction to support his claim for commission, he must accept the apposite burdens and conditions contained therein, and if contract provides for payment of commission only upon completion of escrow transaction, commission does not become due where, through no fault of defendant, transaction is never completed.

7. Brokers 🔑60

Where only agreement to pay broker commission is contained in contract between his principal and the customer, broker's right to compensation is dependent upon performance of contract.

8. Brokers 🔑60

Time limitation in escrow agreement upon which broker's right to compensation depended was legal, and failure to perform within period, in absence of fraud, deprived broker of right to commission.

9. Brokers 🔑63(1)

If performance by broker is frustrated by wrongful or fraudulent act of principal, broker may recover.

10. Brokers 🔑86(3)

In broker's action against principal to recover commission on sale which was never effectuated, evidence was insufficient to sustain finding that principal had broken off negotiations in order to avoid obligation to broker while availing herself of fruits of broker's work.

11. Fraud 🔑50, 58(1)

Fraud is never presumed, but must be established by clear proof.

12. Brokers 🔑63(1)

Where only written memorandum of brokerage agreement was contained in escrow agreement, which provided that broker should be paid and which imposed conditions upon sale, including time limitation, and vendor, without fraud on her part, broke off negotiations so that escrow agreement was never executed, broker was not entitled to commission. West's Ann.Civ. Code, § 1624, subd. 5.

Lester N. Gonser, Fresno, for appellant.

Lee G. Brown, Hanford, for respondent.

CONLEY, Justice pro tem.

This is an appeal by the defendant, Ina Gonser, from a judgment in favor of the plaintiff, G. M. Sanstrum, for a real estate broker's commission in the sum of $1,025. The principal questions to be decided are whether there was a sufficient memorandum in writing to satisfy the requirements of the Statute of Frauds and if so, whether there was performance within the terms of such contract. In the court below, defendant consistently maintained her position that she is not liable, through her pleadings, a motion for judgment on the pleadings and timely objections to the evidence.

[1] Plaintiff, a duly licensed real estate broker, bases his claim that there was a sufficient memorandum to justify a recovery of 5% of the selling price of defendant's ranch near Laton in Fresno County, on three writings. His complaint as amended first alleges that defendant orally engaged him on or about the 20th of March, 1954, as an agent to sell her land and "that plaintiff thereupon undertook the negotiation of the sale of said land belonging to defendant upon the terms and conditions agreed upon and suggested by defendant". As a contract "authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is void "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent", Section 1624(5) Civ.Code; Zeimer v. Antisell, 75 Cal. 509, 511, 17 P. 642; Myres v. Surryhne, 67 Cal. 657, 8 P. 523; Jamison v. Hyde, 141 Cal. 109, 112, 74 P. 695; Augustine v. Trucco, 124 Cal.App.2d 229, 237, 268 P.2d 780; Hooper v. Mayfield, 114 Cal.App.2d 802, 806, 251 P.2d 330; Sweeley v. Gordon, 47 Cal.App.2d 381, 383, 118 P.2d 14; Ford v. Palisades Corp., 101 Cal.App.2d 491, 498, 225 P.2d 545, the plaintiff then refers to three writings which he claims to be sufficient to meet the specifications of the statute. The first (Exhibit A attached to the complaint) is a letter reading as follows:

> "March 30, 1954
> "Visalia, California
>
> "Dear Mr. Sanstrum:
>
> "Since we have set a price on the Laton place there is a realtor in Hanford who would also like to handle the selling of the property. Before placing it in his hands I should like to know just how interested your client is in buying, his financial background, and a little about him personally in order to know just what to do.
>
> "Thank you.
>
> "Yours truly,
> "Ina Gonser
> "1502 Shady Lane
> "Visalia, California
> "Phone 4-4881."

[2] This first letter does not meet the requirements of a sufficient memorandum. The "setting of a price" on land does not imply the employment of a broker, Patterson v. Torrey, 18 Cal.App. 346, 123 P. 224, and mere interest on the part of a "client" of a real estate agent does not give him any ground for claiming remuneration from the landowner for a possible sale of the property. Hooper v. Mayfield, 114 Cal.App.2d 802, 808, 251 P.2d 330; Edens v. Stoddard, 126 Cal.App.2d 56, 60, 271 P.2d 610. In fact the letter, particularly when considered in connection with plaintiff's reply (Exhibit B attached to the complaint) in which he says: "If you will let me know your terms, I have other clients whom I could work on for a sale for you", seems to indicate that no details of a sale had been announced by defendant and that no general oral contract had been entered into between the parties under which defendant had authorized him to secure a purchaser for a compensation to be paid to him.

[3] The second letter (Complaint, Exhibit C) is equally ineffective:

> "Visalia, California,
> "April 19, 1954
>
> "Dear Mr. Sanstrum:
>
> "Please let me know as soon as possible whether you have heard from Mr.

Patrick. There is a Fresno realtor who is anxious to try to sell the property.

"Thank you.

"Yours truly,
"Ina Gonser."

[4] As is said in Blanchard v. Pauley, 92 Cal.App.2d 244, 247, 206 P.2d 864, 865:

> "The rule is settled that in a suit by a broker to recover a real estate commission in order to show compliance with the statute the writing signed by the party to be charged or his agent must unequivocally show on its face the fact of employment of the broker; that is, it must show an authority to act or negotiate a sale of the property for the owner." See also: Edens v. Stoddard, supra, 126 Cal.App.2d 56, 59, 271 P.2d 610; Herzog v. Blatt, 80 Cal.App.2d 340, 342, 180 P.2d 30; Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 536, 120 P. 444; Patterson v. Torrey, 18 Cal.App. 346, 123 P. 224.

Clarity requires a short summary of the evidence relative to the preceding negotiations for the sale of the property before we consider the third writing relied upon by respondent. Mr. Sanstrum had written to one Casey Patrick, a grocery store proprietor, at Quincy, California, with whom he had previously become acquainted in connection with the sale of 40 acres in the vicinity, advising him that he could buy the Gonser place for $25,000. Several letters passed between them, including one in which Mr. Patrick said he would be willing to pay $21,000 for the property; this fact was communicated to Mrs. Gonser and she stated the figure was acceptable. However, the details of the transaction had not been agreed to, and Mrs. Gonser, who was moving to San Luis Obispo, went to the Security Title Insurance Company office in Hanford, and with the assistance of the plaintiff, directed the preparation of complete escrow instructions which were then signed by her. This is the third writing which plaintiff relies upon as a memorandum (Complaint, Exhibit D).

The escrow instructions, on a single sheet of paper, are in the usual two parts, one to be signed by the Patricks but never executed by them, and one actually signed by the defendant. As dictated by her, the proposed agreement by the Patricks was that they should pay $6,000 into escrow and deposit a note and trust deed for $15,000 to complete the purchase of the land, the note to bear interest at the rate of 6% per annum rather than the 4% which Patrick previously had expressed a willingness to pay, with annual installments of $1,000 or more payable on the 11th day of each May, commencing in 1955, and terminating in 1964 but containing the further provision: "Payees agree with payor to pay $5,000.00 on principal of this note, in addition to any and all other payments called for, immediately after completion of the sale of their property at Quincy, California." The sale was specified as being subject to an existing unrecorded farm lease with buyers to receive all rentals, and called for a proration of the 1953–54 taxes and of the rental of the house on the premises; the cost of recording the deed and trust deed and one-half the escrow fee were to be borne by the buyers.

The part of the escrow instructions signed by the defendant approved the buyer's portion of the proposed escrow, and gave directions to the escrow holder with respect to the disbursement of funds as follows:

> "1. Reimburse yourself for advances chargeable to me and deduct your charges as hereinafter specified.
>
> "2. Pay G. M. Sanstrum a commission in the amount of $ 5% of the sale price. Broker's License No. ——— Mail check to him at —————.
>
> "3. Pay demand of none
>
> "Provided buyers acceptance of this escrow in writing is not in escrow agents hands by May 17, 1954, then this escrow shall be cancelled.
>
> "Whose address is —————
>
> "4. Pay balance to seller and mail check to (address) shown below.
>
> "I agree to pay policy of title insurance, revenue stamps and ½ of escrow fee.
>
> "Attach Internal Revenue Stamps to deed in the amount of $23.10

"Ina Gonser 190 Toro, San Luis Obispo, Calif.

"Sellers Address Phone Number"

The Patricks upon being contacted at Quincy, advanced adamant objections to several of the proposed terms of the sale, including the interest rate demanded by Mrs. Gonser on deferred payments of principal, and the escrow instructions were never signed by them. The deadline of May 17, 1954 passed with no contract of sale entered into. On May 29th Mrs. Gonser told the plaintiff that the deal was off and a deposit which Mr. Patrick had made with plaintiff was returned to him; Mr. Sanstrum did nothing further in the matter.

[5] Returning to a consideration of Mrs. Gonser's signed portion of the escrow writing, we conclude that within their self-imposed limits these instructions, considered in the light of Mr. Sanstrum's testimony concerning precedent oral negotiations, constituted a memorandum which would have been sufficient to satisfy the requirements of Section 1624(5) of the Civil Code if the Patricks had executed their part of the escrow instructions, and the sale had been effected. Coulter v. Howard, 203 Cal. 17, 22, 262 P. 751; Devereux v. Sirkus, 105 Cal.App.2d 340, 344, 233 P.2d 644; Allen v. Gindling, 136 Cal.App.2d 21, 288 P.2d 130; Fritz v. Frost, 114 Cal. App. 602, 607, 300 P. 454; Corvin v. Smead Inv. Co., 115 Cal.App. 175, 178, 1 P.2d 507; Hillman v. Koch, 92 Cal.App.2d 163, 206 P.2d 434.

But this is not equivalent to saying, as the trial judge did, that the direction in the uncompleted escrow instructions to pay a commission to the broker if and when the proposed sale should be consummated on the express terms specified may be taken out of its context and treated as a memorandum of a general and continuing brokerage contract. The distinction between the two situations is made clear in Irwin v. Klimper, 56 Cal.App. 434, 435, 205 P. 714, in which it is held that a direction in escrow instructions to pay a commission to a broker upon the close of the escrow does not constitute a general agreement employing the broker to sell the property or a promise to pay a commission, except on the express conditions set forth. "It is an order which, at most, might be construed to be an acknowledgment of obligation on the part of the defendant to pay the stated commission out of the purchase price on completion of the transaction; that is to say, upon transfer of the property and payment of the consideration." Under such circumstances, the broker would have to prove the completion of the escrow before he would become entitled to be paid.

In her part of the escrow instructions Mrs. Gonser did not agree generally that Mr. Sanstrum should be her broker for the sale of the property and that she would pay him a commission if he should procure a purchaser ready, able and willing to complete the transaction upon terms prescribed by her; what was said was that the escrow holder should pay Mr. Sanstrum a commission in the amount of 5% of the sale price if the proposed sale should be effected on the terms stated by May 17, 1954. What was observed in Hargrave v. Moody, 56 Cal.App. 498, 502, 205 P. 890, 892, is applicable here:

> "This instruction was quite different from an unconditional acknowledgment of the alleged debt; it rested upon a condition, to wit, that it should be paid out of money which the proposed vendee should deposit when the escrow transaction was completed. The conditions authorizing this payment to be made never were satisfied."

[6] Smith v. Frans Nelson & Sons, Inc., 214 Cal. 295, 5 P.2d 427, is directly in point; it was there held that when a broker relies upon escrow instructions to support his claim for a commission, "* * * unless overcome by some direct attack in equity, the broker must accept the apposite burdens and conditions contained" therein, and if "* * * the legal effect of the contract is to provide for the payment of a commission only upon completion of the escrow transaction, so as to invest the defendant with a clear title to the property it is to receive in exchange for its own, the commission does not become due where, through no fault of the defendant, the transaction is never completed." The court

pointed out that "* * * the commissions were to be due and payable to plaintiff only upon the consummation of the transaction according to its tenor. By this contract, in the absence of other written agreement, plaintiff must be bound", citing Brion v. Cahill, 34 Cal.App. 258, 165 P. 704, Jennings v. Jordan, 31 Cal.App. 335, 160 P. 576, and Coulter v. Howard, 203 Cal. 17, 23, 262 P. 751.

[7] Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 306, 266 P.2d 856, 860, correctly states the rule applicable to the memorandum in this case as follows:

> "Where the only agreement to pay a broker a commission is contained in the contract between his principal and the customer, the broker's right to compensation is dependent upon performance of that contract. If the customer refuses to perform, or if the contract is canceled or rescinded, the broker cannot recover. In such cases the broker, not having the protection of the ordinary broker's contract for compensation for service to be performed, must stand or fall on the contract actually entered into; and if he has seen fit to allow payment of his compensation to be dependent upon the performance of a contract made between parties other than himself, he cannot complain if, through the nonperformance of that contract, his own contingent rights be lost."

The rule is the same as when the principal and broker enter into a contract for the payment of a commission only upon the happening of some specified contingency, or the performance of a condition precedent. See also: Holland v. Flash, 20 Cal.App. 686, 130 P. 32; Ridgway v. Chase, 122 Cal.App.2d 840, 265 P.2d 603; McGill v. Fleming, 32 Cal.App.2d 601, 604, 90 P.2d 341; Denbo v. Weston Investment Co., 112 Cal.App.2d 153, 157, 245 P.2d 650; Palmtag v. Danielson, 30 Cal.2d 517, 521, 183 P.2d 265; Backman v. Guadalupe Realty Co., 78 Cal.App. 347, 352, 248 P. 296; Hodges v. Lewis, 112 Cal.App.2d 526, 528, 246 P.2d 676; Wilson v. Security-First Nat. Bank, 84 Cal.App.2d 427, 433, 190 P.2d 975.

[8] The time limitation inserted in the escrow instructions was entirely legal and failure to perform within that period, in the absence of fraud on the part of the defendant, would deprive plaintiff of any right to recover. Ridgway v. Chase, supra, 122 Cal.App.2d 840, 848, 265 P.2d 603; Naylor v. Ashton, 20 Cal.App. 544, 546, 130 P. 181; Howard v. Burrow, 77 Cal.App. 4, 7, 245 P. 808.

On the foregoing principles of law, we shall cite only one additional case, Dale v. Raines, 115 Cal.App.2d 309, 252 P.2d 22, 23, decided by this court in 1953. While the broker there had a general listing agreement, he depended for recovery on a set of escrow instructions because the terms of sale stated therein were different from those contained in his original contract; the escrow instructions provided that the completion of the transaction was contingent upon the seller's ability to perfect title and close the escrow by August 30, 1950; title was not cleared and the escrow was not closed. The broker could not recover:

> "This transaction was made dependent upon the happening of a condition. The instructions became a special contract between the parties, which contract was approved by plaintiff. Under the circumstances shown, plaintiff's claim for commission must be based upon the escrow instructions and where, as here, his commission is dependent upon an unfulfilled condition, he cannot recover."

There remains one enquiry—was Mrs. Gonser guilty of fraud so that there could be a legitimate finding of prevention of performance? The court found: "It is true that defendant wrongfully prevented plaintiff from completing the negotiations for the sale of said premises in that defendant broke off negotiations thereby preventing completion thereof by plaintiff, as such broker, when he had the likely and reasonable prospect of successful completion of such negotiations, and said defendant broke off such negotiations in order to avoid her obligation to plaintiff for a broker's commission while availing herself of the fruits of plaintiff's work and the expenses incurred by him in connection therewith." This finding is wholly unsupported by any direct evidence and it seems to this court that no legitimate inference can be drawn from the record to justify it. As already stated, the parties had agreed on a $21,000 price with the Patricks willing to pay 4%, afterwards changed to 4½%, on deferred payments. Mrs. Gonser made her counter-offer in the form of the escrow instructions which document furnishes the sole support to plaintiff's claim that there was a memorandum satisfying the Statute of Frauds. This set of instructions, among other things, provided for 6% interest on deferred payments, contained a requirement that $5,000 must be paid on the note when the Patricks should sell their Quincy property and placed an express time limit for acceptance to wit, May 17, 1954; Mr. Sanstrum testified that he was present at the Title Company's office with Mrs. Gonser, and that he helped her prepare the instructions and witnessed her signature. The Patricks did not agree to these terms and did not sign the papers, and after Mr. Sanstrum arranged for a meeting between the parties for May 30, Mrs. Gonser, on May 29, telephoned him that "she was tired of the deal, it was a mess, wasn't going to sell the property, she changed her mind". Mr. Sanstrum thereupon returned Mr. Patrick's check for $1,000 which he had deposited with him.

About two weeks afterwards, on June 15th, Mrs. Gonser wrote Patrick asking if he would still consider buying the property and a contract was finally negotiated directly between the principals culminating in the execution of new escrow instructions on June 28th which differed in a number of important particulars from those of May 11th. As consummated, the agreement called for the payment of $20,500, with 5% interest on deferred payments and eliminated the provision for the $5,000 payment on the note in case of the sale of the Quincy property.

[9, 10] Neither Mrs. Gonser, nor Mr. Patrick was a witness at the trial. If the record had shown, for example, that after the execution by Mrs. Gonser of her part of the escrow agreement of May 11 there was an agreement between her and Mr. Patrick that there would be a sale on the terms demanded by Mrs. Gonser or on modified terms, but that they would postpone the consummation of the sale until after May 17th (or any extension which might have been granted, expressly or impliedly), so as to deprive plaintiff of his right to a commission, then plaintiff would have had a legitimate claim of prevention of performance. For if performance by a broker is frustrated by the wrongful or fraudulent act of the principal, recovery may be made by the broker. Merkeley v. Fisk, 179 Cal. 748, 758, 178 P. 945; Elms v. Merryman Fruit, etc., Co., 207 Cal. 747, 751, 279 P. 781. But this is pure speculation by way of illustration only; there is no substantial evidence in the present record to justify any such idea, or to warrant any such finding as the trial court made.

A legitimate conclusion might be reached that the time within which the sale could be consummated was extended by Mrs. Gonser from May 17 to May 29 by her continued parleying up to that date, Baker v. Curtis, 105 Cal.App.2d 663, 669, 234 P.2d 153, but she had an absolute right, if acting in good faith, to terminate negotiations on May 29th. Heffernan v. Merrill Estate Co., 77 Cal.App.2d 106, 112–113, 174 P.2d 710.

[11] Fraud is never presumed; it must be established by clear proof and the presumption in favor of fair dealing approximates in strength that of innocence of crime. Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114. After fruitless insistence upon certain terms of a transaction, a woman decides she is "tired of the deal, that it is a mess", that she has changed her mind about selling and so notifies the real estate agent; there is no evidentiary hint of conspiracy between buyer and seller; the realtor, satisfied that everything is as it appears to be, returns the deposit to the prospective buyer and ceases further activity. Two weeks later the seller again changes her mind, reopens direct negotiations and the sale takes place on terms substantially different from those demanded previously by the respective parties. On the basis of the record as it exists there is no justification for the finding of prevention.

[12] We conclude that the first two letters of the defendant (Exhibits A and C at-

tached to the complaint), considered together or separately, wholly fail to satisfy the requirements of a proper memorandum under the Statute of Frauds; that the escrow instructions of May 11, 1954, within the limits fixed by the writing itself, constitute a sufficient memorandum, the conditions being that acceptance of the escrow proposal must take place on the terms and within the time limit, or any extension thereof, specified therein; that there is no substantial evidence of fraud or prevention within the meaning of the law, and that on the present record the plaintiff is not entitled to recover.

Accordingly, the judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

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140 Cal.App.2d 589

Louis J. URZI, Plaintiff and Appellant,

v.

Sebastian A. URZI, Defendant and Respondent.

Civ. 16588.

District Court of Appeal, First District, Division 1, California.

April 9, 1956.

Action by former partner for an accounting, distribution of partnership assets, and share in profits defendant made from subsequent use of partnership assets. The Superior Court, Santa Clara County, Leonard R. Avilla, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where, at time of dissolution of partnership, plaintiff's obligations to partnership and defendant-partner were greater than his interest in partnership assets, he was not entitled to profits which defendant-partner made from subsequent use of the partnership assets.

Affirmed.

1. Partnership ⚷277

Dissolution of partnership did not terminate partnership. West's Ann.Corp. Code, §§ 15029, 15030.

2. Partnership ⚷306

Where assets of partnership are used by one partner in continuing business after dissolution, he is accountable to other partner for profits acquired after dissolution and before termination of partnership. West's Ann.Corp.Code, § 15042.

3. Partnership ⚷306

A partner is entitled to share, after dissolution, in profits derived in part from use of assets in which he has an interest, but where he has no interest in fact at time of dissolution, he is not entitled to division of profits earned by partnership assets. West's Ann.Corp.Code, § 15042.

4. Partnership ⚷306

Where, at time of dissolution of partnership, plaintiff's obligations to partnership and defendant-partner were greater than his interest in partnership assets, he was not entitled to profits which defendant-partner made from subsequent use of the partnership assets. West's Ann.Corp.Code, § 15042.

Morgan & Beauzay, Robert Morgan, San Jose, for appellant.

Foley & Foley, James W. Foley, San Jose, for respondent.

PETERS, Presiding Justice.

Plaintiff, Louis Urzi, a former partner of defendant Sebastian Urzi, brought this action for an accounting, for a distribution of partnership assets, and for a share in the profits of two partnerships entered into by defendant subsequent to the dissolution of the partnership with plaintiff. The defendant cross-complained. The trial court denied any relief to plaintiff, held that defendant was entitled to all of the partnership assets in his possession, and, in addition, that the plaintiff owed defendant $3,276.70. The plaintiff appeals.

On May 10, 1947, the plaintiff and defendant entered into an oral partnership, terminable at will, for the operation of a restaurant in San Jose. Under the oral agreement the defendant contributed the premises on which the restaurant was conducted and some of the equipment and fixtures. The plaintiff agreed to conduct and manage the restaurant and to keep the partnership books. The parties were to share equally in the profits of the venture, without any charge by defendant for use of his capital, or by plaintiff for his managerial services. Some of the equipment used in the restaurant was purchased on credit before operations began, and there were some loans against the business. These were paid off out of partnership funds or by defendant personally.

A firm of accountants appointed by the court found that when the partnership was dissolved plaintiff had contributed $3,145.01 and defendant $8,802.85, to the capital of the partnership. The parties agree that these figures are correct.

After operations began defendant became restive because there was no division of profits. He asked the bookkeeper of the partnership about this and was told that there were no profits to split. Plaintiff told defendant that profits would be divided at the end of 1948. However, no profits were then divided. Defendant protested, and an argument ensued. Thereafter, on April 4, 1949, defendant served on plaintiff a notice of dissolution, retook possession of the restaurant and of most of the equipment, and padlocked the doors. The restaurant was closed for four months. The court-appointed auditors came to the conclusion that the profit shown on the books was "substantially under the normal shown by similar operations." The auditors pointed out that the books did not show any receipts from amusement machines, punchboard, or pool table, and also pointed out that a State Board of Equalization audit for the period here in question, for sales tax purposes, had increased the sales as reported by $10,873.79, and imposed a tax and penalty for not reporting such sales of $305.26, which was paid by plaintiff. The State Board of Equalization had destroyed its records showing the basis for this assessment. The books of the partnership, kept by plaintiff or under his supervision, for the period of May 10, 1947, to April 10, 1949, the period of the partnership, showed net profit as $3,380.10.

In July of 1949 defendant entered into a new partnership with a third person for the operation of the restaurant, using the same building, equipment and fixtures as had previously been used by the Urzi brothers. This partnership was terminated in July of 1950, and then defendant entered into a partnership with one Lonero for the operation of the business. The profits of these two partnerships from 1949 to April of 1954, when the present action was tried, totalled over $28,000.

In May of 1949 plaintiff brought this present action. The cross-complaint of defendant, also for an accounting, charged that during the partnership, and since its dissolution, plaintiff failed to make a complete accounting to defendant.

The trial court found that at the time of dissolution the defendant took, and still has possession of, the partnership assets; that such assets were valued at $11,947.86; that during the life of the partnership plaintiff collected, and failed to account for, sales above those shown by the books, totalling $10,873.79; that, in addition, plaintiff collected undistributed profits of the partnership in the amount of $2,780.10. The court then computed plaintiff's interest in the furnishings and equipment by ascertaining the proportional capital contributions—$3,145.01 for plaintiff and $8,802.85 for defendant—and thus determined that plaintiff was entitled to 27.16% of the $11,947.86, the value of the fixtures, or $3,245.03 for this item. But plaintiff had in his possession undistributed profits totalling $13,653.89. Defendant was entitled to one-half of this, or $6,826.99. (There is a 4½ cent error here in computation.) As against this plaintiff was entitled to a credit for the payment of the tax to the State Board of Equalization, which raised plaintiff's credit to $3,550.29. The court thereupon offset this against the $6,826.99 due from plaintiff, and found that plaintiff owed defendant $3,276.70.

Based on these computations the trial court adjudged that plaintiff was entitled to nothing and that defendant was entitled to all of the assets in his possession, plus the sum of $3,276.70. Plaintiff appeals.

[1, 2] The main controversy is over whether plaintiff is entitled to share in the profits of the two partnerships operated by defendant after dissolution of the partnership with plaintiff. Plaintiff correctly points out that the dissolution on April 4, 1949, did not terminate the partnership. §§ 15029 and 15030, Corp.Code. He then relies on the well-settled general rule that "where the assets of a partnership are used by one partner in continuing the business after dissolution, he is accountable to the retiring partner for profits acquired after dissolution and before termination of the partnership." Hall v. Watson, 73 Cal.App. 2d 735, 737, 167 P.2d 210, 211; see also Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715; Vangel v. Vangel, 116 Cal.App.2d 615, 254 P.2d 919; Sibert v. Shaver, 111 Cal. App.2d 833, 245 P.2d 514; Nuland v. Pruyn, 99 Cal.App.2d 603, 222 P.2d 261. This general rule has been codified in the Uniform Partnership Act and adopted in California in section 15042 of the Corporations Code, which provides: "When any partner retires or dies, and the business is continued * * * without any settlement of accounts * * *, unless otherwise agreed, he or his legal representative * * * may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * * in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership."

[3] Defendant makes several answers to this contention. They need not all be discussed because the complete answer to plaintiff's contention that the general rule embodied in section 15042 of the Corporations Code is here applicable is to be found in the case of Hall v. Watson, 73 Cal.App. 2d 735, 167 P.2d 210. That case held that that general rule is predicated on the theory that a partner is entitled to share, after dissolution, in the profits derived in part from the use of assets in which he has an interest. But where, at the time of dissolution he has, in fact, no interest in such assets he is not entitled to any division of profits earned by them. In the Watson case the plaintiff and two defendants entered into a partnership at will to purchase and operate a cafe, each to contribute one-third of the cost. The two defendants agreed to advance plaintiff's share, it being intended that plaintiff was to repay defendants out of profits. Plaintiff was to manage the business and to receive $75 a week. The plaintiff operated the business for one month. Defendants then dissolved the partnership, and, thereafter, and before termination, continued to operate the business. The plaintiff brought the action for a termination and accounting, claiming, among other things, that he was entitled to a share of the profits after dissolution. The trial court found, as in the instant case, that plaintiff was not entitled to an accounting of the profits earned after dissolution. This was affirmed by the appellate court. Much of what the court there said is applicable here. At page 737 of 73 Cal.App.2d, at page 211 of 167 P.2d it is stated:

"Plaintiff contends that he was entitled to an accounting of profits from the time of the dissolution to the time of the winding up of the partnership affairs by rendition of judgment. He relies principally upon the case of Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715, which held that the plaintiff therein was entitled to an accounting of profits after the dissolution of the partnership. In that case, the partnership had been in existence about seven years prior to dissolution, each partner had paid his share of the capital investment, and the partner who continued the business after the dissolution used the assets in which the retiring partner had a substantial interest. The liquidation therein following dissolution was an involved matter, and, although some of the accounting matters were settled by the partners, a disposition of assets was necessary in order to wind up the partnership. It is the general rule that where the assets of a partnership are used by one partner in continuing the business after dissolution, he is accountable to the retiring partner for profits acquired after dissolution and before termination of the partnership. 40 Am.Jur. 388. 'The right of a partner to share in the profits earned by the continuation of a partnership business after the dissolution of the firm is founded upon the use to which such partner's interest in the capital of the firm has been put in earning these subsequent profits, and if the partner claiming an interest in the profits earned after the dissolution of the partnership has no interest in the assets or capital of the firm after dissolution, he is not entitled to share in the profits earned. The same result is reached where the complaining partner's interest in the capital is negligible.' 40 Am.Jur. 398, sec. 390. It is also said therein at page 399 that: 'It would seem that if, by reason of * * * the excessive indebtedness of the partner to the firm, the partner has no interest, or at least only a nominal interest, remaining in the firm, he should not be entitled to a share of the subsequently earned profits.'

"* * * After dissolution the interest of plaintiff in the assets was not such that he was entitled to an accounting of profits from the dissolution to the termination of the partnership."

The rule of this case is clearly recognized by section 15042 of the Corporations Code, because when that section gives the partner the right to subsequently earned profits it limits the amount to "the profits attributable to the use of his right in the property of the dissolved partnership." That is the precise rule of the Watson case.

The proper application of the Watson case was discussed in Sibert v. Shaver, 111 Cal.App.2d 833, 842, 245 P.2d 514, 520, where the court stated: "Appellant also contends that, assuming the judgment to be otherwise correct, it was error to compel him to account for profits earned after the death of his partner, citing Hall v. Watson, 73 Cal.App.2d 735, 167 P.2d 210. But the cited decision emphasizes that one may share in profits earned after dissolution of a partnership where the partner seeking a portion of such profits has an interest in the assets or capital of the firm after dissolution. Only in the event the complaining partner has no interest in the assets or where his interest is negligible is he barred from asserting claim to a share of the profits."

[4] The rule of the Watson case is here clearly applicable. Plaintiff, by his failure to report sales and retention of that money as well as of certain undistributed profits, on the date of dissolution, had in his possession $13,653.89. He thus was indebted to the partnership on the date of dissolution in that amount. On that date, far from having an interest in the partnership assets, he actually was indebted to defendant in the amount of $3,276.70. He had already received that much more than his interest in the assets were worth. Thus, he had no interest in such assets.

The conclusion that the rule of the Watson case is here controlling makes it unnecessary to discuss any of the other points discussed by counsel.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

140 Cal.App.2d 517

MIDGET PRODUCTS, Inc., a corporation, E. E. Lindsey and Bert H. Brinkley, Plaintiffs and Respondents,

v.

W. C. JACOBSEN, as Acting Director of Agriculture of the State of California, O. A. Ghiggoile, as Chief of the Bureau of Dairy Service of the Department of Agriculture of the State of California, G. P. Mayo, Agent for the Department of Agriculture of the State of California, Defendants and Appellants.

Civ. 20928.

District Court of Appeal, Second District, Division 3, California.

April 5, 1956.

Action for a declaratory relief and injunction. From a judgment for plaintiffs in the Superior Court of Los Angeles County, William J. Palmer, J., the defendants appealed. The District Court of Appeal, Parker Wood, J., held that where plaintiff intended to manufacture and sell a food product containing no milk and milk fat, for use by bakers and others as topping for pies and other foods, and the ingredients of the product would be listed on the label which would state that the product contained no milk or milk fat the product was not an "imitation milk product" within the statute and was not required to be so labeled.

Judgment affirmed.

1. Food ⟹8

Where plaintiffs intended to manufacture and sell a food product containing no milk and milk fat for use by bakers and others as topping for pies and other foods and the ingredients of the product would be listed on the label which would state that the product contained no milk or milk fat, the product was not an "imitation milk product" within the statute and was not required to be so labeled. West's Ann. Agric.Code, §§ 651, 654(a), 655, 666(a, e, f), 667, 668, 676.

See publication Words and Phrases, for other judicial constructions and definitions of "Imitation Milk Product".

2. Constitutional Law ⟹38

A statute valid upon its face may be unconstitutionally applied.

3. Food ⟹1

Where product that plaintiffs proposed to sell and manufacture was not an imitation milk product and did not contain any milk or milk fat, and ingredients of the product would be listed on the label which would state that it contained no milk or milk fat, application of the Agricultural Code sections, so as to require the plaintiffs to label its product as an imitation milk product would be an unconstitutional application of the statutes as an unreasonable interference with the plaintiff's property and business. West's Ann.Agric.Code, §§ 651, 654(a), 655, 666(a, e, f), 667, 668, 676.

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Edmund G. Brown, Atty. Gen., and Stanford D. Herlick, Deputy Atty. Gen., for appellants.

Milo V. Olson and Frank De Marco, Jr., Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for declaratory relief and injunction, the defendants appeal from judgment in favor of plaintiffs.

Plaintiffs intend to manufacture and sell a food product, which contains no milk or milk fat, and is known as Mel-O-Dee Whip Topping and also known as Mel-O-Dee Zert Topping. (For convenience, the Midget Products, Inc., will be referred to as the plaintiff.) The product is intended for use by bakers, confectioners, and others as a topping for pies, cakes, sundaes, and other foods. The Director of Agriculture of California is of the opinion that the product is an imitation milk product within the meaning of section 651 of the Agricultural Code;[1] that such product must be labeled under section 654 of the Agricultural Code,[2] as an imitation milk product; that persons who sell and serve such product as food must, under section 655 of said code,[3] display a sign stating that imitation milk is used and served "here"; and that persons who manufacture the product and persons who sell the product must have licenses therefor under section 666 of said code.[4] Plaintiff sought declaratory relief with respect to issues in controversy between it and the Director of Agriculture, including whether the product was imitation milk, whether it had to be labeled as imitation milk, whether such a sign as referred to had to be displayed, and whether licenses were required. Plaintiff also sought an injunction restraining defendants from enforcing said sections of the Agricultural Code against plaintiff. Plaintiff also alleged that said sections are inapplicable as to plaintiff's product, and that if said sections are applicable thereto, those sections are unconstitutional.

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[1] § 651, Agricultural Code: "As used in this division, 'imitation milk product' means any substance, mixture or compound other than milk or milk products, intended for human food, made in imitation of, or having the appearance or semblance of, milk or any product thereof."

[2] § 654, Agricultural Code: "Each person, who manufactures any imitation milk or imitation cream or imitation milk product, or any substitute that may be used as and substituted for milk, cream or evaporated milk, shall comply with the following: (a) The top * * * and the sides of each package, * * * shall have printed * * * thereon * * * the words 'imitation milk' or 'imitation cream' or 'imitation milk product,' * * *."

[3] § 655, Agricultural Code: "No keeper or proprietor of any bakery, hotel, boarding house, restaurant, * * * or any other place where food or drink is served

Defendants (Acting Director of Agriculture, Chief of Bureau of Dairy Service, and an agent of the Department of Agriculture) alleged in their answer that it was their duty to enforce the statutes referred to in the complaint (Agricultural Code sections heretofore referred to and other sections of that code); that plaintiff's product is an imitation milk product as defined in section 651 of the Agricultural Code "in that it is a substance, mixture or compound other than milk or a milk product, is intended for human food, and is made in imitation of and having the appearance of and semblance of a product of milk, to wit: Whip Cream Topping as defined in Section 639 of the Agricultural Code"; plaintiff's product is made as a substitute for whip cream topping; defendants are informed and believe that plaintiff's product contains no milk or product of milk. Defendants also allege that said sections of the Agricultural Code are applicable to plaintiff's product, and that those sections are constitutional. Defendant Acting Director of Agriculture filed a cross complaint in which he made substantially the same allegations that were made in the answer; and he sought therein an injunction restraining plaintiffs from manufacturing and selling said product.

The court found that plaintiff's product is a wholly nutritious blend of esculent ingredients containing no milk, milk fat, or product of milk. That the product is a blend of water, hydrogenated vegetable facts and nut fats, sucrose, vegetable protein, corn syrup, salt monoglycerides, diglycerides, stabilizer, artificial flavor and artificial color, none of which is a milk product. Plaintiff intends to sell said product in a chilled condition, packaged in containers of various sizes, primarily to commerical customers such as bakeries and confectioners. In the future he also intends to sell the product to the retail trade in liquid form and also in a pressurized container. A demand for a product such as plaintiff's exists, independently of price, from persons whose dietary needs and restrictions do not allow the consumption of milk. Plaintiff's product has certain advantages over any milk product; and, on the other hand, the product cannot serve all the needs served by a milk product. When compared with samples of milk products received in evidence, plaintiff's product had a distinctive appearance and texture. Plaintiff's product was more pink in color than a milk-product whip topping, and plaintiff's product withstood the heat and did not tend to deteriorate as rapidly as the whip topping made from milk. While plaintiff's product had the appearance of milk product, evidence disclosed that other products such as coconut milk, milk from soybean powder, and

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to the public, * * * shall place before any patron or employee for use as food, any imitation milk or imitation cream or imitation milk product, unless there shall be displayed in a prominent place in each room therein where meals are served, a sign bearing the words: 'Imitation milk used and served here' or 'Imitation cream used and served here' or 'Imitation milk product used and served here' * * *."

[4] § 666, Agricultural Code: "It is unlawful * * * to engage in the business * * * of manufacturing, selling, dealing in or furnishing, * * * (a) imitation milk, (b) * * * (e) imitation cream, or (f) any other imitation milk product not otherwise listed herein, without first having applied for and obtained a license so to do. * * *"

marshmallow paste also have the appearance of a milk product. Plaintiff's product can be, and it is intended to be, used rather than a milk product in certain types of food preparation. Plaintiff's intentions with respect to its product are honest. Plaintiff intends to label each container truthfully and each container will announce in conspicuous type that the product contains no milk or milk fat; and the ingredients of the product, as above given, will be set forth on the label. By reason of such labeling and the distinctive appearance and texture, the public will not be defrauded and should not be confused when buying the product. The product is a product of plaintiff's inventive compounding, designed to be used as a dessert topping, or filling; and while it is a competing product with a product made of milk, it is not an imitation milk product but is a food compound singular and distinctive to itself. Plaintiff's product is not an imitation milk product and, although it may reasonably be said to have the appearance of a milk product, it does not come within a constitutional definition of imitation milk product. Section 651 of the Agricultural Code, insofar as it purports to classify as an imitation milk any substance other than milk or milk products, intended for human food and having the appearance of milk, is whimsical, arbitrary and unconstitutional, and would, if valid, legally define as an imitation milk product such substances as coconut milk, marshmallow cream, and soybean powder dissolved in water, no one of which is an imitation milk product. Plaintiff's product is not a whip cream topping as defined by section 639 of said code. The product may not lawfully be required to be labeled "imitation milk product." Persons manufacturing, dealing with, or having possession of the product, may not lawfully be required to have a license or to pay a fee or in any way to comply with sections 666, 667 or 668 of said code. Those sections do not apply to plaintiff's product. The product does not come within the purview of section 655 of said code, as constitutionally applied, and by reason of that fact persons who sell or serve such product may not lawfully be required to display a sign stating that imitation milk is used and served "here." That to apply said sections, or any of them, to said product so as to require it to be labeled an imitation milk product, or to require a person who manufactures or deals in it to have a license or to pay a fee, or to require a person who uses, serves, or sells it to display such a sign, would result in an unconstitutional application of said statutes and would thereby take property from plaintiff without due process of law in violation of the Constitutions of the United States and California; and would result in an unconstitutional restriction upon the business activities of plaintiff. Should plaintiff label its product an imitation milk product, and should persons who use or serve the product display a sign " 'Imitation milk product used and served here,' " such labeling and such sign would result in confusion and would be misleading to the public.

The judgment was that the product is not an imitation milk product; that said product is not an imitation product but is a food product of its own distinctive character and peculiar merits; that plaintiff proposes that the product will be sold in containers on which there will be a label that sets forth the ingredients of the product, and which label will state that the product contains no milk or milk fat; that in marketing and labeling the product in the manner so projected there will be nothing false or misleading to the public; that sections 639, 651, 654, 655, 666, 667, 668 and 676 of the Agricultural Code have no application to plaintiff's product; that said product need not be labeled an imitation milk product or be described as an imitation of any product of milk; that no person who sells the product need obtain a license so to do; that no person who serves or uses the product need display a sign bearing the words " 'Imitation milk product used and served here' "; that if any of said statutes were applied to the product, such application would constitute an unconstitutional and invalid application of said statute; the defendants, their successors, and their agents are enjoined (1) from prosecuting plaintiff or any other person for distributing, marketing, or selling plaintiff's product, and (2) from interfering with the distribution, use or sale of said product.

Appellants contend that plaintiff's product is an imitation milk product. They argue that the product is obviously meant to be a substitute for a milk product, namely, whipped cream or whipped cream topping; that plaintiff's product is a copy of a milk product, in that, whipped cream and plaintiff's product are emulsion of fat and protein—the only difference being that the origin of plaintiff's product is vegetable; that plaintiff, in order to further bring its product up to the standards of a milk product, intends to add vitamins to its product; the only factor in the case which presents any lack of similarity is the color—plaintiff adds a red coloring to give its product a pinkish cast; that since the evidence concerning the factors of similarity and use is without conflict, and since the trial court found that plaintiff's product has the appearance of a milk product and is intended as a substitute for a milk product, plaintiff's product is an imitation milk product as a matter of law.

Appellants cite In re Reineger, 184 Cal. 97, 193 P. 81, wherein Reineger was charged with selling imitation milk, namely, a compound composed of evaporated skim milk and 7.8 per cent of edible vegetable fat, without having obtained a license. A question therein was whether a statute was void by reason of uncertainty, which statute provided that no person shall engage in the business of selling imitation milk without first having obtained a license so to do, and that wholesale dealers shall pay a fee of fifty dollars and retail dealers a fee of five dollars. The argument, with reference to uncertainty, was that a person could not determine, from the definitions of "wholesale dealer" and "retail dealer" in the statute, whether he was a wholesaler or retailer. Appellants herein quote from the cited case, 184 Cal. at page 104, 193 P. at page 84, as follows: "The proposition that a compound of this kind which is not milk, but which resembles milk, and which for many purposes may be used as a substitute for milk, is subject to reasonable regulations under the police power, designed to prevent it from being sold to consumers as real milk, is settled by the decision of the Supreme Court of the United States in Hebe Co. v. Shaw, 248 U.S. 297, 39 S.Ct. 125, 63 L.Ed. 255." That case is distinguishable from the present case. The cited case involved a product which admittedly did contain a large percentage of skim milk, whereas the present case involved a product which, according to the findings of the trial court, did not contain any milk.

Appellants also cite United States v. 651 Cases, etc., D.C., 114 F.Supp. 430, 432, wherein questions were whether a certain product was imitation chocolate ice cream and whether it should have been labeled "imitation." That product contained "the usual ingredients of chocolate-flavored ice cream in approximately the same proportions, except that soy fat and soy protein are used therein in place of milk fat and milk protein." That product was labeled "'not an ice cream'" and "'contains no milk or milk fat!'." The court therein, which was a trial court, found that the product was imitation chocolate ice cream, and the court held that the product should have been labeled "imitation." That case is distinguishable from the present case, in that, in the present case the trial court found that the product involved here was not an imitation milk product.

[1–3] In the present case, the evidence supports the finding that the product is not an imitation milk product, but it is a food product of its own distinctive character. The product does not contain any milk or milk fat. The ingredients of the product will be listed on the label, and the label will state that the product contains no milk or milk fat. To require the plaintiff, by reason of said sections of the Agricultural Code, to label its product an "imitation" when it is not an imitation would be an unconstitutional application of said sections, and would be an unreasonable interference with plaintiff's property and business. See Brock v. Superior Court, 12 Cal. 2d 605, 610, 86 P.2d 805, 807, stating that "a statute valid upon its face may be unconstitutionally applied." It cannot be said as a matter of law that the product is an imitation milk product within the meaning of section 651 of the Agricultural Code.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

140 Cal.App.2d 724

Lessel VENABLES, Plaintiff and Respondent,

v.

CREDENTIAL INSURANCE AGENCY, Inc., George Yule, Phillip Greenfield and Marvin Rappaport, Defendants and Appellants.

Civ. 21264.

District Court of Appeal, Second District, Division 1, California.

April 13, 1956.

Corporation dissolution proceeding. The Superior Court, Los Angeles County, Arnold Praeger, J., appointed commissioners to appraise the fair cash value of stock held by the plaintiff minority stockholder but later set aside the commissioners' award and the majority stockholders appealed. The District Court of Appeal, Doran, J., held that where the trial court was convinced that the award of the commissioners was erroneous, it became the court's duty to examine the matter de novo and fix proper value.

Affirmed.

1. Corporations ⚷629

In corporate dissolution proceeding, when trial court was convinced that award of commissioners, appointed by court to appraise value of stock held by minority stockholder, was erroneous, it became court's duty to examine matter de novo and fix proper value. West's Ann.Corp.Code, §§ 4658, 4659.

2. Corporations ⚷629

In corporate dissolution proceeding, evidence sustained trial court's finding that stock held by minority stockholder had fair cash value of $62.50 per share, notwithstanding that commissioners appointed by court had appraised it at $22.50 per share. West's Ann.Corp.Code, §§ 4658, 4659.

Paul Pearlin, Abraham Gorenfeld, Los Angeles, for appellants.

Trent G. Anderson, Jr., Los Angeles, for respondent.

DORAN, Justice.

Plaintiff, as a director and minority stockholder in the defendant corporation, filed the complaint herein against the corporation and the other directors, seeking a dissolution. The complaint alleged the existence of two factions which were deadlocked so that corporate business could not be advantageously conducted, together with various wrongful acts on the part of the defendant majority stockholders. Plaintiff was a former employe of the corporation who had withdrawn from such employment about a year previous to the filing of the complaint.

The answer sets forth that the defendants, owning more than 50% of the corporate stock, desire to purchase plaintiff's stock, and to that end request the court "to appoint three disinterested commissioners to appraise the fair value of plaintiff's shares, and for an order directing the sale by plaintiff to defendants pursuant to the provisions of sections 4658 and 4659 of the Corporations Code". Thereafter each side submitted three names of proposed commissioners, from which list the trial court selected two names from plaintiff's list and one name from the defendants' list. Commissioners Bulkley and Tichner are managers of insurance company offices and Commissioner George Gish is a certified public accountant. Further proceedings for dissolution were suspended upon defendants posting a $20,000 bond.

The order appointing commissioners declared that "The fair cash value of said shares * * * shall be the amount which a ready, able, willing and informed buyer would pay, and the amount which a willing and informed seller would accept for said shares in said corporation as a going concern, and not in liquidation thereof". Pursuant thereto, the commissioners held hearings at which oral and documentary evidence was received and considered.

A written statement was thereafter made by the commissioners but was not filed within the specified time; plaintiff objected to further consideration but the trial court allowed the commissioners to file an amended appraisal report. The commissioners report recommends "as a fair cash value of 188 shares held by the Plaintiff, the amount of $4,240.85, or $22.56 per share". The report further states that the parties had agreed that the value of the Credential Insurance Agency's net assets, aside from goodwill, was $10,389.73.

As to goodwill, the report concedes that "the figure used by most insurance agencies is one year's gross commission, based upon a three years average, * * * dependent upon members of the agency not competing for business with the agency. The absence of any agreement not to compete, has led us to believe that the Plaintiff has been placed in an enviable position towards obtaining some of the business * * *. Information submitted by Mr. Venables indicates that he is currently operating an Insurance Agency and has already succeeded in selling insurance to some of the accounts previously serviced by the Credential Insurance Agency".

The commissioners concluded that since no dividends were paid, and there was no agreement not to compete and that Mr. Venables was in competition with the corporation, "any goodwill left in the corporation is for all practical purposes nonexistent. However, because of his prior connection with the corporation this commission feels that Plaintiff is entitled to a small amount of goodwill * * * in the sum of $513.01".

Thereafter, plaintiff moved to strike the report and have the court fix a value, "on the premise that the appraisers were confused * * * and that they did not make a fair appraisal". Defendants moved to confirm the award. The trial court set aside the award of the Commissioners and rendered a memorandum decision fixing the value of plaintiff's shares at $62.50 per share, a total of $11,750.

In this memorandum the court notes that "Since Venables left the employ of the corporation on October 1, 1953, important changes have been made in bookkeeping methods. It is difficult to reconstruct the records so as to show the status of the corporation on its former basis of keeping financial records. * * * It is noted that in November, 1951, Greenfield and Rappaport (defendants herein) purchased 160 shares from the corporation for $10,000. This would be $62.50 per share, not considering other possible consideration for the shares. The results of the operations of the corporation seem to be at least as good now as they were then. Previously, in October, 1950, Venables purchased another shareholder's shares for $100 per share. If one followed formulas for evaluating insurance agency businesses even a higher valuation might be reached." From the judgment pursuant thereto, the defendants have appealed, and the plaintiff has filed a cross-appeal.

The defendant-appellants contend that "the trial court erred in ordering judgment for plaintiff in excess of the award of the appraisers"; that "the trial court erroneously used a simple market value approach", in place of considering "all material factors and elements, and assert that "the determination made by the appraisers was correct and should have been confirmed".

Plaintiff-respondent, on the other hand, argues that "the court gave a broader and more objective consideration to the evidence than did the Commissioners", and that since the decision of the court is based upon matters appearing substantially in the record, the same should be sustained. On plaintiff's cross-appeal, it is urged that plaintiff is entitled to a portion of the renewal values of insurance, which are a "tangible asset" in the hands of the corporation; that the court "did not give consideration to the investment of the parties", nor to "the allegations of wrong doing in the complaint", for which reasons the award to plaintiff should be increased.

[1] Consideration of the entire record leads to the conclusion that the trial court committed no reversible error in setting aside the award of the commissioners and entering the judgment appealed from. Under the express provisions of Section 4659, "The award of the commissioners or of a majority of them, *when confirmed by the court*, shall be final and conclusive upon all parties," and in Section 4658, "*The Court*" is empowered "*to ascertain and fix the value* of the shares owned by the plaintiffs." (Respondent's italics.) When convinced that the award was erroneous, it was clearly the duty of the trial court to examine the matter de novo and to fix a proper value, as was done in the instant case.

[2] The questions presented to the trial court were largely factual, and the decisions cited by the parties to this appeal deal either with fundamental legal concepts or with situations not comparable with that here involved. In the instant case, the findings and judgment are amply supported by the record.

Examination of the trial court's findings of fact clearly indicates that full consideration was given to the organization and history of the defendant corporation, the various activities of these associated with the business, and the fact "That the corporation has not paid dividends at any time, and due to the fact that the operating profits of the company are almost wholly paid out in the form of salaries and expense accounts to the officers and principal stockholders * * *, a very small surplus has been accumulated and the payment of dividends is unlikely". The matter of renewal values is likewise treated, and the court found that "on or about the month of June, 1954 the defendants had, without the consent of the plaintiff, revised the bookkeeping practices and procedures. That in doing so they had eliminated the matter of renewal value or goodwill", and "That it was therefore impossible to make any valuation of the shares of stock based on the book value of the corporation".

The trial court also found that the "ordinary methods of determining what a ready, able and willing buyer would pay for plaintiff's shares are inapplicable", for the reason that "plaintiff's shares * * * have a fair cash value peculiar to said purchasing defendants and not applicable to any other buyer"; and that "even after making allowance for the possible competition of plaintiff said shares should have a fair cash value to said defendants of at least * * * $62.50 per share", the amount paid by Greenfield and Rappaport in 1951, since "the business and affairs and earning capacity of said corporation on September 23, 1954, were as good or better than they were in 1951".

The various contentions of the appellants are untenable, as are the points made on plaintiff's cross-appeal. No reversible error is apparent.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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140 Cal.App.2d 595

Kenneth O. PLOUGH, Plaintiff and Appellant,

v.

C. Ross PETERSEN, Eleanor Petersen, Catherine Laguens, Defendants and Respondents.

Civ. 16869.

District Court of Appeal, First District, Division 2, California.

April 9, 1956.

Action by purchaser at foreclosure sale against mortgagors to recover articles which mortgagors had removed from mortgaged premises. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment denying purchaser recovery of certain rugs and he appealed. The District Court of Appeal, Nourse, P. J., held that evidence on issue of whether rugs which had covered concrete floors and which had been tacked to wooden strips on perimeter of floor were fixtures or personalty was for trial court.

Judgment affirmed.

1. Fixtures ⚿35(3)

Whether a certain object in a house is a fixture or personalty is question of fact to be determined by various factors such as manner of its annexation, its adaptability to purpose for which realty is used, and intention of party making annexation.

2. Appeal and Error ⚿996

Where interpretation of evidence was subject to difference of opinion, factual decision of trial court was binding upon reviewing court.

3. Appeal and Error ⚿991

In action by purchaser at foreclosure sale against mortgagors to recover articles which mortgagors had removed from mortgaged premises, evidence on issue of whether rugs which had covered concrete floors and which had been tacked to wooden strips on perimeter of floor were fixtures or personalty was for trial court.

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Mack & Jorgenson, John D. Jorgenson, Menlo Park, for appellant.

Reginald G. Hearn, San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff, the beneficiary under a deed of trust on a residence then owned by the defendants Petersen, bought it at the foreclosure sale. He sued to recover certain articles which defendants had removed from the premises. He appeals from that part of the judgment which denied him the recovery of certain rugs, which the court found were personal property and not fixtures. The appeal has been submitted by appellant waiving oral argument. Although respondent has not filed any brief we have concluded that the judgment must be affirmed.

[1] Whether a certain object in a house is a fixture or personalty is a question of fact and various factors must be considered, such as the manner of its annexation, its adaptability to the purpose for which the realty is used, and the intention of the party making the annexation, Knell v. Morris, 39 Cal.2d 450, 456, 247 P.2d 352.

The evidence showed that the rugs covered concrete floors. On these floors, all around the perimeter of each of the rooms involved, were affixed wooden strips from which tacks were sticking up, inclined towards the nearest wall. On these wooden strips and tacks the rugs were placed. They could be removed by just lifting them up along the walls, but some strands of wool of them remained on some of the little nails after the removal and in one place a piece of rug remained on the strip against the wall after the rug had there been cut off. The defendants transferred the rugs to another house. They had been bought on a conditional sales contract for more than $6,000 and were still being paid off. A chattel mortgage on them had been recorded prior to the execution of the deed of trust. They had not been seen by or discussed with plaintiff before said execution of the deed. Defendant Petersen testified that when he put the rugs down in the house he intended to leave them there during the period of their usefulness.

[2, 3] Whether under the above evidence the rugs were fixtures or personalty may be subject to reasonable difference of opinion; hence the factual decision of the trial court is binding on us. The rugs were installed in a manner which made them readily removable and they were not permanently attached by any of the means enumerated for fixtures in section 660 of the Civil Code. Although this test in itself is not considered decisive anymore, M. P. Moller, Inc., v. Wilson, 8 Cal.2d 31, 37, 63 P.2d 818, it is sometimes given more weight with respect to furniture and furnishings of private dwelling houses than with respect to other articles. 22 Cal.Jur.2d 311; 22 Am.Jur. 769. Such can be justified by the fact that normal furniture and fur-

nishings, although essential to the use of any dwelling house, are, if readily removable, mostly adaptable to use in many different residences, and are often used successively in different ones. It has been held that carpets were not fixtures. Cosgrove v. Troescher, 62 App.Div. 123, 70 N.Y.S. 764; Manning v. Ogden, 70 Hun 399, 24 N.Y.S. 70.

With respect to the important factor of the intent of the owner the fact that he bought the rugs on a conditional sales contract, fastened them in a manner which the court could consider intended to make them easily removable and granted a chattel mortgage on them causes a conflict with his testimony that he intended them to remain in place during their usefulness. The conflicts were resolved by the trial court against appellant.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

William CLINKSCALE and Ida Clinkscale, his wife, Plaintiffs, Cross-Defendants, Appellants and Cross-Respondents,

v.

W. J. GERMERSHAUSEN, Defendant, Cross-Complainant, Respondent and Cross-Appellant.*

Civ. 8750.

District Court of Appeal. Third District. California.

April 4, 1956.

Rehearing Granted April 30, 1956.

Action arising out of collision with plaintiffs' disabled automobile which was stopped on causeway. The Superior Court of Solano County, Harlow V. Greenwood, J., rendered judgment on verdict in favor of defendant, and in favor of plaintiff as cross-defendant on defendant's cross-complaint, and plaintiffs and defendant appealed. The District Court of Appeal, Schottky, J., held that where two foot walkway was separated from pavement of causeway by wooden barrier, the roadway was within statute governing stopping on highway but accepting roadway bounded by adjacent "curbs", and hence giving of instruction based on such statute was prejudicial error.

Judgment for defendant upon plaintiffs' complaint reversed, and judgment for plaintiffs upon the cross-complainant affirmed.

1. Appeal and Error 🔑1001(1)

Before an appellate tribunal may reverse upon ground of insufficiency of evidence, it must appear from record that, accepting the full force of evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering judgment.

2. Appeal and Error 🔑930(1)

Evidence must be construed most strongly against losing party on appeal.

3. Appeal and Error 🔑930(1)

Every favorable inference and presumption which may fairly be deduced from evidence should be resolved on appeal in favor of prevailing party.

4. Appeal and Error 🔑930(1), 989

Prevailing party's evidence must ordinarily be accepted as true on appeal, and evidence which is contradictory must be disregarded.

5. Automobiles 🔑245(43)

Driving 50 feet behind another automobile at speed of 45 miles per hour in heavy traffic on four-lane causeway was not unreasonable under statute as matter of law. Vehicle Code, § 531.

6. Negligence 🔑136(9, 14)

Generally, negligence is a question of fact for jury and only where inference of negligence is irresistible, it becomes court's duty to decide upon it as matter of law.

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* Opinion vacated 302 P.2d 23.

7. Negligence ⇨136(9)

Where inferences to be drawn are in any degree doubtful, question of negligence must be submitted to jury under proper instructions.

8. Negligence ⇨1

"Negligence" is not an absolute term but a relative one, and in deciding whether there was negligence in a given case, conduct must be considered in light of all surrounding circumstances as shown by evidence.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

9. Automobiles ⇨245(40)

Evidence showing, inter alia, that defendant's automobile was traveling about 40 miles per hour about 50 feet behind automobile ahead of him, which was 50 feet from plaintiffs' disabled automobile, stopped in same traffic lane, when the other automobile began to turn out, and that defendant applied brakes when he saw disabled automobile, being unable to swerve because of traffic going in the same direction, and that defendant's automobile made 65 feet of skid marks, raised a jury question as to defendant's negligence.

10. Automobiles ⇨245(83)

In action arising out of collision with plaintiffs' disabled automobile which was standing on highway, question of contributory negligence in failing to anticipate automobile would be disabled because of heat and in failing to give greater warning to oncoming traffic was for jury under evidence. Vehicle Code, § 582.

11. Appeal and Error ⇨1001(1)

Where evidence raised fact questions for jury, reviewing court would not interfere with verdict for defendant though evidence preponderated in favor of plaintiffs and trial court might have well granted new trial.

12. New Trial ⇨1

Trial judge in passing upon a motion for new trial is not bound by same rules as appellate court.

13. Negligence ⇨83.1

Under doctrine of "last clear chance," plaintiffs must be negligent and as result of their negligence, must be in a position where they cannot escape from perilous position by exercise of ordinary care, and defendant must be aware of their danger so that he realizes, or ought to realize, that plaintiffs are unable to escape, and defendant must then have a clear chance to avoid injuring plaintiffs by exercise of ordinary care.

See publication Words and Phrases, for other judicial constructions and definitions of "Last Clear Chance".

14. Automobiles ⇨245(91)

In action arising out of collision with plaintiffs' disabled automobile, which was stopped on four-lane highway, doctrine of last clear chance was not applicable as matter of law, in view of defendant's testimony that he applied brakes as soon as he observed plaintiffs and could not swerve into inside lane because of condition of traffic.

15. Appeal and Error ⇨216(1)

Where plaintiffs offered no instruction on doctrine of last clear chance, trial court could have considered such doctrine on hearing of motion for new trial, but could not be held on appeal to have erred in not giving instruction on such doctrine or in not granting new trial on that ground.

16. Automobiles ⇨246(58)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on causeway, wherein there was some evidence of plaintiffs' negligence in failing to anticipate that automobile might become disabled because of heat, instruction that plaintiffs could not recover if plaintiff was negligent in the "manner in which he stopped and parked" was not erroneous as injecting unwarranted issues.

17. Automobiles ⇨246(27)

In action arising out of collision with plaintiffs' disabled automobile, instruction that plaintiffs could not recover if plaintiff was negligent in manner in which he attempted to warn defendant of fact that his automobile was stopped, and if such negligence contributed proximately to the accident, was proper.

18. Automobiles 🔑246(60)

B.A.J.I. instruction on statutory duties as to stopping or parking on highway, which referred to prima facie showing of negligence in stopping contrary to statute and required person thus stopping to explain why automobile was stopped, and affirmatively showing impracticability of handling the vehicle otherwise, was not improper as applied to plaintiffs on theory that it shifted burden of proof. Vehicle Code, § 582.

19. Automobiles 🔑173(2)

Under statute governing stopping on highway with exception relating to highway bounded by curbs, a "curb" is a stone or row of stones, or a similar construction of concrete, wood, or other material, along margin of roadway, as a limit to roadway and a restraint upon and protection to adjoining sidewalk space. Vehicle Code, § 582.

See publication Words and Phrases, for other judicial constructions and definitions of "Curb".

20. Appeal and Error 🔑1064(1)
Automobiles 🔑211, 246(58)

Where walkway at side of four-lane causeway was separated from pavement by a wooden barrier, the highway was bounded by "curbs" as matter of law, within terms of statute governing stopping on highways but excepting highways bounded by curbs, and hence giving of instruction on application of such statute was error and prejudicial where evidence of plaintiffs' negligence was not strong and instruction was given that violation of any section of Vehicle Code was negligence as matter of law. Vehicle Code, § 582.

21. Automobiles 🔑173(2)

Fact that statute governing stopping on highway does not by its terms apply to roadway having curbs, does not mean that anyone may park on such a roadway with impunity, since such parking may be negligent under common law. Vehicle Code, § 582.

22. Automobiles 🔑244(45)

In action arising out of collision with plaintiffs' disabled automobile which was stopped on highway, evidence supported implied finding that defendant was guilty of contributory negligence as basis for judgment against defendant upon his cross-complaint. Vehicle Code, § 531.

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Robert M. Cole, Davis, for appellants-cross respondents.

Russell A. Harris, Sacramento, for respondent-cross appellant.

SCHOTTKY, Justice.

Plaintiffs commenced an action for damages for personal injuries and property damage sustained by plaintiff Ida Clinkscale and for property damage sustained by her husband plaintiff William Clinkscale, when the automobile which he was driving and in which she was a passenger became involved in an accident with an automobile driven by defendant, W. J. Germershausen. Plaintiffs appeal from that portion of the judgment entered in favor of the defendant upon a jury verdict, and defendant appeals from the same judgment in favor of the cross-defendant, William Clinkscale. A nonsuit was granted to cross-defendant Ida Clinkscale, and the cross-complainant, W. J. Germershausen, has not appealed from that order.

At the time the accident occurred, the plaintiffs were traveling east on U. S. Highway 40 over the Yolo Causeway, which is a form of bridge over a by-pass and runs in a general easterly and westerly direction, being 3 to 4 miles in length. The highway is at least 15 to 20 feet from the ground and consists of four perfectly straight and level traffic lanes, two in each direction, each divided by a white line with a double line in the center. At the south side of the causeway is a two-foot walkway separated from the pavement by a wooden barrier. The plaintiffs had traveled to San Francisco on the morning of the accident and on the way down, near Fairfield, the car sputtered and the temperature of the engine was abnormally high, so they stopped at a filling station to put water in the radiator.

After driving around in San Francisco for a few hours, the plaintiffs left to return to their residence in Broderick, Yolo County, California. They did not notice any trouble with the car until it stopped in the middle of the Yolo Causeway, in the outside eastbound lane against the wooden barrier.

It was a sunny Sunday afternoon in June, around 5 p. m., and the traffic was heavy in all four lanes. Clinkscale set his emergency brake, looked under the hood and discovered that smoke was coming off the engine and the radiator was steaming. He checked the temperature gauge and found it to be at the boiling point. He had not checked the gauge before crossing the causeway, nor at the time he passed a service station located on the highway at Davis, nor at any time since leaving the filling station at Fairfield on the way to San Francisco. After unsuccessfully trying to start the car, he stationed himself at the left rear fender to flag cars around his stopped automobile. Ida Clinkscale remained seated in the right front seat.

Clinkscale directed about 20 to 25 cars by his stopped car before it was struck in the rear by the automobile driven by the defendant who was approaching from the west traveling east in the outside or southerly lane. Defendant had remained in this lane at all times prior to the accident and had been following several cars. He did not observe cars fanning out to pass the plaintiffs' car and the traffic was moving evenly. The defendant was following the car ahead of him by approximately 50 feet when the car swerved sharply to the left into the inside lane just prior to the time the defendant saw the plaintiffs' parked automobile. The defendant determined that it was unsafe for him to swerve into the inside lane because of the traffic passing by, going in the same direction, and being only several car lengths away from the plaintiffs' car, he applied his brakes hard and skidded into the rear of it. The skid marks were 65 feet in length up to the point of impact and continued on approximately 12 feet. The defendant's car stopped so that it was resting on the walkway which is located on the south side of the causeway with the right front next to the iron rail which serves as a barrier at the extreme south edge. As a result of the impact the Clinkscale automobile was propelled 400 feet east on the causeway.

Clinkscale testified that when he first saw defendant's car it was traveling at an estimated rate of speed of 55 to 60 miles per hour. However, the defendant testified that he kept a constant speed of approximately 45 miles per hour in crossing the causeway. Defendant also testified that although he saw Clinkscale standing at the left rear of his automobile prior to the accident, he did not notice him make any movement.

Appellants' first major contention is that the evidence is insufficient to support the judgment in favor of respondent because respondent was negligent as a matter of law and appellants were free from negligence as a matter of law. We are unable to agree with this contention.

[1–4] It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

In support of their contention that defendant was negligent as a matter of law, plaintiffs argue that the defendant did not exercise ordinary care to observe traffic conditions on the causeway ahead of him; that he was following the vehicle ahead of him more closely than was reasonable and prudent, in violation of section 531 of the Vehicle Code; that according to the testimony of the traffic officer defendant stated that he was looking at the rice checks and was tired and sleepy; that because of these things defendant did not see the Clinkscale car until he was too close to stop in order to avoid an accident.

Plaintiffs rely strongly on the case of Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655, where it was held that the conduct of defendant in driving into plaintiff's car ahead constituted negligence as a matter of law. However, the facts in the Huetter case were quite different from those in the instant case. In the Huetter case the defendant had a clear view of the highway, with no vehicles intervening, for 850 feet preceding the point of impact with plaintiff's car. Plaintiff had stopped, backed onto the shoulder, and was executing a left turn into a crossover on a divided, four-lane highway. Defendant drove this 850 feet looking straight ahead but did not see plaintiff's automobile until he was within 75 to 100 feet of it. He still continued a straight course and left no skid marks until he struck plaintiff's car broadside at a speed of 35 to 40 miles an hour.

[5] As a further point in support of the plaintiffs' position that the defendant was guilty of negligence as a matter of law, it is contended that the defendant violated section 531 of the California Vehicle Code which provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway." Plaintiffs argue that defendant was traveling too close to the automobile ahead of him because he was not able to stop in time. However, Landrum v. Severin, 37 Cal.2d 24, 230 P.2d 337, states the rule in its headnote to be: "It is for the jury to determine whether, within the terms of Veh.Code, § 531(a), a motorist followed another automobile at a distance less than what was reasonable and prudent, except where the space between the vehicles was such as to establish whether there was a violation of such provision as a matter of law." See also Driver v. Norman, 106 Cal.App.2d 725, 236 P.2d 6, and Giles v. Happely, 123 Cal.App.2d 894, 267 P.2d 1051. In view of these decisions, it cannot be said as a matter of law that a space of 50 feet at a speed of 45 miles per hour, under traffic conditions existing here, is unreasonable.

[6–8] The general rule is that negligence is a question of fact for the jury. It is only where the inference of negligence is irresistible that it becomes the duty of the court to decide upon it as a matter of law, and where the inferences to be drawn are in any degree doubtful the only proper rule is to submit the matter to the jury under proper instructions. As is so often stated in instructions to juries in negligence cases, negligence is not an absolute term but a relative one, and in deciding whether there was negligence in a given case the conduct in question must be considered in the light of all the surrounding circumstances as shown by the evidence.

[9] It would serve no useful purpose to review the decisions cited by plaintiffs as the factual situations in those cases were different from those in the instant case. Each case must be considered on its own facts. Bearing in mind the familiar rules hereinbefore mentioned, we cannot say that the evidence in the instant case compelled a finding that defendant was guilty of negligence as a matter of law. The jury could have concluded that since defendant was about 50 feet behind the car ahead of him and that car was 50 feet from plaintiffs' car when the other car began to turn out, defendant's car was about 100 feet from plaintiffs' car when he first observed it, and since defendant's car made 65 feet of skid marks to the point of impact, that therefore defendant must have been looking down the highway at the time the car ahead of him pulled out to pass. Defendant testified that he did not see plaintiffs' car until he was several car lengths from it, and that as soon as he saw it he applied his brakes; that he could not swerve into the inside lane because of traffic going in the same direction. We believe that the question of whether or not defendant was guilty of negligence was one of fact for the jury.

[10] Furthermore, even if the evidence compelled a finding that defendant was negligent as a matter of law, we do not believe that the evidence compels a finding that plaintiff Clinkscale was free from negligence as a matter of law.

Defendant points out that the record shows that on the day of this accident the plaintiff, Mr. Clinkscale, before starting on this trip to San Francisco, had gas and water put in his automobile, presumably in Broderick, and that on the way down by the time he reached Fairfield, California, his engine acted "funny" and "kind of stubborn," as if it were going to cut out on him, so he pulled into a service station near Fairfield and the attendant put water into the radiator. Clinkscale knew that the car was hot at this time and observed that the heat gauge was high; that although while en route home he was traveling from a cool area into a warm area, appellant Clinkscale testified that at no time after leaving Fairfield on the way to San Francisco did he ever check the temperature gauge on his automobile, that he knew he had to cross the Yolo Causeway, and that he did not make any observations with respect to that temperature gauge before crossing the causeway; that he passed right by the large Standard Oil service station at Davis and apparently gave no thought to the advisibility of checking his temperature gauge or checking the water in his radiator before leaving that area to pass on down the highway towards the causeway. Defendant argues that since Clinkscale testified that he did not look at his temperature gauge after leaving Fairfield on the way down to San Francisco, and since he testified that he did not look at that gauge before crossing the causeway, the jury could have believed that he was contributorily negligent because he in fact did not look at that gauge, or they could have concluded that he did look at the gauge and was not telling the truth with respect to what it indicated, but instead decided to try to make it across the causeway, and that the jury could reasonably conclude from the evidence that in view of the difficulty which Clinkscale had on the way down to San Francisco, and from the other facts herein outlined, Clinkscale did not act with ordinary care in attempting to cross the causeway under these circumstances, and that therefore his car was not "disabled" within the language of section 582 of the California Vehicle Code, so as to exempt him from contributory negligence.

The defendant argues further that the jury could have concluded that the plaintiff Clinkscale was contributorily negligent in failing to station himself farther to the rear of his automobile in order to give approaching motorists, including the defendant, more time and distance in which to discover the fact that his car was stopped and to either stop or turn into the inside lane, and might have prevented the accident. Defendant testified that he did not see plaintiffs' automobile until the car ahead of him turned out, and while it is possible that defendant might not have observed plaintiffs' automobile if plaintiff Clinkscale had been stationed 50 or 75 feet further west, it is also probable that he would have observed it in time to have avoided the accident. Plaintiff Mr. Clinkscale stationed himself at the left rear fender while plaintiff Mrs. Clinkscale remained seated in the front seat of the automobile. In view of the fact that it was 5 p. m. on a hot Sunday afternoon when the traffic was heavy, we cannot say that the jury may not have properly concluded that under all the circumstances plaintiffs failed to exercise ordinary care in failing to give greater warning to oncoming traffic.

We believe that whether or not plaintiff Mr. Clinkscale was guilty of contributory negligence was one of fact for the jury and are unable to agree with defendant's contention that reasonable men could only draw the conclusion that plaintiffs were not free from contributory negligence.

[11, 12] We are frank to state that in our opinion the record indicates strongly that the evidence preponderates in favor of plaintiffs on the issue of defendant's negligence as well as on the issue of the contributory negligence of plaintiffs, and that in view of the verdict of the jury the case was one in which the trial court might well have granted a new trial. A trial judge in passing upon a motion for a new

trial is not bound by the same rules as an appellate court. We quote what was said in Brush v. Pacific Electric Ry., 58 Cal. App. 501, at page 506, 208 P. 997, at page 1000:

> "But, while an appellate court will not review a verdict where the evidence shows a substantial conflict, the trial court is guided by very different considerations. If the trial judge, notwithstanding a conflict in the testimony, is satisfied that the verdict is against the weight of the evidence, he may, indeed he should, grant a new trial, although upon the same conflict an appellate court would be bound by the verdict. And even though there be no conflict in the testimony, the probative force and effect of the evidence is ultimately for the determination of the trial judge upon the hearing of a motion for a new trial. Meinberg v. Jordan, 29 Cal.App. [760] 762, 157 P. 1005, 1007. The judgment of the trial judge is not based upon the cold record which comes to an appellate court. He hears the evidence, and has ample opportunity to observe the demeanor and manner of the witnesses and to judge their credibility. If, therefore he is dissatisfied with the verdict, and is of the opinion that it clearly is against the weight of the evidence, he may set it aside and grant a new trial, even though there be substantial evidence to support the verdict. He—'is in a position to determine between the apparent and the real, to detect the fallacy of specious testimony which may have misled the jury, but which his wider experience enables him to readily comprehend. * * * It is for these and other reasons which might be mentioned that a wide discretion is accorded to trial courts in the disposition of motions for new trials.' Bates v. Howard, 105 Cal. [173] 178, 38 P. 715. Though the parties are entitled to the judgment of the jury in the first instance, they are, upon a motion for a new trial, equally entitled to the independent judgment of the judge as to whether such verdict is supported by the evidence. Green v. Soule, 145 Cal. [96] 102, 78 P. 337."

So while we regard the instant case as one in which the trial court might well have granted plaintiffs' motion for a new trial, we are satisfied that it cannot be held as a matter of law that the judgment lacks substantial support in the record.

[13, 14] Plaintiffs contend that the doctrine of last clear chance should have been applied by the trial judge on the motion for new trial, and that he should have set aside the verdict as a matter of law. Under that doctrine the plaintiffs must be negligent and as a result of their negligence they must be in a position where they cannot escape from their perilous position by the exercise of ordinary care, and the defendant must be aware of their danger so that he realizes, or ought to realize, that the plaintiffs are unable to escape, and the defendant must then have a clear chance to avoid injuring the plaintiffs by the exercise of ordinary care. The defendant testified that as soon as he observed the plaintiffs, he applied his brakes hard and attempted to stop his automobile, and that he could not swerve into the inside lane because of the condition of the traffic to his left. Whether or not he had the last clear chance to have avoided the accident is quite doubtful, but in any event this court cannot say as a matter of law that he did have such an opportunity.

Counsel for plaintiffs states: "The doctrine of last clear chance should have been applied in this case, and even if the doctrine was too complex for the Jury to apply, the Judge on the motion for a new trial should have applied the doctrine as a matter of law, and should have set aside the verdict of the Jury."

[15] It is apparent from the record that the doctrine of last clear chance was not relied upon by plaintiffs at the trial for they offered no instruction on it. No decision has been cited which holds that it is reversible error for a court to fail to give such an instruction when it is not offered or requested. While the trial court upon the hearing of the motion for a new trial could have considered the doctrine of

last clear chance along with all other rules of law and might well have granted the motion for a new trial on the ground that the verdict was against the weight of the evidence, we cannot say that upon the record in the instant case the court erred in not giving an instruction on the doctrine of last clear chance or in not granting a new trial upon that ground.

Plaintiffs next contend that certain erroneous and highly prejudicial instructions were given by the court.

Plaintiffs contend that the giving of Instruction No. 10 was prejudicially erroneous because it interjected issues into the case which were not present. This instruction reads:

> "If you believe from the evidence that Mr. Clinkscale was careless and negligent in the manner in which he stopped and parked his Studebaker automobile on the Yolo Causeway prior to the accident and that said carelessness and negligence on his part proximately contributed to this accident, then I instruct you that the plaintiffs, Mr. and Mrs. Clinkscale, can not recover from Mr. Germershausen."

[16] However, this instruction advised the jury that if they found that the car was "stopped and parked" in a careless and negligent manner and if this carelessness and negligence proximately contributed to the accident, then the plaintiffs could not recover. It contained both the element of negligence and the element of proximate cause, and was a correct statement of the law. The question of whether or not the plaintiffs were justified in stopping and parking on the causeway under all of the circumstances in the case was a question of fact for the jury, and the instruction does not relate only to the manner in which the car was parked on the causeway, but it relates to the issue of whether or not the car should have been stopped and parked before it got onto the causeway.

Plaintiffs complain also that there was prejudicial error in giving Instruction No. 11 which reads:

> "If you believe from the evidence that William Clinkscale was careless and negligent in the manner in which he attempted to warn Mr. Germershausen of the fact that the Studebaker automobile was stopped on the Yolo Causeway and if you further believe that said careless [sic] and negligence on the part of said William Clinkscale contributed proximately to the accident, then I instruct you that the plaintiffs, Mr. and Mrs. Clinkscale can not recover from Mr. Germershausen."

[17] This instruction related to the warning which was given by Mr. Clinkscale to the defendant, and that was an element in the case. The instruction correctly stated the law and contained both the elements of negligence and proximate cause.

If plaintiffs' contention that Clinkscale was free from negligence as a matter of law was upheld, then Instructions 10 and 11 would have been improper. However, since we have come to the conclusion that Clinkscale's negligence was a question of fact, these instructions correctly presented the issues to the jury.

Far more serious is plaintiffs' contention that the court committed prejudicial error in giving Instruction No. 17. This instruction which is based on section 582 of the Vehicle Code is identical with Instruction No. 143 of B.A.J.I., Civ., '50 Supp., which reads as follows:

> "At the time of the accident involved in this case, our Vehicle Code provided as follows:
>
> "'Upon any highway in unincorporated areas no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles, and a clear view of such stopped vehicle shall be available from a distance of 200 feet in each direction upon such highway. This section shall not apply upon a highway where the roadway is bounded by adjacent curbs.

" 'This section shall not apply to the driver of any vehicle which is disabled in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle on the main traveled portion of a highway.'

"In weighing the evidence in this case, you will be guided by a rule now to be stated: If and when it has been established by the evidence that a person stopped, parked or left standing any vehicle, whether attended or unattended, upon the main traveled portion of a highway in an unincorporated area, or that he stopped or parked or left standing a vehicle upon the main traveled portion of such a highway in such a position as not to leave an unobstructed width of the highway opposite said vehicle for the free passage of other vehicles or in such a place that a clear view of said vehicle was not available from a distance of 200 feet in each direction upon the highway, such evidence is a prima facie showing of negligence on the part of the person who so handled the vehicle and will support a finding that he was negligent in such conduct, unless that showing together with any other proved facts that support it, fails to preponderate over evidence that it was impracticable to stop, park, or leave the vehicle off the main traveled portion of the highway or evidence that the vehicle was disabled in such a manner and to such an extent that it was impossible to avoid stopping and temporarily leaving it on that portion of the highway or at a place where the clearance of unobstructed highway opposite it or the clear view of it from the highway was not such as is required by the law that I just read to you.

"To state the point in another way: The law places upon a person who stops, parks or leaves standing a vehicle on a highway in an unincorporated area, the risk of being found to have been negligent in so doing, unless he affirmatively shows the impracticability or the impossibility, as just stated, of handling the vehicle otherwise. If, however, he makes such a showing, the inference of negligence to which I previously referred may thereby be disproved and removed from the case.

"The accident involved in this case occurred in unincorporated area."

[18] Plaintiffs argue that since defendant had the burden of proving contributory negligence, the above instruction, which required that the plaintiffs explain why the car was stopped on the causeway, shifted the burden of proof to the plaintiffs on this issue, and therefore violated the fundamental rule of law with respect to the burden of proving contributory negligence. However, we think it is clear that the instruction does not in any way shift the burden of proof either as to the negligence of defendant or the contributory negligence of plaintiffs.

Plaintiffs also argue that the instruction was improper because section 582 of the Vehicle Code specifically states that it "shall not apply upon a highway where the roadway is bounded by adjacent curbs." It therefore becomes necessary to determine whether or not the roadway across the causeway is "bounded by adjacent curbs." On the north side of the causeway is a barrier consisting of steel pipes imbedded in concrete with openings in the concrete so that the water can flow off the highway. On the south side is a two-foot walkway with wooden boards about 8 inches high separating the walkway from the vehicular part of the highway.

[19] The Vehicle Code itself does not give any definition of the term curb, no doubt because it is a term which is so commonly used and so generally understood. Nor have we found any California case that defines the term. However, what seems to us to be a correct definition is given by the Supreme Court of Illinois in Lyman v. Town of Cicero, 222 Ill. 379, 78 N.E. 830, as follows:

> "The common meaning of the word 'curb,' as applied to a street, is a stone or row of stones, or a similar construction of concrete, wood, or other material, along the margin of the roadway, as a limit to the roadway and a restraint upon and protection to the adjoining sidewalk space."

And in Domke v. Gunning, 62 Wash. 629, 114 P. 436, at page 438, the Supreme Court of Washington said:

> "The respondent pleaded and proved and ordinance of the city of Spokane making it the duty of a person driving an automobile on the streets of the city, 'upon turning the corner of any street,' to 'leave a space of at least six feet between the curb and the * * * automobile * * *.' It appeared that on the lot fronting on the street where the accident happened a building was being erected; that debris therefrom had been piled in the corner of the street around which a fence or barricade had been constructed, and pedestrians traveling along the street on reaching the corner would be obliged to leave the regular walk, step into the street, and walk around the outside of this fence or barricade. The court charged the jury that this fence became the curb within the meaning of the ordinance, and that the appellant was guilty of violating the ordinance when he drove along the street if he did not keep his automobile six feet therefrom. This instruction is assigned as error, but we think it correct. The purpose of the ordinance was to keep vehicles in rounding corners out of the path usually taken by foot passengers, and the word 'curb' was used as the most convenient term to mark one of the boundaries of the path, and not in a technical sense. When a fence was used to mark the boundary of this path, it became the curb within the meaning of the ordinance."

[20] Defendant argues that the question of whether or not the causeway is bounded by curbs was a question of fact for the jury to determine. However, we believe that it must be held as a matter of law that the highway across the causeway is a highway where the roadway is bounded on the south side by adjacent curbs. We can reach no other conclusion when we consider the definition of "curbs" and the undisputed physical facts. If the Legislature had intended to make a distinction between curbs on a highway across a causeway or bridge and those on other roadways it could easily have done so. If we are correct in this conclusion, then section 582 does not apply to the roadway here involved and the instruction should not have been given. If it was error to give the instruction then we are convinced that it was prejudicial error, because it was followed by Instruction No. 19 which told the jury that the violation of any section of the Vehicle Code was negligence as a matter of law. Furthermore the instruction itself told the jury that where a person "stopped, parked or left standing any vehicle, whether attended or unattended, upon the main traveled portion of the highway, in an unincorporated area", such evidence is a prima facie showing of negligence and "will support a finding that he was negligent in such conduct."

We believe that this instruction placed a greater burden upon plaintiffs than they were required to carry and that in view of the fact that the evidence of negligence on plaintiffs' part was far from strong, the giving of this instruction could well have resulted in the verdict against plaintiffs. We feel that the giving of this instruction requires a reversal of the judgment.

[21] In holding that section 582 does not by its terms apply to the roadway on which this accident happened, we do not of course imply that anyone may, with impunity, park his vehicle thereon. Under the common law definition of negligence, it would seldom occur that a driver so parking, unless compelled to do so as by mechanical failure, was not negligent.

[22] As to the cross-appeal of defendant from the judgment in favor of plaintiffs on defendant's cross-complaint, it is stated in defendant's brief that such appeal was taken "purely to preserve cross-complainant's right, in the event that this Court should reverse the judgment in favor of the defendant and against the plaintiffs." However, it is clear that there is ample evidence in the record to support the implied finding of the jury that defendant was guilty of contributory negligence and

that the judgment against defendant upon his cross-complaint should be affirmed.

The judgment in favor of defendant upon plaintiffs' complaint is reversed, and the judgment in favor of plaintiffs upon defendant's cross-complaint is affirmed

VAN DYKE, P. J., and PEEK, J., concur.

140 Cal.App.2d 502

Gertrude ZOLLARS, Plaintiff, Respondent and Cross-Appellant,

v.

James T. BARBER, Defendant, Appellant and Cross-Respondent.

Civ. 16529.

District Court of Appeal, First District, Division 2, California.

April 5, 1956.

Hearing Denied May 29, 1956.

Action by pedestrian for personal injuries sustained when she was allegedly struck by defendant's automobile while crossing street in crosswalk at intersection. After verdict for defendant, the Superior Court, County of Marin, Thomas F. Keating, J., sustained plaintiff's motion for new trial, and both parties appealed. The District Court of Appeal, Nourse, P. J., held, in part, that where defendant automobile operator testified fully to all circumstances of accident, trial court erroneously instructed jury that each of parties was presumed to have been exercising ordinary care and obeying law immediately preceding accident, though plaintiff had requested such an instruction as solely applicable to herself.

Order affirmed; appeal from judgment dismissed.

1. Appeal and Error 🔑790(1)

Where defendant appealed from order granting new trial, and plaintiff cross-appealed from judgment, and District Court of Appeal concluded that order should be affirmed, appeal from judgment would be dismissed as moot.

2. Automobiles 🔑246(60)

Where defendant automobile operator, in pedestrian's personal injury action, testified fully to all circumstances of accident, trial court erroneously instructed jury that each of parties was presumed to have been exercising ordinary care and obeying law immediately preceding accident though plaintiff had requested such an instruction as solely applicable to herself.

3. New Trial 🔑10

If error appears in record, power of trial court to grant new trial is not limited by conduct of parties in inviting such error.

4. Automobiles 🔑246(60)

In pedestrian's personal injury action against operator of automobile which struck pedestrian while she was crossing street at intersection, if pedestrian became unconscious and did not know from her own observation how accident happened, plaintiff was entitled to instruction to effect that law presumes that she was exercising due care and obeying law immediately before accident.

5. Automobiles 🔑242(8)

If pedestrian, who was struck by defendant's automobile while she was walking across street at intersection, was unconscious and therefore could not testify to what happened during certain period in which she could have been negligent, for example, in not seeing traffic button over which defendant claimed she had tripped, she was for that period entitled to presumption of due care.

6. Automobiles 🔑246(60)

Where, in personal injury action by pedestrian struck in crosswalk by defendant's automobile, there was conflict in evidence as to pedestrian's unconsciousness, instruction on presumption of due care should have been conditioned on jury's believing that she was unconscious.

7. Appeal and Error 🔑1064(1)

Whether error in giving instruction on presumption of due care is prejudicial depends on facts of the case.

8. Appeal and Error 🔑978(1)

On appeal from an order granting new trial question of prejudicial character of error in instruction is one for trial court except for manifest abuse of discretion.

9. New Trial 🔑41(3)

In pedestrian's personal injury action against operator of automobile which struck her while she was crossing street at intersection, in view of error of court in giving instruction on presumption of due care as applicable to both parties, though pedestrian alone was entitled to such instruction, and despite fact that instruction may have been too favorable to pedestrian, trial court's order granting plaintiff new trial was not an abuse of discretion.

10. Automobiles 🔑246(31)

Where court instructed jury that pedestrian crossing highway not only had continuing duty of ordinary care to avoid accident, but also continuing duty to look out for approaching vehicles, instruction was erroneous.

11. Automobiles 🔑245(72)

Whether pedestrian, crossing street in marked pedestrian crosswalk, would be required in exercise of ordinary care to keep continuing lookout for approaching vehicles, as to which she had right of way, was jury question, in pedestrian's personal injury action against operator of automobile which struck her in crosswalk.

12. Automobiles 🔑243(3)

Where automobile operator made written report to police concerning facts of accident immediately following accident, report, though not made on approved form, and though operator testified differently from report in subsequent action, was properly excluded from evidence, in action by pedestrian against operator for personal injuries. Vehicle Code, §§ 484, 488.

13. Automobiles 🔑243(3)

Automobile accident report made to police by motorist at time of accident is not excluded from protection of statute, though not made on approved form. Vehicle Code, §§ 484, 488.

14. Evidence 🔑145

The relevancy or remoteness of evidence offered is mainly within discretion of trial court.

15. Evidence 🔑99
Witnesses 🔑319

It is within discretion of trial court to permit inquiry into collateral fact, when such fact is directly connected with question in dispute, and is essential to its proper determination, or when it affects credibility of a witness. West's Ann. Code Civ.Proc. § 1868.

16. Evidence 🔑150, 314(1)

Admission of testimony of defendant automobile operator, in action by pedestrian for personal injuries sustained when struck while crossing at intersection, relating to observations and experiments which defendant made day after accident and which tended to prove that defendant could not, under circumstances, have struck pedestrian, was not abuse of discretion, as hearsay, in view of defendant's availability for cross-examination; and in view of essential importance of testimony, admission was not abuse of discretion. West's Ann.Code Civ.Proc. § 1868.

17. Negligence 🔑138(4)

An instruction on contributory negligence should not be given if evidence cannot possibly support such a finding.

18. Appeal and Error 🔑1064(1)

The giving of instruction on inevitable accident is not reversible error when question whether injury was proximately caused by negligence of defendant is for jury to decide, even though violation of statute is involved.

19. Negligence 🔑138(3)

Instruction on inevitable accident is error only when evidence is such that no other inference than that negligence of one or more of parties caused injury can reasonably be made.

Alexander, Bacon & Mundhenk, Jack M. O'Brien, Ewart Lytton Merica, San Francisco, for appellant.

W. L. A. Calder, Abraham Glicksberg, San Francisco, for respondent.

NOURSE, Presiding Justice.

[1] In this negligence action the verdict was for defendant and judgment was entered thereon. On plaintiff's motion a new trial was granted. Defendant appeals from the order granting the new trial and plaintiff cross-appeals from the judgment. We have concluded that the order granting a new trial must be affirmed. The appeal from the judgment will then be dismissed as having become moot. Brignoli v. Seaboard Transp. Co., 29 Cal.2d 782, 792, 178 P.2d 445.

In the evening of January 17, 1953 plaintiff was injured at the intersection of Princess Street and Bridgeway Boulevard in Sausalito when she was crossing Princess Street in a southerly direction in the marked pedestrian crosswalk at the west side of the intersection. The testimony of the parties regarding the manner in which the accident happened was to the following general effect. Defendant: When he reached the intersection in his car coming from the south and intending to make a left turn into Princess Street, another car stopped in the west side of the intersection, headed east on Princess Street, with its rear part in the western crosswalk, waiting to make a left turn north into Bridgeway Boulevard. Defendant passed slowly (driving at most ten miles an hour) in front of that car. Only after he had completed his turn did he see plaintiff near the rear of the stopped car. She was falling backward toward his car with one foot in the air and the other flying out from under her. On seeing her so he stopped his car in seven or eight feet. He thought he had hit her. When he got out of his car she was rising up from a kneeling position five or six feet from his car. She was conscious all the time. He led her to his car. In going there she said relating to the brass traffic button in the crosswalk: "I fell over that." He did not think anything of it at the time. He asked her where his car had hit her, but she did not answer. He also told a police officer that he had struck her but when he examined his car with him they did not find any denting or disturbance of mud or water on fender or bumper. At the police station he gave an oral statement in which he said that suddenly he was aware that he had struck something and that he believed that plaintiff was struck with the rear part of his left front fender. He was asked by a police officer at the station to make a written report and did so in his own hand. (The report was marked for identification but objections to its introduction were repeatedly sustained.) To explain the inconsistency between his statements on the evening of the accident and his testimony at the trial which pointed to plaintiff's fall not having been caused by contact with his car but by tripping over a traffic button, defendant, over objection, was permitted to testify to certain observations and experiments he made the morning after the accident, which tended to show that he could not have seen plaintiff in the manner in which he first saw her from his car if she then had been near enough to have been struck by it.

Plaintiff testified that she observed the traffic in the different directions before starting to cross along the center of the pedestrian crosswalk and that she made a further observation when she was walking across. She did not see a car coming down Princess Street and coming to a stop in the intersection. She saw no headlights as though from a car making a left turn from the south into Princess Street. She does not know what happened from then until she heard defendant say: "My God, I hit you" and until he took hold of her. She was unconscious. She does not remember any contact between her and a car. She remembers vaguely that her head was struck (contacting the pavement). Some seemingly conflicting testimony relates clearly to what she later heard not to what she remembered. She did not say "I fell over that" (relating to the traffic button). The records of the hospital to which plaintiff was brought from the police station were received in evidence. The "history sheet" of said records states among other things: "She did not get unconsciousness. She recall every detail of the accident."

The order granting a new trial does not specify the grounds on which it is made. The motion mentioned among other grounds: "Errors in law occurring at the trial and excepted to by plaintiff" and respondent defends the order solely on that ground. The parties correctly agree that the following instruction given by the court is erroneous insofar as applicable to defendant:

"The law presumes that each of the parties, in their conduct at the time of and immediately preceding the accident here in question, was exercising ordinary care and was obeying the law. These presumptions are a form of prima facie evidence and will support findings in accordance therewith, in the absence of the evidence to the contrary."

[2] "Repeatedly it has been held that the giving of * * * an instruction of similar tenor, is error when thereby the benefit of the presumption of due care is extended to a party who by his testimony or by evidence introduced in his behalf has disclosed his acts and conduct immediately preceding and at the time of the accident. [Citations.]" Rozzen v. Blumenfeld, 117 Cal.App.2d 285, 287, 255 P.2d 850, 852; Jones v. Scurlock, 96 Cal.App.2d 201, 214 P.2d 599. There were here no special circumstances preventing appellant from fully testifying to all circumstances of the accident and he fully testified to them.

Appellant contends that the error in giving said instruction cannot justify the granting of the new trial because the error was allegedly induced by instructions proposed by respondent and because the instruction was not prejudicial as neither party was unduly favored because allegedly neither was entitled to the instruction, plaintiff also having testified as to her action and care before and during the accident. We do not agree.

[3] Respondent's proposed instruction was limited to herself only and she complains of the extension of the instruction to include both parties. This extension was in no way induced by her. But even if the error had been so induced such would not have restricted the power of the trial court to grant a new trial on plaintiff's motion because of it. "'If error appears in the record, the power of the trial court to grant a new trial is not limited by the conduct of the parties in inviting such error.'" Roberson v. J. C. Penney Co., 136 Cal.App.2d 1, 288 P.2d 275, 277, quoting from Springer v. Sodestrom, 54 Cal.App.2d 704, 707, 129 P.2d 499; Conroy v. Perez, 64 Cal.App.2d 217, 226, 148 P.2d 680.

[4-6] Respondent's testimony was not so unhampered by special circumstances as that of appellant. Although she fully testified as to what she did and the care she took prior to the accident, she testified that she suddenly became unconscious and did not know from her own observation how the accident happened. She could therefore not expressly controvert appellant's evidence intimating that she stumbled over a traffic button. No other witness produced by her testified to the manner in which the accident happened. If she actually was unconscious and therefore could not testify as to what happened during certain period in which she could have been negligent (e. g. in not seeing the traffic button) she was for that period entitled to the presumption of due care. As there was a conflict in the evidence as to her unconsciousness the instruction on the presumption of due care should have been conditioned on the jury's believing that she was unconscious. Although in that respect the instruction may have been somewhat too favorable to plaintiff it cannot be said as a matter of law that the two distinct errors must have cancelled each other out in their effect on the jury.

[7-9] Whether the error in giving the instruction on the presumption of due care is prejudicial depends on the facts of the case. Rozzen v. Blumenfeld, supra, 117 Cal.App.2d 285, 287, 255 P.2d 850. On appeal from an order granting a new trial the question of the prejudicial character of an error in instruction is one for the

trial court except for a manifest abuse of discretion, Brignoli v. Seaboard Transp. Co., supra, 29 Cal.2d 782, 792, 178 P.2d 445; "the appellate court must indulge the presumption that the trial judge performed his duty, considered the whole record in the case and decided that the giving of the instruction was prejudicial and resulted in a miscarriage of justice." Jones v. Scurlock, supra, 96 Cal.App.2d at page 203, 214 P.2d at page 600. Both the Rozzen and the Jones case, supra, affirmed the granting of a new trial on the ground of prejudicial error in giving the instruction on the presumption of due care. See also Ford v. Chesley Transp. Co., 101 Cal. App.2d 548, 552, 225 P.2d 997; Cole v. Ridings, 95 Cal.App.2d 136, 140, 212 P.2d 597. For the same reasons as given in these cases the order in this case must be affirmed.

As the above is conclusive of the decision of the case the other errors alleged by defendant as justifying the granting of a new trial need only cursory treatment, mainly for the purpose of guidance in the new trial ordered.

[10, 11] The instruction on the duties of one crossing a highway which placed upon respondent not only the continuing duty of ordinary care to avoid an accident but moreover the continuing duty to look out for approaching vehicles, is also erroneous and can assist in supporting the order granting a new trial. It was for the jury to say whether for plaintiff, crossing in a marked pedestrian crosswalk, ordinary care required a continuing lookout for approaching vehicles as to which she had the right of way. Francis v. City and County of San Francisco, 44 Cal.2d 335, 339, 282 P.2d 496 and cases there cited.

[12, 13] The rulings which kept appellant's written report to the police from the jury were correct. The court could correctly consider said report as one required under section 484 of the Vehicle Code, expressly excluded as evidence by section 488 of said code. At the time appellant made the report on the demand of the police he considered himself as having been involved in an accident resulting in injuries to respondent and the fact that he thereafter testified differently does not nullify the prohibition of section 488, supra. The fact that there was no showing that the report was made on forms prescribed therefor, does not have the effect of excluding it from the protection of section 488, supra, as the Vehicle Code does not any longer require the report to be made on approved forms as was the case under section 142 of the Vehicle Act involved in Dwelly v. McReynolds, 6 Cal.2d 128, 56 P.2d 1232, on which case respondent relies.

[14–16] Neither do we find error in the admission over objection of certain testimony of defendant as to observations and experiments made by him the day after the accident. Respondent's contention that such ex parte investigations constitute hearsay is erroneous. Compare V Wigmore on Evidence section 1385. The witness who made the observations and experiments was available for cross-examination. As to experimental evidence in general and the trial court's wide discretion in admitting it see 18 Cal.Jur.2d Evidence section 205. We see no reason why the trial court may not permit testimony as to such experiments or investigations in explanation of conflicting statements of a witness if the statements are of sufficient importance for the case. The relevancy or remoteness of evidence offered is mainly within the discretion of the trial court. Estate of Ades, 81 Cal.App.2d 334, 342, 184 P.2d 1. It is within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness, § 1868, Code of Civil Procedure. Certainly when we consider the essential importance of the statements involved we find no abuse of said discretion.

[17] No instruction on contributory negligence should evidently be given if the evidence cannot possibly support a finding of contributory negligence. As the evidence on the new trial need not be the same as that on the present one a

decision of this point on the basis of the present evidence would serve no useful purpose.

[18, 19] The giving of an instruction on inevitable accident is not reversible error when the question whether the injury was proximately caused by the negligence of the defendant is for the jury to decide, even when violation of statute is involved. Smith v. City and County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999. It is only error when the evidence is such that no other inference than that of negligence of one or more of the parties causing the injury can reasonably be made. Such was not the case here.

The order granting a new trial is affirmed; plaintiff's appeal from the judgment is dismissed.

DOOLING and KAUFMAN, JJ., concur.

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140 Cal.App.2d 677

Matter of the ESTATE of Harry O. BROWN, Deceased.

Lydia H. Brown, Appellant.

Winnie Dorner, Henry Dorner, Ward Travis, Shriners Hospital for Crippled Children of San Francisco, California, Shriners Hospitals for Crippled Children, a corporation, Respondents.

District Court of Appeal, Third District, California.

April 10, 1956.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Siskiyou County, James M. Allen, J., entered a decree settling the final account of the executors and ordering distribution of the estate of the deceased testator, and the mother and sole heir of deceased testator appealed. The District Court of Appeal, Van Dyke, P. J., held that bequest to Shriners Hospital of San Francisco, for the establishment of a fund to be used by the hospital for such purposes as in the discretion of the directors of the hospital would accomplish the greatest good in the relief of human misery, was for a charitable use and was sufficiently certain.

Decree affirmed.

1. Wills 🔑15

Where, under one contingency, which might occur, will would violate provision of the Probate Code that charitable legacies may not collectively exceed one-third of testator's estate as against his spouse or ancestor who would otherwise have taken the excess over one-third, but under another contingency, which might occur, will would not violate such provision of the Probate Code, determination as to whether there was a violation of such provision of the Probate Code could properly be deferred until such time as the future events, on which it was dependent, should occur. West's Ann.Prob.Code, §§ 41, 1120.

2. Charities 🔑33

The Shriners Hospitals for Crippled Children, a Colorado corporation, which owns and operates the Shriners Hospital of San Francisco, would be a proper body to receive a bequest to that specific hospital. West's Ann.Prob.Code, § 27.

3. Charities 🔑20(1)

A charitable gift may be made by will to a noncharitable institution so long as the purpose of the gift remains charitable.

4. Charities 🔑11, 21(3)

Bequest to the Shriners Hospital of San Francisco for the establishment of a fund to be used by the hospital for such purposes as in the discretion of the directors of the hospital would accomplish the greatest good in the relief of human misery, was for a charitable use and was sufficiently certain. West's Ann.Prob.Code, § 27.

◆

Weis & Weis, Yuba City, for appellant.

J. Clark Benson, San Francisco, for beneficiary, Shriners Hospital for Crippled Children of San Francisco.

Gerald L. Shannon, Dunsmuir, for respondents Dorner.

VAN DYKE, Presiding Justice.

This is an appeal from a decree settling the final account of the executors and ordering distribution of the entire estate of Harry O. Brown, deceased, to Winnie Dorner and Henry Dorner, or the survivor of them, as trustees.

Appellant is the aged mother and sole heir of the deceased whose will, which was admitted to probate, provided:

> "I hereby give, devise and bequeath all of my estate, real, personal and mixed, In Trust, nevertheless for following named purposes and uses and benefits as hereinafter stated:
>
> * * * * * *
>
> "1. One-half of the net income, or the sum of $75.00 per month, whichever sum is the greater, shall be for the use and benefit and the maintenance of my step-son, Ward Travis, for and during his lifetime.
>
> "2. The remainder of the net income derived from said trust estate, after payment of the provisions hereinbefore made for the said Ward Travis, shall be paid out and shall be for the use and benefit of Henry Dorner and Winnie Dorner, his wife, or the survivor of them, for and during the lifetime of the survivor of them.
>
> "3. Upon the demise of all three of said persons, towit: Ward Travis, Henry Dorner and Winnie Dorner, his wife, my said estate shall be liquidated and the corpus thereof I hereby give, devise and bequeath to the Shriner's Hospital of San Francisco, California, for the establishment of a Fund to be known as the Geneva May Brown and Harry O. Brown Fund, which said Fund shall be used by the said Shriner's Hospital for such purposes as in the discretion of the Directors of said Hospital will accomplish the greatest good in the relief of human misery.
>
> "*Fourth:* For and during the lifetime of the said Henry Dorner and Winnie Dorner, his wife, or the survivor of them, they are hereby appointed as Trustees to administer the Trust hereinbefore created.
>
> "a. Upon the demise of the said Henry Dorner and Winnie Dorner, his wife, then the Bank of America, N.T. & S.A. is hereby appointed Trustee to administer the Trust hereinbefore created.
>
> "b. In the event of the Bank of Amercia, N.T. & S.A. becoming the Trustee of said Trust, under the terms and conditions hereof, said Bank may use such sums as in its discretion may be necessary for the support and maintenance of the said Ward Travis."

Appellant filed objections to the petition for distribution of the estate in accordance with the above quoted provisions of the decedent's will, contending (1) that the trust thereby attempted to be created was too indefinite as to objects, purposes, and beneficiaries and was, therefore, void and unenforceable, and, (2) that under the terms of the will more than one-third of the decedent's estate would go to a charitable organization for a charitable purpose, namely, the Shriners Hospital of San Francisco, which would contravene Section 41 of the Probate Code, which provides:

> "No estate * * *, may be bequeathed or devised to any charitable or benevolent society or corporation, * * * for charitable uses, by a testator who leaves a spouse, * * * or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least 30 days before the death of the testator. If so executed at least 30 days before death, such devises and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, * * * or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or de-

> vised contrary to the provisions of this section shall go to the spouse, * * or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected."

[1] Appellant argues that the will is clearly violative of said section since, so long as either Mr. or Mrs. Dorner survives Mr. Travis, only income from the trust could be spent and the entire principal would remain intact. That is true, but it is equally true that if both Mr. and Mrs. Dorner predeceased Mr. Travis, the trust then being freed of their demands thereon, the Bank of America National Trust & Savings Association, as the successor trustee, may at its discretion invade the corpus of the estate to provide necessary support and maintenance for Mr. Travis. In that event, the residue upon the death of Mr. Travis may be less than the allowable one-third which could be distributed to the Shriners Hospital. We cannot speculate as to which of the two contingencies may occur. What the proportionate value of the remainder will be cannot now be ascertained. Therefore, such determination may be properly deferred until such time as the future events upon which it is dependent occur. Probate Code, sec. 1120; Estate of Campbell, 175 Cal. 345, 351–352, 165 P. 931; Estate of Gorchakoff, 108 Cal.App.2d 44, 46–47, 238 P.2d 121. The trial court's decree, from which this appeal was taken, expressly reserved "jurisdiction to determine at the termination of the intervening Life Estates, whether the amount of the then estate going to Charity is in excess of that permitted by law." In so decreeing the court did not commit error.

The appellant's contention that the trial court should have found that she was the sole heir of the testator and that she would be entitled to receive any portion of the estate which was in excess of the one-third which could be distributed to the Shriners Hospital is unfounded. Since it is presently impossible to determine whether or not appellant can ever take anything, the court acted within its discretion in reserving such matters for its future determination.

Likewise without merit is the alleged total invalidity of the bequest to the Shriners Hospital.

It was proved that the Shriners Hospital of San Francisco is owned and operated by the Shriners Hospitals for Crippled Children, a Colorado corporation, duly authorized to transact business in the State of California.

[2] The Shriners Hospitals for Crippled Children, a Colorado corporation, which owns and operates the Shriners Hospital of San Francisco, would be a proper body to receive the bequest to that specific hospital. Probate Code, sec. 27; Estate of Moeller, 199 Cal. 705, 715–716, 251 P. 311; Estate of Scrimger, 188 Cal. 158, 165–166, 206 P. 65.

As stated in Estate of McDole, 215 Cal. 328, 333, 10 P.2d 75, 77:

> "There are numerous instances where homes maintained by charitable corporations do not bear the exact name of the corporation holding title to the physical properties of the home. Incorporated lodges and fraternal organizations of nation-wide membership maintain homes for aged and indigent members at various places throughout the territory where lodges or chapters exist. Applying the rule for which respondent heirs contend, it would be necessary to hold that a bequest to the fraternal home at a certain place would fail because the corporate entity which maintained the home and held title to the property upon which it was operated did not include in its title either the word 'home,' or the name of the town where the particular home was located." See, also, Estate of Clippinger, 75 Cal.App.2d 426, 171 P.2d 567.

[3, 4] The status of the corporation is immaterial as "'A charitable gift may be made to a non-charitable institution so long as *the purpose of the gift* remains charitable.'" Estate of Tarrant, 38 Cal.2d 42, 47, 237 P.2d 505, 507, 28 A.L.R.2d 419. The bequest herein for "the relief of human

misery" is for a charitable use and is sufficiently certain.

The trial court correctly upheld the validity of the charitable trust.

The decree is affirmed.

SCHOTTKY and PEEK, JJ., concur.

140 Cal.App.2d 357

Louis JACOB, Plaintiff and Respondent,

v.

KEY SYSTEM TRANSIT LINES, a corporation et al., Defendants,

Key System Transit Lines, a corporation, and Marie Freestone, Appellants.

No. 16725.

District Court of Appeal, First District, Division 1, California.

March 29, 1956.

Rehearing Denied April 27, 1956.

Hearing Denied May 23, 1956.

Bus passenger brought action against bus company and bus driver for injuries sustained by passenger when thrown to floor of bus when bus ran into unflagged ladders extending from truck. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment for passenger, and bus company and bus driver appealed. The District Court of Appeal, Bray, J., held that questions whether bus passenger was contributorily negligent and whether bus driver was negligent in not seeing ladders in time to avoid hitting them were questions for jury.

Judgment affirmed.

1. Appeal and Error 🔑151(2)

A defendant can not appeal from a judgment in favor of a codefendant.

2. Carriers 🔑280(1)

Bus company had duty as a common carrier to exercise the highest degree of care reasonable to protect passengers from injury.

3. Carriers 🔑318(7)

Fact that bus in broad daylight ran into ladders extending back from truck amply supported an implied finding, in action by bus passenger against bus company and bus driver for injuries, that bus company and bus driver did not exercise highest care reasonable to protect passengers, even if negligence of owner of truck was also a proximate cause of accident, because of his failure to have the ladders flagged.

4. Carriers 🔑347(6)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, question whether passenger was guilty of contributory negligence or assumed risk of being injured was for jury.

5. Carriers 🔑318(7)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, whether sudden stopping of bus was caused by ladders on truck or brakes of bus was immaterial on question of lack of care of bus company and bus driver in allowing either to happen.

6. Negligence 🔑72

The imminent peril or sudden emergency doctrine applies only where person claiming the benefit of it is himself without fault.

7. Carriers 🔑320(21)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, question whether bus driver was free from negligence in not seeing ladders in time to avoid hitting them or suddenly stopping was for jury.

8. Carriers 🔑321(12)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, court properly gave instruction embodying the basic speed law. Vehicle Code, § 510.

9. Carriers ⚷321(12)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, court properly gave instruction embodying section of the Vehicle Code dealing with the following of another vehicle more closely than is prudent. Vehicle Code, § 531.

10. Damages ⚷210(1)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, instruction that if jury found that negligence of bus company and bus driver was the proximate cause of passenger's injury, passenger would be entitled to damages though pre-existing condition on part of passenger made him more readily predisposed to injury, and even though such negligence would not have caused injury to a person who did not have the pre-existing condition such as passenger had, was correct.

11. Carriers ⚷321(12)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, court properly instructed that when one looks in the direction of an object clearly visible, he sees it. Vehicle Code, § 626(a).

12. Carriers ⚷321(21)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, instruction that res ipsa loquitur was applicable to bus company but not to owner of truck was correct.

13. Carriers ⚷316(4)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, fact of accident raised an inference of negligence on part of bus company and bus driver, even though evidence might reveal that real and sole cause of accident was negligence of truck driver.

14. Carriers ⚷316(4), 321(21)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, fact that bus company and bus driver claimed defense that the real and sole cause of the accident was the negligence of the truck driver would not prevent trial court from instructing on, and jury from considering, res ipsa loquitur.

15. Carriers ⚷316(4)

In action by bus passenger against bus company and bus driver for injuries sustained when passenger was thrown to floor of bus when bus ran into ladders which extended back from truck, and which were not flagged, complaint charging that bus company and bus driver so negligently and carelessly drove, maintained, loaded, and guarded bus as to cause it to collide with rear of truck or its load and thereby caused passenger to be violently thrown in and about the bus did not so specifically allege negligence as to render the res ipsa loquitur doctrine inapplicable.

16. Damages ⚷130(1)

Award of $10,000 to 74 year old man for fracture of rib, bruise on shoulder, and moderate brain concussion requiring him to remain in bed for 12 weeks, and to incur bills of $628.67 for medical attention, was not excessive.

◆

Edward J. Rice, Jr., Stafford P. Buckley, Oakland, for appellants.

Smith & Parrish, George W. Hauer, Oakland, for respondent.

BRAY, Justice.

[1] In a personal injury action, judgment was rendered on a jury verdict for $10,000 in favor of plaintiff and against defendants Key System and Marie Freestone.[1]

Questions Presented.

1. Sufficiency of the evidence.
2. Instructions.
3. Was verdict excessive?

1. Evidence.

The evidence, viewed most strongly in favor of plaintiff, amply supports the verdict. Plaintiff, 74 years old, boarded defendant's bus. After paying his fare he proceeded down the aisle towards the rear to get a seat. The bus started up. Before plaintiff reached a seat the bus came to a sudden stop, having run into ladders which extended 3 to 5 feet back from Velasco's truck. Plaintiff was thrown to the floor, receiving injuries complained of. The bus operator testified that as she left the stop where plaintiff claimed to have got on (she doesn't remember whether any passengers got on there or not) "quite a little distance" in front of her was a black sedan. She looked back in her mirror and noticed two or three people in the aisle. She noticed plaintiff proceeding towards the rear. When she looked forward she saw the truck about 20 feet ahead of her, stopped for a red light. She was then traveling 7 to 12 miles per hour. She immediately applied her brakes. The ladders on the truck were not marked with a flag. She didn't see the ladders at first. The bus struck the ladders but not the truck. She never saw the truck when it was moving.

[2, 3] Most of defendants' brief dealing with the question of the alleged insufficiency of the evidence, while containing excellent arguments for a jury, is of little value here because based almost entirely on defendants' conclusions from the evidence. It is clear that the effect of the failure of Velasco to have his ladders flagged was a question for the jury. Even if it erred in not finding such failure to be a proximate cause of the accident, such error is of no help to defendants. Having in mind that defendants' duty as a common carrier was to exercise the highest care reasonable to protect its passengers from injury, the fact that in broad daylight the bus ran into the ladders on the truck under the circumstances here amply supports an implied finding that defendants did not exercise that degree of care, even if the negligence of Velasco was also a proximate cause of the accident.

[4] Nor can we say as a matter of law that plaintiff was guilty of contributory negligence or assumed the risk of being injured. Defendants, merely taking portions of the medical evidence of plaintiff's infirmities (he was 74 years old and had "a borderline heart" and "practically no muscles in his abdomen," and other conditions), contend that plaintiff had such muscular instability as not to be able to stand up in the ordinary operation of a bus. Defendants, however, ignore the other testimony to the effect that despite his physical condition plaintiff was extremely active for his age, did general work around the house, and in the garden, and even climbed trees. Moreover, there was no evidence that plaintiff at the time of the accident was unstable in his walking. The nearest approach to such evidence was a statement by a doctor in discussing the subject of arteriosclerosis (plaintiff had the normal amount of arteriosclerosis for a man of his age), "Some people have it in the extremities and have difficulties in walking." This entire question, if an issue, was a jury one.[2]

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[1] Ramon Cortes Velasco, a truck driver, was a codefendant. The jury found in his favor. Defendants Key System and Marie Freestone attempted to appeal from the judgment in favor of Velasco. As a defendant may not appeal from a judgment in favor of a codefendant, see Click v. Southern Pacific Co., 113 Cal. App. 528, 298 P. 839, we heretofore dismissed that appeal.

[2] Defendants did not plead either contributory negligence or assumption of risk. Defendants concede that ordinarily such defenses must be pleaded, see Routh v. Quinn, 20 Cal.2d 488, 127 P.2d 1, 149

[5–7] We fail to understand defendants' contention that what threw plaintiff to the floor was not the bus running into the ladders of the truck, but the sudden stopping of the bus in the bus driver's attempt to prevent the bus from colliding with the ladders and therefore defendants could not be liable. Whether the sudden stopping of the bus was caused by the ladders or the brakes of the bus is immaterial on the question of defendants' lack of care in allowing either to happen. Defendants refer to the "imminent peril" or "sudden emergency" doctrine. This doctrine applies only where the person claiming the benefit of it is himself without fault. See Mortensen v. Fairbanks, 1 Cal.2d 489, 35 P.2d 1030; Kardasinski v. Koford, 88 N.H. 444, 190 A. 702, 111 A.L.R. 1019; Restatement, Torts, § 296, p. 796. It was a jury question whether the bus driver was free from negligence in not seeing the ladders in time to avoid hitting them or suddenly stopping,

2. Instructions.

[8, 9] The court read section 510, Vehicle Code (the basic speed law) and section 531 (following another vehicle more closely than is prudent).[3] Obviously these were proper instructions. It was the jury's duty to determine whether even the slow speed defendants claimed to be traveling was reasonable and prudent in view of the traffic. As to the second instruction, all that needs to be said is that the bus struck the load of the vehicle ahead of it. Defendants' position seems to be that "the jury might have believed the evidence favorable to the defendant," hence no instructions should be given contrary to defendants' theory of the case. This contention needs no answer.

[10] The court instructed that if the jury found that defendants' negligence was the proximate cause of plaintiff's injury, plaintiff would be entitled to damages "If any pre-existing condition on the part of the plaintiff has more readily predisposed him to injury * * * even though such negligence would not have caused injury to a person that did not have the pre-existing condition such as the plaintiff had." Defendants have cited no authorities to support their contention that the instruction is erroneous. It is a correct instruction.

[11] The court gave the well known instruction to the effect that when one looks in the direction of "an object clearly visible, he sees it." Defendants' contention that it could not be applicable here is not supported by any authority. It is obvious that it was for the jury to determine from all the evidence whether the ladders were "clearly visible" to the bus driver in time for her to have avoided injuring plaintiff.

[12–14] Defendants make two objections to the giving of res ipsa loquitur instructions. (1) The court instructed that res ipsa loquitur was applicable as to defendant Key System but not as to Velasco. This was correct. Velasco's duty towards plaintiff was merely that of ordinary care; defendants' duty was to use the highest degree of care. Moreover, the instrumentality which injured plaintiff was the operation of the bus. As between plaintiff and defendants, the fact of the accident raised an inference of negligence, even though the evidence might reveal that the real and sole cause of the accident was the truck's negligence. Such fact, if it were a fact, would have been a matter of defense. Because defendants claimed such defense did not prevent the court from instructing on, and the jury from considering, res ipsa loquitur.

[15] (2) Defendants claim that plaintiff's complaint pleaded specific acts of negligence and that, therefore, the doctrine could not apply. The complaint charged

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A.L.R. 215; Witkin, California Procedure, p. 1536, but contend that nevertheless evidence concerning them was admitted at the trial without objection and therefore it became an issue. See Moeller v. Packard, 86 Cal.App. 459, 261 P. 315. Evidence of plaintiff's physical condition was admitted but we can find nothing in the record to indicate it was offered or considered as evidence of contributory negligence or assumption of risk. No instructions on either subject were offered or given.

[3] The court also gave portions of section 626, subdivision (a), requiring a vehicle with a load extending 4 feet to the rear thereof to display a red flag warning.

that defendants "did so negligently and carelessly drive, own, operate, maintain, load, protect and guard * * * [its] bus" as to cause it to collide with the rear of the truck and/or its load "and thereby caused plaintiff to be violently thrown in and about said" bus.

In Sherman v. Hartman, 137 Cal.App.2d 589, 290 P.2d 894, we pointed out that there had been considerable confusion in the cases as to what constitutes the pleading of special acts of negligence which would bar the application of the res ipsa loquitur doctrine. We reviewed many of the cases upon the subject, including Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008, which reviewed other cases. We concluded that in this state there has been a great liberalization of the tests for the application of the doctrine and that regardless of whether the complaint alleges general acts of negligence alone, general and specific acts of negligence, or even specific acts of negligence only, the doctrine may apply depending not upon the type of pleading but whether the allegations show that "the plaintiff knows the specific or underlying *cause* of the accident or is ignorant thereof." 137 Cal.App.2d at page 599, 290 P.2d at page 900. (Emphasis added.) If he knows such cause then the doctrine may not apply. Using such test here, it is obvious that the plaintiff has not alleged any knowledge of the specific acts of defendants' negligence, which caused defendants' bus to collide with the truck. There was nothing in the complaint which barred the application of the doctrine.

3. Damages.

[16] Plaintiff suffered a fracture of the 8th rib, a bruise on the left shoulder, a moderate brain concussion. He suffered great pain. He was 12 weeks in bed. He was required to have a nurse for 4 weeks. Five or 6 months after the accident he was still suffering from dizziness. He complained of loss of memory and headache. A nerve specialist treated him several times. His doctor's prognosis of a brain injury was "not favorable." The bills for medical attention, etc., were $628.67. More than a year after the accident plaintiff felt weak without any strength, could not do the things he did before the accident, could not go on a ladder any more, frequently had headaches, dizziness, which he did not have before. Although his memory before the accident was very good it is bad now. His shoulder hurts at night. He uses an infra-red lamp daily on it. Defendants' doctor testified that because of his previous condition (a "borderline heart" and a ruptured abdominal wall) his symptoms will linger longer than they would otherwise. His doctor testified that his symptoms still persisted and were "not favorable" and "do not give good prognosis." We cannot say that an award of $10,000 for plaintiff's injuries was the result of "passion, prejudice, or corruption on the part of the triers of the facts," as we are required to do to upset an amount of damages fixed by the jury and passed upon and approved by the trial court on motion for new trial. See Miller v. Southern Pacific Co., 117 Cal.App.2d 492, 510, 256 P.2d 603. See also 117 Cal.App.2d page 509, 256 P.2d 603 for discussion of damages for pain and suffering.

The purported appeal from the order denying new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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141 Cal.App.2d 387

Matter of the Application of Gloria Dean CHAPMAN, for a Writ of Habeas Corpus.

Cr. 5648.

District Court of Appeal, Second District, Division 1, California.

May 9, 1956.

Habeas corpus petition for relief from commitment on a judgment finding petitioner guilty of contempt of court for violation of an order modifying interlocutory divorce decree to award custody of children to husband. The District Court of Appeal, Fourt, J., held that judge pro tempore, who tried the cause pursuant to stipulation, did not have jurisdiction to try the contempt proceedings without further stipulation or appointment by court.

Order of commitment annulled and petitioner discharged.

1. Contempt ⚷66(1)

Under statute making contempt judgment final, one adjudged guilty of contempt has only two remedies, habeas corpus and certiorari. West's Ann.Code Civ. Proc. § 1222.

2. Contempt ⚷67

Habeas Corpus ⚷92(3)

The scope of inquiry upon habeas corpus or certiorari to review contempt adjudication is the same, and both writs extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. West's Ann.Code Civ.Proc. § 1222.

3. Contempt ⚷67

Habeas Corpus ⚷92(3)

On habeas corpus or certiorari to review contempt adjudication, inquiry cannot go beyond question of jurisdiction, and review of evidence is limited to determining whether jurisdiction existed and whether it was exceeded. West's Ann.Code Civ. Proc. § 1222.

4. Contempt ⚷40

A contempt proceeding is not a civil action but a separate proceeding of criminal nature and summary character in which the court exercises but a limited jurisdiction.

5. Contempt ⚷60(3)

Contempt proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient.

6. Contempt ⚷67

Habeas Corpus ⚷92(3)

In reviewing contempt proceeding on certiorari or habeas corpus, the charge, evidence, findings and judgment are all to be strictly construed in favor of accused and no intendments or presumptions can be indulged in aid of their sufficiency. West's Ann.Code Civ.Proc. § 1222.

7. Contempt ⚷67

Habeas Corpus ⚷106

On certiorari or habeas corpus to review contempt proceedings, if record fails to show affirmatively upon its face the existence of all necessary facts upon which jurisdiction depended, the order must be annulled. West's Ann.Code Civ.Proc. § 1222.

8. Divorce ⚷305

Habeas Corpus ⚷22(2)

Attorney-commissioner who, pursuant to stipulation that "the above entitled cause" might be tried by him as judge pro tempore, had ordered modification of divorce decree so as to award custody of children to husband, did not have authority, without further stipulation or order of court, to hear contempt proceedings against wife for disobedience of such modified decree, and hence his order committing wife to jail was without jurisdiction and subject to attack by habeas corpus. West's Ann.Code Civ.Proc. § 1222.

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Brown & Ayers, Los Angeles, for applicant.

Harold W. Kennedy, County Counsel, Los Angeles, David D. Mix, Deputy County Counsel, Granada Hills, for respondent Sheriff.

S. W. Spizer, Huntington Park, for real party in interest, Marvin A. Chapman.

FOURT, Justice.

This is an application for relief under habeas corpus from a commitment of the petitioner on a judgment finding her guilty of contempt of court.

The charges arose out of a divorce action. Petitioner herein filed a complaint in divorce against Marvin A. Chapman on or about July 27, 1955. An order to show cause was issued and at a hearing thereon the husband was ordered restrained from annoying, harassing or molesting the wife in any manner. The husband made no appearance at the divorce trial on September 28, 1955, and the court granted an interlocutory decree of divorce to the wife wherein, among other things, the court awarded the four minor children of the parties to the wife, ordered the husband to pay support and maintenance for the children and the wife's attorney's fees. The husband was restrained substantially as under the previous order. On October 3, 1955, an interlocutory judgment of divorce was signed and filed on October 4, 1955.

The husband, on or about February 9, 1956, executed an affidavit for an order to show cause in re modification of the interlocutory judgment of divorce. His affidavit was filed on February 14, 1956, and the court made an order on the same day directing the wife to appear and show cause why the interlocutory judgment of divorce should not be modified in respect to the custody of the children. The matter of the custody was thereafter, pursuant to a stipulation, referred to a court investigator and the cause was continued for hearing. On March 28, 1956, the date to which the matter was ultimately continued, the attorneys for the parties stipulated in writing that "the above entitled cause may be tried by Francis A. Cochran, an attorney, and member of the bar of this state in accordance with the constitutional provisions". The selection of Cochran as judge pro tempore was approved and ordered by the judge of Department 8 of the Superior Court. The cause was then transferred to Department 8b for hearing. Testimony was taken and the judge pro tempore ordered that the interlocutory decree of divorce be modified so as to provide that the custody of the minor children be awarded to the husband, the wife to have the right to reasonable visitations. The wife was ordered to deliver the four minor children to the husband on or before April 5, 1956.

On April 9, 1956, the husband made an affidavit, the substance of which is that the wife would not deliver the children to him nor tell where the children were nor permit him to have them; that she would go to jail first before she would tell where the children were. An order to show cause was signed by the judge of Department 8 on April 10, 1956, wherein the wife was directed to appear before the court in Department 8 on the 19th of April, 1956, at 1:45 o'clock p. m., then and there to show cause why she should not be adjudged guilty of contempt of court and punished accordingly for wilfully disobeying the order of March 28, 1956.

On April 19, 1956, the matter of the contempt proceedings of the wife was apparently transferred to Department 8b, although there is no minute order in the file so indicating. The minutes of Department 8b recite that at 3:15 o'clock p. m. the parties and their attorneys were present and testimony was taken before Francis A. Cochran, judge pro tempore. The minutes further set forth that the court found that the wife wilfully refused to deliver the children to the husband or to tell him of their whereabouts in accordance with the order theretofore made; that she has the ability to comply and wilfully refuses to do so. She was found guilty of contempt and sentenced to be confined in the county jail until she complies with the order by causing the children to be delivered to the husband. She was remanded to the sheriff to commence sentence forthwith. The commitment to the county jail was signed April 19, 1956, by Francis A. Cochran, Judge pro tem.

The wife, petitioner here, thereupon applied for a writ of habeas corpus. At the time of the hearing it was stipulated that the petition might be deemed a traverse.

The record does not indicate that there was any stipulation of the parties or their attorneys that Commissioner Cochran could act as a judge pro tempore to hear the contempt proceedings; neither is there any order of any judge in the record wherein Commissioner Cochran was appointed as a judge pro tempore to hear the contempt proceedings.

[1-3] It was said in In re Lake, 65 Cal. App. 420, at pages 423-425, 224 P. 126, at page 127:

> "The statute, section 1222 of the Code of Civil Procedure, declares that the judgment in cases of contempt is

final and conclusive. Thus, one who has been adjudged guilty of contempt has but two remedies—*habeas corpus* and *certiorari*. The scope of the inquiry which the court can make upon either *habeas corpus* or *certiorari* is precisely the same. [Citing cases.] While neither writ is one of error, both extend to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 75, 29 A.L.R. 127. This inquiry, of course, cannot go beyond the question of jurisdiction and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends not only to the entire record but to the evidence itself. [Citing cases.]

* * * * * *

[4–7] "'* * * A contempt proceeding is not a civil action, either at law or in equity, * * * but is a separate proceeding of a criminal nature and summary character [citing cases], in which the court exercises but a limited jurisdiction. * * * The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient.' Following this statement of principles the court then announces the rule in such clear and succinct language that we can do no better than quote it in full: 'While the writ of *certiorari* is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. [Citing cases.] *In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused* (Schwarz v. Superior Court, supra [111 Cal. 106, 43 P. 580]), *and no intendments or presumptions can be indulged in aid of their sufficiency*. (Frowley v. Superior Court, supra [158 Cal. 220, 110 P. 817].) *If the record* of the proceedings, reviewed in the light of the foregoing rules, *fails to show affirmatively upon its face* the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. [Citing cases.]'"

[8] It is at once apparent in this case that Commissioner Cochran was not acting as a judge pro tempore by stipulation or appointment and consequently was entirely without jurisdiction to make the order that the wife be committed to jail.

For the reasons given the order of commitment is annulled and the petitioner discharged.

WHITE, P. J., and DORAN, J., concur.

141 Cal.App.2d 304

Joe F. NOVO, Jr. and Alvin F. Novo, co-administrators of the Estate of Emilia Novo, Deceased, substituted in the place and stead of Emilia Novo, Plaintiffs and Appellants,

v.

HOTEL DEL RIO, a partnership, consisting of Manuel C. Valine, Arthur A. Valine and Robert Valine, and Joe F. Novo, Sr., Defendants and Respondents.

District Court of Appeal, Third District, California.

May 4, 1956.

Rehearing Denied May 31, 1956.

Hearing Denied June 27, 1956.

Action brought by wife against husband and others to recover community personal property which husband had transferred for gambling debts without wife's written consent. The Superior Court, Sacramento County, Ralph McGee, J., entered judgment for defendants and the co-administrators of the wife's estate appealed. The District Court of Appeal, Van Dyke, P. J., held that community property given by husband for gambling debt could be recovered by the wife from person receiving it.

Judgment reversed as to one defendant, otherwise affirmed.

1. Gaming ⚷49(3)

In action by wife to recover community property transferred by husband for gambling losses without wife's written consent against a hotel and its two owners, evidence sustained findings rejecting wife's claim that hotel partnership operated a house game. West's Ann.Civ.Code, § 172.

2. Gaming ⚷49(3)

In action by wife to recover community property transferred by husband for gambling losses without wife's written consent, where husband paid all the losses by check to one of four persons playing poker, evidence sustained findings rejecting wife's claim that the recipient of the money was running a banking game, acting as banker, and that he was wholly responsible for husband's losses. West's Ann.Civ.Code, § 172.

3. Gaming ⚷19(1)

Although community funds had been disposed of without wife's consent by husband's checks to pay his gambling losses, wife could not recover from recipient of checks community funds which had, upon husband's direction, passed from recipient to others who had won from husband but who had not been made parties to the suit. West's Ann.Civ.Code, § 172.

4. Gaming ⚷19(1)

Husband's gambling debt was unenforceable and his transfer of community funds, without wife's consent, to pay his gambling losses was without consideration, doctrine of unjust enrichment was inapplicable, and wife could recover the community funds from the recipient gambler. West's Ann.Civ.Code, § 172.

5. Gaming ⚷19(1)

As no liability can be incurred by virtue of a gambling contract, such contract can never be a consideration for a new contract.

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6. Husband and Wife ⚷265

A transfer of community property by the husband without a valuable consideration and without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband. West's Ann.Civ.Code, § 172.

Lewis, Lewis & Lewis, Sacramento, for appellant.

Anthony J. Kennedy, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

Emilia Novo brought this action to recover, as the wife of Joe F. Novo, Sr., community property which she alleged he transferred without valuable consideration and without her written consent, in violation of the provisions of Section 172 of the Civil Code. It is without dispute in the record that the transfer of which appellant complained was a transfer of community personal property of herself and her husband and that the transfer had its roots in a gambling transaction between her husband and Arthur Valine, Ed Emigh and Glenn Maxey. On June 26, 1952, the four men engaged in a game of draw low-ball poker; and when the game was over, Joe Novo had lost to the other players a total of $7,300. During the game he gave to Arthur Valine a check drawn on a Rio Vista bank in the sum of $5,300 and made out to cash. This check, after the game, Arthur delivered to Emigh and Maxey, and they cashed the same and divided it among them. On the day after the game, Joe Novo also gave a second check drawn on the same bank to Arthur Valine. This check Arthur endorsed, cashed, and from the proceeds retained $1,200 as his share of the winnings of the evening. He gave the rest to Emigh and Maxey, and they divided it between themselves as their final share of winnings.

[1, 2] By her complaint, appellant endeavored to hold the Hotel Del Rio, a partnership, composed of the father and brother of Arthur Valine, responsible for his losses on the theory that they were running a house game, but the findings of the trial court upon substantial evidence were against these allegations. She also sought to hold Arthur Valine as wholly responsible for Joe Novo's losses, claiming that he was running a banking game, acting as banker, and that, therefore, the total of Joe's losses were losses to Arthur. But the evidence and the findings are against this claim, also.

[3] It appears from the evidence that the game was an ordinary four-handed draw poker game of the low-ball variety; that it had lasted from around 10 P. M. until 6 A. M. the following morning, during which time many hands were played; and that when Joe Novo gave the checks to Arthur Valine he did so with the authorization to Arthur to pay his losses to those who had won money from him during the evening, including his losses to Arthur. Under no consideration, therefore, could plaintiff and appellant recover from Arthur the community funds which had, upon Joe's direction, passed to Emigh and Maxey who were not made parties to the suit. It still remains, however, to determine whether or not she could recover from Arthur the money which her husband paid him.

Whether or not the funds which Joe dispersed were community funds of himself and appellant, his wife, was not expressly found by the trial court. It appears that this was for the reason that the court considered Joe had received a valuable consideration for the transfer of funds and, therefore, needed not the written or other consent of appellant even though the funds were community. However, from the record there is no conflict on the subject of the status of the funds, and it must be taken that they were community funds.

The trial court found as follows: That on or about June 26, 1952, the day following the game, Joe F. Novo paid to Arthur Valine a sum of money as losses by said Joe F. Novo and winnings by said Arthur A. Valine in a game of poker held in the premises of the Del Rio Hotel; that it was not true that said sum of money so paid and lost by the defendant Joe F. Novo was paid by him without valuable consideration; that it was true that defendant Arthur Valine furnished a good and valuable consideration for all money paid to him; that said Arthur Valine has held and kept and does now hold and keep the said losses of the said Joe F. Novo paid to him as aforesaid. On the foregoing findings the court concluded that appellant was entitled to take no judgment whatever against any of the defendants.

[4, 5] The finding that, when he transferred the funds to Arthur Valine in payment of gambling losses to Arthur, Joe Novo received a valuable consideration therefor furnished by Arthur, is without support in the evidence and the law. Tokar v. Redman, 138 Cal.App.2d 350, 291 P.2d 987. When Joe Novo left the game and went home it was true that he had suffered gambling losses and in that sense owed gambling debts to those who had won from him. However, any obligation arising therefrom was, of course, wholly unenforceable by reason of the unlawfulness of the transaction out of which the debts arose. Consequently, his discharge of his gambling debt to Arthur Valine was wholly without consideration. "As no liability can be incurred by virtue of a gambling contract, such contract can never be a consideration for a new contract." 38 C.J.S., Gaming, § 3, page 79. By acceptance of the check, Arthur Valine gained no title thereto and equally had no title to the funds which later the check produced and which, as the court found, he still holds. People v. Rosen, 11 Cal.2d 147, 149–150, 78 P.2d 727, 116 A.L.R. 991.

We hold that the transfer to Arthur of community funds of Joe Novo and the appellant was, within the meaning of Section 172 of the Civil Code, a transfer of community funds without the consent, written or otherwise, of the appellant and without the receipt by the husband of valuable or any consideration for that transfer.

The trial court apparently based its judgment wholly upon its finding that the transfer which the appellant attacked was a transfer for a valuable consideration, and that, therefore, it could not be set aside by the action of the wife. But respondents argue that even if that basis for the judgment be unsound, nevertheless, because of the unlawfulness of the transactions between Joe and Arthur, Joe cannot recover moneys paid for his losses, and that the law will not permit appellant, though innocent, to recover the community property and restore it to the community because to do so would be to enable Joe thus indirectly to obtain relief which directly the law would not afford him. A parallel is sought to be drawn between such a situation and that presented where a wife, tortiously injured, seeks to recover damages, and the defense is interposed and sustained that her husband had been guilty or contributory negligence. Such cases are inapplicable. They are based on the doctrine of unjust enrichment under which the negligence of one spouse is imputed to the other in order to prevent the negligent spouse from profiting by his own wrong. Flores v. Brown, 39 Cal.2d 622, 630–631, 248 P.2d 922; Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257. In the instant case, the husband, although benefiting by the wife's recovery, would not thereby be unjustly enriched. There would be but a return to the community of that which was unlawfully taken from it. The restoration of that which was unlawfully obtained does not result in the husband profiting from his own wrong. It merely places the parties in the positions which they occupied prior to the transaction. No one is penalized nor is anyone unduly enriched. The enforcement of the innocent wife's statutory right is neither inequitable nor unjust.

[6] It is well established that a transfer of community property by the husband without a valuable consideration and without the consent of the wife may be set aside in its entirety by the wife during the lifetime of her husband. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221. After his death, the widow may set aside one-half of such unauthorized transfers or may recover one-half of the value thereof from her husband's estate. Trimble v. Trimble, 219 Cal. 340, 26 P.2d 477; Fields v. Michael, 91 Cal.App.2d 443, 205 P.2d 402. This is true even if the husband's gifts were the result of an illicit relationship. In re Estate of McNutt, 36 Cal.App.2d 542, 98 P.2d 253. The taint of the husband's immoral association with his donee does not preclude the innocent wife from enforcing her statutory right to recover the community property which the husband has disposed of without her consent. The protection contemplated by Section 172 of the Civil Code is unqualified.

We see no reason why the plain mandate of the statute should not prevail in this case.

In so far as the judgment appealed from denies recovery of the funds paid to, and retained by, Arthur Valine, it is reversed. In all else it is affirmed.

SCHOTTKY, J., and McMURRAY, J. pro tem., concur.

140 Cal.App.2d 657

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Robert Dorsey SAYLES, Defendant and
Appellant.
Cr. 5549.**

District Court of Appeal, Second District,
Division 2, California.
April 10, 1956.

Defendant was convicted of possession of narcotics. The Superior Court of Los Angeles County, Lewis Drucker, J., entered judgment on the verdict and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that where defendant was known as a narcotics addict and was suspected of selling narcotics, and paid informant informed police officers that defendant was selling narcotics and had some in his possession, and informant was given money with which he purchased narcotics from defendant, and police officers, without obtaining a warrant, went to defendant's home where they announced that they were police officers and made forcible entry and found narcotics, officers had reasonable ground to believe that defendant had possession of narcotics and they had the right to make a forcible entry for purpose of an immediate arrest.

Judgment and order affirmed.

1. Arrest ⚷68

Where defendant was known as a narcotics addict and was suspected of selling narcotics, and paid informant informed police officers that defendant was selling narcotics and had some in his possession, and informant was given money with which he purchased narcotics from defendant, and police officers, without obtaining a warrant, went to defendant's home where they announced that they were police officers and made forcible entry and found narcotics, officers had reasonable ground to believe that defendant had possession of narcotics and they had the right to make a forcible entry for purpose of an immediate arrest.

2. Searches and Seizures ⚷3(1)

Where defendant was known as a narcotics addict and was suspected of selling narcotics, and paid informant informed police officers that defendant was selling narcotics and had some in his possession, and informant was given money with which he purchased narcotics from defendant, and police officers, without obtaining a warrant, went to defendant's home where they announced that they were police officers and made forcible entry and found narcotics, search was not unlawful because of failure of officers to comply with section of Penal Code providing that to make an arrest, peace officer may break open door or window of house after having demanded admittance and after having explained purpose for which admittance is desired. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 844.

Ellery E. Cuff, Public Defender, J. Stanley Brill and Noel B. Martin, Deputies Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Appellant, convicted of possession of narcotics, § 11500, Health & Safety Code, appeals upon the theory that the only evidence against him was obtained through an unreasonable search and seizure. His counsel makes two points, (1) that a search without a warrant cannot be made where the police have had ample opportunity to procure a search warrant and have failed to do so, (2) that a lawful search cannot be made when § 844, Penal Code is violated—through forcible entry without "having demanded admittance and explained the purpose for which admittance is desired." Neither contention can be sustained.

Defendant did not testify. The evidence given by the police officers is without contradiction except in certain inconsequential particulars. The arrest and search occurred on April 15, 1955, at defendant's residence in Los Angeles. One of the arresting officers was Frank A. Mullens, who had known defendant for some time, having interrogated him two years before the instant arrest in the course of a narcotic investigation. At that time defendant said that he had been in jail for addiction and had just recently been released. The officer then observed that he had fresh needle marks on his arms, his eyes were definitely pin-pointed and not reacting to light, and he was under the influence of a narcotic. This information was relayed by Mullens to his fellow officers, Hill and Van Court, at the beginning of an investigation which led to defendant's arrest in April, 1955. This scrutiny of defendant's conduct started about the first of April. The officers had prior information that defendant was possessing and selling narcotics; they placed his home under surveillance at various times looking for entry or departure of users of narcotics; but they did not obtain information which they deemed adequate to support an arrest until the day it occurred. Early that morning a paid operator or informer advised officer Hill that defendant was not only selling narcotics but then had some in his possession. Hill testified: "This particular operator that I have reference to now was a paid informant, and it was the operator's duty to find narcotic information and relay that information to us, and we in turn investigate it and see if there was anything that warrants further action or not." Hill gave him $5 and told him to make a preliminary purchase. In an hour or so the informant reported to Hill that he had bought one capsule at defendant's house and that defendant was holding narcotics in his pocket. He presented the capsule to Hill, who identified the contents as heroin or some derivative and preserved the same as evidence. Hill, Mullens and Van Court soon met near defendant's home; Hill told them of the operator's report and production of the capsule. Without obtaining a search warrant they then went to the house, Hill and Van Court to the front door and Mullens to the rear. Hill testified that the front door was open but the screen door was probably fastened; he saw a woman in the front room, said "Police officers," and entered forthwith. In doing so he pulled the eye of the fastener out of the door, thus effecting a forcible entry. He walked through the front room to the bedroom where defendant was standing near the bed, told him they were police officers and not to move. On top of a dresser next to the bed was a plastic bag containing a hypodermic outfit and syringe. Search of the person of defendant yielded from the pocket of the trousers he was wearing a rubber finger stall which contained 28 capsules, the contents of which were later identified by the police chemist as heroin and received in evidence. Further search of the house yielded nothing evidentiary. Defendant there made a full and voluntary confession of possession and use of the drug.

[1] No claim is made that the information received from the particular informer could not be accepted by the officers as reliable (concerning which matter see Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36.[1] The officers knew him, he was "an operator working for us." Given money for the purpose, he promptly made good upon his information, effected a purchase from defendant, reported that the sale was made at defendant's home and produced a capsule which officer Hill identified as heroin. With the background of known addiction on defendant's part, previous information "that he was possibly selling narcotics," knowledge of the persistence of addiction which has once fastened upon a victim (defendant), the officers had reasonable ground to believe that defendant was then committing the crime of possession of narcotics, and the trial judge was justified in so finding.

When entering the house officer Hill acted quickly in order to forestall destruction of evidence that he reasonably believed to be there. He testified: "At the time I was —my main purpose was getting in there and getting to this particular defendant before he could get to the bathroom and flush whatever evidence he had down the toilet, which is quite common. We meet that quite often. By the time we get to the defendants they are usually near a bathroom and they go to a bathroom and flush it down the toilet." He had a right to make a forcible entry for the purpose of an immediate arrest. See People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Martin, 45 Cal.2d 755, 290 P.2d 855. This carried with it a right to search the person and premises of defendant.

The claim that failure to procure a search warrant, given reasonable time so to do, precluded a search as an incident to the arrest, was rejected by the Supreme Court in People v. Winston, 46 Cal.2d 151, 293 P.2d 40, 47. The court there said: "Defendant unavailingly argues thtat here the police officers had ample time to procure a search warrant and therefore such warrant was required in order to validate the search and seizure of the incriminating evidence at the time of his arrest. Trupiano v. United States, 334 U.S. 699, 708, 68 S.Ct. 1229, 92 L.Ed. 1663. In United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653, it was held that a search of the defendant's premises incident to his lawful arrest at those premises was not unreasonable." In the cited case of United States v. Rabinowitz, 339 U.S. 56, 65–66, 70 S.Ct. 430, 435, 94 L.Ed. 653, it was observed: "It is appropriate to note that the Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable for the officers to procure one. The mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches. It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant. Upon acceptance of this established rule that some authority to search follows from lawfully taking the person into custody, it becomes apparent that such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required. To the extent that Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."

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[1] The fact that the officers refused to disclose at the trial the identity of this informant is not made the basis of any argument by appellant's counsel.

[2] Section 844, Penal Code, provides: "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired." Failure to comply with it does not make the search unlawful in circumstances such as those disclosed here. This was decided in People v. Maddox, supra, 46 Cal. 2d 301, 294 P.2d 6, parts of which decision we now quote: "The question is thus presented whether or not evidence obtained by a search incident to an arrest must be excluded when the officer has reasonable cause to make the arrest and search but fails to comply with the requirements of section 844 [46 Cal.2d at page 304, 294 P.2d at page 8]. * * * Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844 [46 Cal.2d at page 306, 294 P.2d at page 9]. * * * Moreover, since the officer's right to invade defendant's privacy clearly appears, there is no compelling need for strict compliance with the requirements of section 844 to protect basic constitutional guarantees. Cf. People v. Boyles, supra, 45 Cal.2d 652, 290 P.2d 535; People v. Cahan, supra, 44 Cal.2d 434, 442, footnote, 282 P.2d 905. We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." 46 Cal.2d at page 306, 294 P.2d at page 9.

The judgment and the order denying a new trial are affirmed.

MOORE, P. J., and FOX, J., concur.

140 Cal.App.2d 651

Sybil MOYER and Edward Jensen, individually and as copartners doing business under the name and style of Jensen's, Petitioners and Appellants,

v.

STATE BOARD OF EQUALIZATION of the State of California, Respondent.

Civ. 16899.

District Court of Appeal, First District, Division 2, California.

April 10, 1956.

Proceeding for peremptory writ of mandate in proceedings to review order of State Board of Equalization affirming on reconsideration its prior order suspending liquor licenses for sales to minors. The Superior Court, County of Alameda, A. T. Shine, J., denied the writ and an appeal was taken. The District Court of Appeal, Kaufman, J., held that under the section of the Government Code requiring an administrative hearing in a contested case to be presided over by a hearing officer, the Board exceeded its jurisdiction by reconsidering the case without a hearing officer though the original hearing was before a hearing officer.

Reversed with directions.

1. Intoxicating Liquors 🔑108(9)

Under section of Government Code requiring administrative hearing in contested case to be presided over by hearing officer, State Board of Equalization exceeded its jurisdiction, in case wherein liquor licenses had been suspended, by reconsidering case without hearing officer though original hearing was before hearing officer. West's Ann.Gov.Code, §§ 11512(b), 11521.

2. Intoxicating Liquors 🔑108(9)

At hearing after reconsideration granted in case wherein liquor licenses had been suspended by State Board of Equalization, it was not necessary that all evidence should be newly introduced and new findings and new decisions made, and Board's action, after reconsideration, in affirming its prior order which adopted proposed decision of hearing officer, was not improper with respect to procedure. West's Ann.Gov.Code, §§ 11512, 11521.

3. Intoxicating Liquors 🔑108(9)

At hearing before State Board of Equalization, in case wherein liquor licenses had been suspended, decision on reconsideration was not vitiated by Board's alleged failure to read transcript of evidence before hearing officer. West's Ann.Gov.Code, §§ 11512, 11521.

4. Evidence 🔑86

Where, at hearing on application for writ of mandate, there was no evidence showing that members of State Board of Equalization had not studied transcript of case wherein liquor licenses had been suspended, and there was no evidence or stipulation rebutting presumption that official duty had been regularly performed, such presumption sustained conclusion that Board had duly considered the evidence. West's Ann.Gov.Code, § 11521; West's Ann.Code Civ.Proc., §§ 1094.5 and (b, c), 1963, subd. 15.

5. Intoxicating Liquors 🔑108(5)

Evidence at hearing before State Board of Equalization in case wherein liquor licenses had been suspended sustained Board's finding that liquor store owners, by certain bartender-employee, sold alcoholic beverages to minors. West's Ann. Gov.Code, § 11521; West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a)

6. Evidence 🔑317(2)
Intoxicating Liquors 🔑108(5)

At hearing before State Board of Equalization, minor's testimony that he bought beer from bartender behind bar and whiskey from same bartender who worked there all night, another minor's testimony that minors ordered beer at bar and saw bartender serve it, and bartender's testimony that he was bartender that night, was not hearsay, and, under section of Government Code pertaining to evidence and examination of witnesses before administrative agencies, testimony as to prior identification of bartender by the minors was then admissible to supplement such direct evidence. West's Ann.Bus. & Prof.Code, §§ 24200(b), 25658(a); West's Ann.Gov.Code, §§ 11513, 11521.

J. Albert Hutchinson, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment denying appellants a peremptory writ of mandate in proceedings under section 1094.5, Code of Civil Procedure, to review an order of the State Board of Equalization, hereinafter called the Board, affirming after reconsideration granted its prior order, suspending appellants' on-sale and off-sale alcoholic beverage licenses for 15 days because of sales to minors.

The introductory accusation was in two counts alleging in substance: 1) that the licensees on June 26, 1954 through their bartender-employee, Herbert J. Collins sold beer to three named minors and permitted them to consume it on the licensed premises in violation of sections 25658(a) and 24200 (b) of the Bus. & Prof. Code (Alcoholic Beverage Act, hereinafter called the ABC Act); 2) that the licensees on June 26, 1954 by the same bartender employee sold to one of said minors, Alexander Francis Boyle, one ½ pint bottle of whiskey in violation of section 25658(a) of the ABC Act. A hearing was had before a hearing officer at which the licensees were present in person but were not represented by counsel. The hearing officer in his proposed decision made findings to the effect that the allegations of the first count were true as to two of the minors, not as to the third, who was not available to testify and of whose age there was no competent evidence, and that the allegations of the second count were true. He recommended suspension of licenses for 15 days on each count, to run concurrently. The proposed decision was adopted by the Board, but on appellants' petition a reconsideration was granted. At the hearing on reconsideration, three members of the Board without a hearing officer were present. Appellants were represented by counsel. Counsel for the Board summarized the evidence before the hearing officer. The bartender Collins was heard as a witness for appellants, after which the order imposing 15 days suspension was affirmed.

In the review proceedings the Superior Court found certain basic allegations of appellants' petition to be untrue and by separate findings decided each point to be inquired into under sections 1094.5(b) and (c) of the Code of Civil Procedure against appellants.

Appellants contend that the Board proceeded in violation of the manner required by law and was without jurisdiction so to proceed in several respects.

[1] 1. It is contended that the law required the presence of a hearing officer at the hearing on reconsideration because section 11512 of the Government Code requires every hearing in a contested case to be presided over by a hearing officer. Respondent asserts that once a hearing officer, as in this case, presided over the original hearing and presented his proposed decision his duties are terminated. This may well be true if no further hearing in the matter takes place and no further testimony is introduced. However, respondent does not cite any provision of the Code which states an exception to the general rule of section 11512, supra, in case the Board in its discretion after ordering reconsideration permits argument and the introduction of additional testimony. In such a case there is a "hearing" (the Board itself gave the licensees notice of the granting of a "hearing" pursuant to section 11521 of the Government Code). Section 11512(b) reads in part: "When the agency itself hears the case the hearing officer shall preside at the hearing, rule on the admission and exclusion of evidence, and advise the agency on matters of law; * * *." The importance of said task of the hearing officer to overcome the lack of procedural knowledge of a presiding lay member of the Board and his ensuing reliance on the advice of the prosecuting agency attorney is clearly expressed in the comments of the Judicial Council on the proposed Administrative Procedure Act in the Council's Tenth Biennial Report, pp. 19–20. It has been held accordingly that "The hearing officer is needful for the pur-

pose of conducting all hearings after such fashion as will safeguard the legal rights of those concerned." Bartosh v. Board of Osteopathic Examiners, 82 Cal.App.2d 486, 492, 186 P.2d 984, 987; National Automobile & Casualty Ins. Co. v. Downey, 98 Cal.App.2d 586, 592, 220 P.2d 962. There is clearly such need for expert and impartial legal guidance also when the Board receives evidence on a hearing on reconsideration. We hold that in the absence of an express statutory exception the provision of section 11512 requiring a hearing officer to preside was applicable to the hearing on reconsideration in this case and that in holding said hearing without a hearing officer the Board did not proceed in the manner required by law and acted in excess of its jurisdiction. National Automobile & Casualty Ins. Co. v. Downey, supra. For this reason the peremptory writ of mandate should have been granted.

[2] 2. Appellants next assert that the hearing after reconsideration granted is a hearing de novo, and that therefore all evidence should have been newly introduced and new findings and a new decision made. There is no basis whatever for this contention. Section 11521 of the Government Code reads in part: "(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. * * * (b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to a hearing officer. * * *"

The possibility of reconsideration on the pertinent parts of the record without any new evidence is inconsistent with the alleged requirements of a hearing de novo in the above sense. Reconsideration can, dependent on the provisions regulating it, be a proceeding de novo or part of continuing proceedings leading to the final determination of the case. Compare Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 317, 144 P.2d 4. The latter is the case under section 11521, supra. Yee v. State Board of Equalization, 16 Cal.App.2d 417, 60 P.2d 322, on which appellants rely is not in point because it relates to a repealed section 45 of the Alcoholic Beverage Control Act of 1935, which expressly required a rehearing de novo of the entire matter if the licensee filed a petition for rehearing.

In the procedure under section 11521 the prior record remains before the Board. We see then no reasonable objection to the procedure here followed by which the Board, after reconsideration, affirmed its prior order which adopted the proposed decision of the hearing officer. The findings contained in the proposed decision were in that manner adopted as the findings on the final determination of the Board after rehearing. The circumstance that respondent admitted and the court found true appellants' allegation that the granting of the reconsideration placed the issues of the accusation at large is without importance. Said expression is not necessarily in conflict with our above holding and at any rate the question is not one of fact but of law.

[3, 4] 3. It is contended that the decision on reconsideration was vitiated by the alleged fact that the Board did not read the transcript of the evidence before the hearing officer. It has been held in Cooper v. State Bd. of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630, 633, 18 A.L.R.2d 593, with respect to Government Code section 11517 (c) "that an agency member who exercises his own independent judgment on the case * * * must be acquainted with the record but need not be physically present when the evidence is produced." In Hohreiter v. Garrison, 81 Cal.App.2d 384, 398, 184 P.2d 323, it is said that in such a situation the agency must "review" the evidence. To be acquainted with or review evidence does not necessarily require the reading of a full transcript of the evidence. Chosick v. Reilly, 125 Cal.App.2d 334, 337, 270 P.2d 547. In Power v. Industrial Acc. Comm., 123 Cal.App.2d 591, 595, 267 P.2d 85, on which appellants rely, the question whether the agency could have made its decision without examining a verbatim record of the prior evidence if a summary of the evidence presented to them had been accurate was expressly left undecided, and the case solely

decided on the ground of the material inaccuracy of the summary. In the present case, as in Chosick v. Reilly, supra, the summary of the prior evidence was accurate in all material points. Appellants' attorney did not oppose but invited the summarizing of the record by counsel of the Board and at the end of the summary pointed out one alleged minor factual error only in said summary, to wit that the minors were not 19 but nearer to 20. However, as in the Chosick case, we need not decide whether an accurate summary of the evidence is a sufficient basis on which the Board may render a decision, because the presumption that official duty has been regularly performed, Code Civ.Proc. § 1963, subd. 15, sustains the conclusion that the Board has duly considered the evidence, Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 931, 229 P.2d 27; compare Lumbermen's Mut. Cas. Co. v. Industrial Acc. Comm., 29 Cal.2d 492, 501, 175 P.2d 823 and at the court hearing there was no evidence or stipulation whatever rebutting said presumption or showing that prior to the hearing the members of the Board present had not studied the transcript.

[5, 6] 4. Appellants' contention that the decision insofar as it finds that appellants sold alcoholic beverage to minors "by their bartender-employee, Herbert J. Collins" is not supported by legal evidence is without merit. It is not true that with respect to the identity of Collins as the bar man who actually sold to the minors there was no other evidence than hearsay evidence concerning prior identification of Collins by the minors, although it is true that before the referee one of them only was asked to identify the bartender and he then said that he was not sure. Even if we assume that the testimony of Collins himself as well as that of the liquor control officer Knust that the three boys identified Collins is hearsay, there remains the testimony of the minor Boyle that he bought the beer from the bartender behind the bar and the whiskey from said bartender who worked there all night; of the minor Schuchert that both he and Boyle ordered beer at the bar and that he saw the bartender serve it and of Collins that he was the bartender that night. None of this evidence was hearsay. Under section 11513 of the Government Code the testimony as to prior identification was then admissible to supplement the above direct evidence.

5. Finally, appellants complain of the inaccuracy of the findings, which are partly in conflict with admitted facts stated in the Reporter's transcripts of the administrative hearings and partly conclusions of law. It is true that the findings made by reference to the pleadings are not always accurate. Although there is no showing of prejudice, considering that the short transcripts do not leave room for substantial disputes of fact and said defects would therefore in themselves not justify reversal, Alonso v. Hills, 95 Cal.App.2d 778, 785, 214 P.2d 50, now that reversal and partial amendment of findings is necessitated by our upholding of appellants' first grievance, further correction of the findings so as correctly to accord with the record is in order.

The judgment is reversed with directions to the trial court to amend its findings and conclusions of law in accordance with the opinions herein expressed and to grant a peremptory writ of mandate commanding the Department of Alcoholic Beverage Control, as having succeeded to the powers and duties of the State Board of Equalization in this matter, to set aside the order made by said Board in this matter on reconsideration on November 18, 1954, and to proceed from the order of said Board granting reconsideration in a manner not inconsistent with the opinions herein expressed.

DOOLING, J., concurs.

140 Cal.App.2d 528

Thomas J. McCAFFREY, Plaintiff and Appellant,

v.

Norbert CRONIN, Defendant and Respondent.

Civ. 8719.

District Court of Appeal, Third District, California.

April 5, 1956.

Action for declaration of the parties' rights and interests in commissions paid by a life insurance company to defendant as soliciting agent forwarding to company application for employees group insurance policy issued thereby to a labor union. From a judgment of the Superior Court, Solano County, Harlow V. Greenwood, J., for defendant, plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that defendant, having undertaken duty of union's insurance broker in servicing insurance plan, with full knowledge of provision in supplemental agreement between employers and union that employers' insurance consultant should be equitably compensated from commissions paid broker, impliedly contracted for equitable division of commissions with plaintiff as employers' insurance consultant, though defendant was entitled, under company's rules, to payment of full commission for placing insurance.

Judgment reversed with instructions.

1. Insurance ⚷105

One undertaking duty of labor union's insurance broker in servicing employees' group insurance plan, with full knowledge of provision in supplemental agreement between employers and union for equitable compensation of employers' insurance consultant from commissions paid broker by company issuing policy, impliedly contracted for equitable division of commissions with such consultant, though broker, as soliciting agent filing application for insurance with company, became entitled, under its rules, to payment of full commission for placing insurance. West's Ann.Civ.Code, § 1621.

2. Work and Labor ⚷4(2)

Intention to pay and expectation of compensation for services rendered may be inferred from conduct of parties concerned, where equity so requires, as well as from direct communications between parties. West's Ann.Civ.Code, § 1621.

3. Contracts ⚷4

An "implied contract" is one not expressed by parties thereto, but gathered from facts showing their mutual intent to contract. West's Ann.Civ.Code, § 1621.

See publication Words and Phrases, for other judicial constructions and definitions of "Implied Contract".

4. Contracts ⚷4

Where a party confers a benefit, not intended as a gratuity, on another with his assent, law implies promise by party receiving benefit to pay reasonable value thereof. West's Ann.Civ.Code, § 1621.

5. Work and Labor ⚷4(2)

When a person renders services, from which another derives a benefit, though there is no express contract or agreement to pay therefor, presumption of law arises from proof of such services that person enjoying benefit thereof is bound to pay what they are reasonably worth.

6. Contracts ⚷4

The doctrine of implied contract is founded on doctrine of unjust enrichment. West's Ann.Civ.Code, § 1621.

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O'Hara, O'Hara & Healy, Vallejo, for appellant.

Carroll, Davis & Burdick, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of the defendant in an action brought against him by plaintiff to have the rights and interests of the parties declared in respect of certain commissions paid defendant as soliciting agent for an employee group insurance policy issued to Retail Clerks' Union, Local No. 373 of Solano and Napa Counties, by Occidental Life Insurance Company.

Mr. Stanley Lathen, during the period here involved, was the local secretary of the union, with headquarters in Vallejo, and defendant, hereinafter called "respondent", was an insurance broker with offices in San Francisco and Los Angeles. Plaintiff, hereinafter called "appellant", during the same period was an insurance agent for Occidental Life Insurance Company. In February, 1950, Lathen, for his union, contacted respondent, requesting that he attend a membership meeting of the union and address the members with regard to group life, health and accident insurance plans. Respondent had participated in negotiating several such plans on behalf of unions in San Francisco. This respondent did and in April began to act in the status of insurance broker for the union in respect of the proposed group insurance plan. While these things were going on the union was also negotiating with employers of members of Local 373, it being contemplated by the union that the cost of the plan would be borne by the employers. Tentatively the negotiations had arrived at an employer charge per employee of $8.66 per month and the union, with the aid of respondent as its broker, began inviting various companies issuing group policies to, in effect, bid for the business by proposing benefits which could be purchased for the amount of money expected to become available. Among others submitting plans was Occidental Life Insurance Company and its plan was submitted through appellant, aided by staff employees of the company specializing in group insurance plans. Some 20 companies presented their plans and among others was Bankers' Life Insurance Company, for which respondent was a soliciting agent. That company had been the one whose group plan for such insurance had been obtained through the activities of respondent for the San Francisco unions. For some time respondent had not been an agent for Occidental, but became one in May of 1950. At a meeting of the representatives of the employers and the union, held on June 14, 1950, the Occidental plan based on the anticipated payment by the employers of $8.66 per month per employee was approved as the best plan offered and Occidental was informed of this action by the representatives of the two groups. It was well known to both groups that appellant, as agent for Occidental, had been quite active in attempting to sell the Occidental plan.

On June 15th, following the June 14th meeting, respondent, as agent for Occidental, obtained the signature of Lathen, as agent for the union to whom the policy was to be issued, to an application for the issuance of the proposed policy and as agent forwarded the application to Occidental. This action placed respondent in such a position that when the policy should be issued to the union he would be rightfully entitled to the payment to him by Occidental of the usual commissions for placing insurance business of that type. Before issuance of the policy, however, it was required that the union and the employer group should formalize their anticipated agreement concerning the issuance and maintenance of the policy, including payment by the employer group of the cost of the insurance based on the number of employee members of the union employed by each employer and including also such agreements as the two groups should make concerning implementation and operation of the plan. Before the policy was issued, therefore, a written agreement was executed between employers and union, called the "Supplemental Agreement". That agreement contemplated that each group should have the assistance of a qualified person in the operation of the plan. The employers selected appellant, naming him in the agreement as their "insurance consultant". The union selected respondent, calling him their "insurance broker". The agreement treated of the matter of compensating these assistants and paragraph 9 of the written document contained the following language: "The Employer party to this agreement may appoint an insurance consultant who shall have full access to the policies, insurance company records, and other pertinent material, in the same manner as shall the broker appointed by the Union. It is the intent of the parties that the consultant appointed by the Employer shall be equitably compensated from any commissions paid under this Plan, and such compensation shall be determined by the consultant appointed by the Employer and the Union broker between themselves, and the parties hereto shall be held responsible therefor in no manner." The employers and the union having thus agreed, Occidental issued its policy to the union as its insured and in due time began paying to respondent the regular commissions for the placement with it of the business. Although the record shows that appellant, deeming himself the procuring cause for the issuance of the policy so far as Occidental was concerned, made some claims to the company itself for a share at least in the commissions to be paid, the company took the position that in the regular course of its business it was bound to pay and would pay commissions only to the agent who forwarded the application for insurance to it. Thereafter appellant began this action against respondent, claiming that, in view of all the circumstances and under said paragraph 9 of the supplemental agreement between the employers and the union, he was entitled to receive from respondent, as commissions were paid, a share of those commissions. In his complaint he alleged that he was equitably entitled under said paragraph 9 to 80% of the commissions paid respondent as and when paid to him, it being appellant's claim that the amount of his work and services in obtaining the insurance and maintaining it and servicing the plan exceeded the work and services of respondent.

During the trial much testimony was addressed to the subject of the rights, if any, of the appellant under said paragraph 9 to demand and receive of respondent a share of the commissions paid respondent, which commissions were paid from time to time as the plan was kept in operation. The efforts of appellant and respondent in both effectuating the issuance of the policy and in implementing the plan thereafter as advisers to the employer and the union groups from the time each became active in the matter were the subject of much testimony, as was also the general customs of the insurance business in the payment of commissions and the division thereof among agents and brokers where more than one had participated in effecting insurance.

The problem presented to the trial court was two-fold. By reason of what had occurred and by reason of the execution of the supplemental agreement containing its paragraph 9, had there arisen in favor of appellant enforceable rights against respondent to share in commissions paid him? If that were so, then how should the provision for equitable division of commissions between the two men be construed and applied? By his complaint appellant had pleaded the facts and many of his allegations had been controverted by respondent's answer. These denials of facts pleaded had apparently been too broad. So when respondent was called under Section 2055 of the Code of Civil Procedure he was questioned as to whether or not certain denials were genuine and admitted that in many instances the allegations of facts as pleaded were true. He was then questioned about a tender he had made to appellant of 10% of commissions received to the date of the tender, which tender had been rejected. The following appears in the record:

> "Q. Mr. Cronin, I understood you to state prior to the recess this afternoon that upon making that tender of 10 per cent for the months of October and November, 1950 in the amount of $222.46, you did so because of the Supplemental Agreement between the employers and the union, and particularly with reference to paragraph 9 thereof, providing that the division would be equitable between the union broker and insurance consultant for the employers, is that true? A. Yes, sir.
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> "Q. Is your position then with respect to the complaint in this matter simply that while under the understanding Mr. McCaffrey is entitled to something that he is not entitled to any more than 10 per cent? A. That's right.
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> "The Court. That is entirely the position you are taking in this case? A. That is right, your Honor."

No objection or protest was made by his counsel nor was any attempt made thereafter to show he spoke inadvertently or by mistake. Thereafter much attention was paid during the trial to the question of what would constitute an equitable division under the circumstances of commissions received by respondent.

At the close of the trial the court found as follows: Between April 1, 1950 and about July 1, 1950, there was negotiated, executed and established between the union and the employers a plan of group insurance whereby the employers would pay the premiums, the members of the union would receive various benefits and the insurance would be written by Occidental. On June 14th the union applied to Occidental for a policy, the application designating the union as the policy holder and the respondent as the broker for the insurance. The application was accepted and the policy issued and Occidental thereafter paid to respondent all commissions earned by him as broker. Appellant did not perform any services for respondent of a character usually charged for nor did respondent avail himself of any services performed by appellant, the nature of which obligated him to compensate appellant therefor, and such services as had been performed by appellant at any time were performed for Occidental whose agent appellant was. The course of conduct between appellant and respondent had not manifested any agreement, express or implied, that appellant was rendering a service to respondent and that respondent intended to pay therefor. There existed no agreement between appellant and respondent under which appellant was entitled to be paid any money or compensation of any kind by respondent either from commissions paid him by Occidental or otherwise. Although in the supplemental agreement appellant became insurance consultant for the employers, neither the agreement between the union and the employers nor such designation of appellant as insurance consultant for employers created or resulted in any contractual relationship between appellant and respondent and the two had not in fact ever reached an agreement between them as to any compensation payable to appellant from commissions received by respondent. Although, after receipt of commissions, respondent had tendered 10% thereof to appellant and appellant had refused to accept the tender, the two had thereafter reached no agreement concerning any sharing by respondent with appellant of commissions received or to be received. Failing such an agreement, respondent was not obligated to pay anything to appellant under said paragraph 9 of the supplemental agreement. Thereafter judgment that appellant take nothing as against respondent was entered. Motion for new trial was made and denied and this appeal was taken.

[1-6] The judgment must be reversed. The record shows that from the beginning the group insurance plan required throughout its initiation and maintenance more than the issuance of a policy from Occidental to the union. It required a negotiated agreement between the union and the employers for the issuance of the group plan policy, and also for the performance after policy issuance of burdensome duties in the exercise of significant rights by each party to the supplemental agreement. The supplemental agreement between the employers and the union contemplated and treated of not only the issuance of the policy but of the maintenance and implementation of the plan, involving such matters as collection of premiums from participating employers, the opening of the plan to admit other employers and their employees, the processing of claims for benefits from hundreds of employees, and the keeping of proper records of such matters. The processing of claims would inevitably develop controversies as to the scope of coverage, the eligibility of the claimant for benefits and other matters requiring expert investigation and advice to both parties to the supplemental agreement. For instance, respondent testified that for a long period of time his duties as adviser to the union required the use of many employees by him in the performance of his duties as "broker" for the union under the supplemental agreement. Appellant likewise testified that he, too, had spent much time and put out much effort as "insurance consultant" for the employers. Without going further into detail it can be said that the policy and the

supplemental agreement constituted a package deal, of which paragraph 9 was a material component part. All the circumstances considered, it is apparent that to the initiation, maintenance and working of the group plan, the supplemental agreement was of vital import and that the provisions of paragraph 9 for the furnishing of the services of expert advice and aid to each group was of such import that without it the parties might not and probably would not have gone forward. When, therefore, and before any commission had been earned and with full knowledge of the provisions of paragraph 9 of the supplemental agreement, respondent undertook the duty of "broker" to the union in the matter of servicing the plan, knowing that the agreement gave to the employers the right to have for their benefit an "insurance consultant" who would be required likewise to service the plan, and when he did this with knowledge that under said paragraph 9 the "broker" to the union and the "insurance consultant" to the employers would neither receive compensation for their work under the supplemental agreement except and unless it was derived from commissions paid to him by Occidental, he bound himself by an implied contract to the equitable division of those commissions with the appellant. An implied contract is defined in the Civil Code as "one, the existence and terms of which are manifested by conduct." Civ.Code, sec. 1621. And the case law has established that intention to pay and expectation of compensation for services rendered may be inferred from conduct where equity requires it as well as from direct communications between the parties. Bean v. Wilson, 120 Cal.App.2d 58, 260 P.2d 134. It is said that an implied contract is one not expressed by the parties but gathered from the facts showing a mutual intent to contract. Travelers Fire Ins. Co. v. Brock & Co., 47 Cal.App.2d 387, 118 P.2d 25. Where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, the law implies a promise on the part of the party receiving the benefits to pay the reasonable value. The principle was thus stated in DeRosier v. Vierra, 109 Cal.App.2d 291, 294, 240 P.2d 660, 662: "'When services are rendered by one person, from which another derives a benefit, although there is no express contract or agreement to pay for the services, there is a "presumption of law" which arises from the proof of services rendered, that the person enjoying the benefit of the same is bound to pay what they are reasonably worth.'" The doctrine of implied contracts has its foundation in the doctrine of unjust enrichment. Anderson v. Doolittle, 97 Cal.App.2d 836, 218 P.2d 848.

We think the record here compels a finding that respondent and appellant entered into an implied contract for the division of commissions under the terms of paragraph 9 of the supplemental agreement. The quoted testimony of respondent is most significant in this regard. It is the claim of appellant that it amounted to a judicial admission tantamount to an amendment to the answer admitting that respondent was obligated to share commissions with appellant, leaving for determination by the court only the question of what constituted an equitable division thereof. We think it unnecessary to determine whether respondent's testimony amounted to such a judicial admission. Considering the whole record, we hold that the acts and conduct of the parties hereto created an implied obligation for division of commissions and that the findings of the court contrary to this conclusion lack support in the record.

In our view it is immaterial here that respondent as soliciting agent filing the application for insurance with Occidental became, under the company's rules, entitled, to the complete exclusion of appellant, to the payment from Occidental of the full commission for the placement of the insurance. He impliedly agreed that, notwithstanding he was so entitled to initially receive the commissions, said commissions as received should constitute a fund out of which the equitable demands of appellant and himself under the supplemental agreement should be discharged.

The judgment appealed from is reversed with instructions to the trial court to set aside its findings, conclusions and judgment heretofore entered herein and from the evidence already received, and such further evidence as the court shall receive, to determine what constitutes and shall constitute an equitable division between respondent and appellant, while they occupy their present statuses under paragraph 9 of the supplemental agreement, of commissions received by respondent from Occidental Life Insurance Company.

SCHOTTKY and PEEK, JJ., concur.

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140 Cal.App.2d 973

Leon C. WILLIAMS, Plaintiff and Respondent,

v.

CARUSO ENTERPRISES, INC., et al., Commercial Credit Corporation, Defendants and Appellants.

Civ. A. 8821.

Appellate Department, Superior Court, Los Angeles County, California.

March 27, 1956.

Action by buyer to recover money paid under contract of conditional sale of automobile sold without complying with requirements of West's Ann.Civ.Code, § 2982, governing conditional sales of motor vehicles, wherein defendants filed counterclaim for reasonable value of use of automobile while in plaintiff's possession. The Municipal Court of Compton Judicial District, Ralph C. Dills, J., rendered judgment for plaintiff, and defendants appealed. The Superior Court, Patrosso, J., held that seller was entitled to set off against amount which buyer was entitled to recover as money paid under illegal conditional sales contract an amount representing depreciation in value of automobile occasioned by use made of it by buyer while in his possession, exclusive of any depreciation resulting from general decline in market value of automobile and not exceeding amount which buyer was entitled to recover.

Judgment reversed and cause remanded for new trial upon specified issue.

1. Sales 🔑481

In action by buyer to recover money paid under contract of conditional sale of automobile, evidence supported finding that seller had not complied with statutory requirements governing conditional sales of motor vehicles, in that, among other things, copy of conditional sales contract was not delivered to buyer at time of its execution. West's Ann.Civ.Code, § 2982.

2. Sales 🔑464, 481

A contract of conditional sale of automobile which fails to conform to any of the statutory requirements governing conditional sales of motor vehicles is not enforceable by seller, and buyer may recover the consideration paid by him under such contract, notwithstanding amendment of statute removing former provision imposing additional penalty of three times amount paid by buyer on contract for violation of time price differential provisions of statute. West's Ann.Civ.Code, § 2982 (a–d).

3. Contracts 🔑139

A member of class for whose protection a statute is enacted is ordinarily not considered in pari delicto with those who violate statute, and consequently general rule that courts will not aid either party to an illegal bargain is not applicable.

4. Contracts 🔑138(1), 139

Where parties to illegal contract are not in pari delicto, guilty party may not maintain an action on contract, even though other party to contract has received and retained everything he was to receive thereunder, but innocent party may recover money paid by him under such contract.

5. Sales 🔑464

Contracts or transactions in violation of statutes enacted for protection of a particular class, such as statutory requirements governing conditional sales of motor vehicles, are merely voidable at instance of innocent party, who, may elect to treat such contract as valid and retain all benefits accrued and to accrue thereunder. West's Ann.Civ.Code, § 2982.

6. Sales ⚷481

Buyer cannot maintain action to recover money paid by him under contract of conditional sale of automobile on ground that such contract does not conform to statutory requirements governing conditional sales of motor vehicles, unless automobile has been repossessed by seller or buyer surrenders or offers to surrender possession of automobile. West's Ann.Civ.Code, § 2982.

7. Sales ⚷481

To permit automobile dealer guilty of violation of requirements of statute governing conditional sales of motor vehicles to set off rental value of automobile while in possession of buyer against amount which buyer is entitled to recover as money paid by him under illegal contract of conditional sale of automobile which does not conform to statutory requirements would be highly inequitable and contrary to statute. West's Ann.Civ.Code, §§ 2982, 3517.

8. Sales ⚷481

Automobile seller, who violated statutory requirements in conditional sale of automobile, was entitled to set off against amount which buyer was entitled to recover as money paid under conditional sales contract, amount representing depreciation in value of automobile occasioned by use made of it by buyer while in his possession, exclusive of any depreciation resulting from general decline in market value of automobile while in buyer's possession and not exceeding amount which buyer is entitled to recover. West's Ann.Civ.Code, § 2982.

9. Sales ⚷481

Buyer, being entitled to recover full value of automobile traded in as part payment on purchase price of automobile sold without complying with statutory requirements governing conditional sales of motor vehicles, is not entitled to set off reasonable value of use of automobile traded in by him against amount representing depreciation in value of automobile sold which seller is entitled to set off against amount which buyer is entitled to recover. West's Ann. Civ.Code, § 2982.

10. Appeal and Error ⚷1178(6)

Where judgment provided for recovery by buyer of money paid under contract of conditional sale of automobile sold without complying with statutory requirements governing conditional sales of motor vehicles without allowing seller any setoff on account of depreciation in value of automobile occasioned by use made of it by buyer, though seller erroneously claimed right to set off reasonable rental value of use of automobile while in buyer's possession, judgment should be reversed and cause remanded for new trial upon sole issue of amount of any setoff to be allowed seller, and seller should be permitted to amend answer accordingly. West's Ann.Civ.Code, § 2982.

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Roger J. Pryor, and Block, Toler, Bullock & Biggerstaff, Compton, for appellants.

Marvin Eugene Tincher, Long Beach, for respondent.

PATROSSO, Judge.

Plaintiff instituted this action to recover money paid by him on account of the purchase price of an automobile under a conditional sales contract which it is alleged did not conform to the requirements of Civil Code section 2982. Defendants' answer to plaintiff's complaint, in addition to a denial of the material allegations thereof, set up a counterclaim or offset for the reasonable value of the use of the automobile while in the possession of the plaintiff, which was alleged to be $7 per day or the total sum of $2,030. Upon the trial it was stipulated that the reasonable rental value of the car purchased by plaintiff was "in excess of but limited to $895.00" and that the reasonable rental value of the car which plaintiff had traded in on account of the purchase price "was in excess of but limited to $135.00."

By its findings the court found that compliance was not had with the requirements of section 2982, in that, among other things, no copy of the conditional sales contract was delivered to the plaintiff at the time of its execution, and without any finding as to the reasonable value of the use of either car, found that defendant was not entitled to an offset for the reasonable value of the use of the car purchased by plaintiff while in his possession, for the reason, as stated in the conclusions of law, that to do so "would constitute unjust enrichment of the defendants herein, at the expense of the plaintiff here" and because defendants violated the statute referred to this precluded "the awarding of any sum as value of the use of said automobile by plaintiff herein, in that to make such award would result in the award of an amount in excess of the value of the automobile in question and would be to permit the wrongdoer to profit by his own wrong, and further that such action would be harsh and inequitable and would vitiate the clear intendment of the legislature in the enactment of section 2982." Upon these findings the court entered judgment in favor of plaintiff for the sum of $656.68, together with interest thereon, and defendants appeal.

[1] Defendants contend (1) that the court's conclusion that the defendant did not conform to the requirements of section 2982 is not supported by the evidence, and (2) that the court erred in refusing to offset against the amount found due plaintiff the reasonable value of the use of the automobile purchased by plaintiff while it remained in his possession. As to the first contention we find that the evidence supports the trial court's finding of defendant's failure to comply with the statutory requirements with respect to the contract here involved.

In Carter v. Seaboard Finance Co., 1949, 33 Cal.2d 564, 203 P.2d 758, the Supreme Court directly held that section 2982 was enacted for the benefit and protection of purchasers of motor vehicles under conditional sales contracts; that conditional contracts not conforming to the requirements thereof are unenforceable by the seller, and as a purchaser is not to be regarded as in *pari delicto* with the seller, he may recover the consideration paid by him under the contract.

[2] It has, however, been urged upon us that it is only violations of subdivisions (c) and (d) of Civil Code section 2982 which render conditional sales contract of an automobile unenforceable and not those set forth in subdivisions (a) and (b) of that section, in support of which we are cited to Millick v. Peer, 1955, 130 Cal.App.2d Supp., 894, 896, 279 P.2d 212. But that case has now been repudiated by the court which decided it. Baum v. Aleman, 1956, 139 Cal.App.2d Supp. 929, 293 P.2d 162. Moreover, the same contention was urged and rejected by the Supreme Court in Carter v. Seaboard Finance Co., supra, 33 Cal.2d 564, at page 573, 203 P.2d 758, at page 764, where it is said: "Since section 2982(c) limiting the time price differential provides that a contract in violation thereof shall be unenforceable and that the buyer may recover three times the amount paid by him on the contract balance, it follows that the additional penalty applies to a violation of that subdivision only. The conclusion that a violation of other provisions renders the contract merely unenforceable is therefore not inconsistent." This holding was re-affirmed in Estrada v. Alvarez, 38 Cal.2d 386, 388, 240 P.2d 278. These decisions of the Supreme Court are therefore controlling upon us. Nor is their force as authority overcome by reason of the 1949 amendment removing the former provision imposing an additional penalty of three times the amount paid by the buyer on the contract balance for a violation of subdivision (c).

We pass, therefore, to a consideration of the second question which is one of more difficulty. The Supreme Court in the Carter case did not undertake to consider or decide whether in an action by a purchaser to recover the money paid by him under a contract which did not conform to the requirements of section 2982, the seller was entitled to offset against plaintiff's recovery any amount for the use of the vehicle while in the possession of the buyer. And since that decision, neither the Supreme Court nor any District Court of Appeal has discussed or decided this question save in the case of United States Credit Bureau v. Sanders, 1951, 103 Cal.App.2d 806, 230 P.2d 849, and that of Adams v. Caruso Enterprises, 1955, 134 Cal.App.2d 403, 285 P.2d 1022. In the course of the opinion in the first cited case, it is said 103 Cal.App.2d at page 816, 230 P.2d at page 855: "Cross-complainants [purchasers] were chargeable with the reasonable value of the use of the equipment [motor vehicles] while it was in their possession." A petition for hearing was denied by the Supreme Court, and in the circumstances, we would normally accept the statement of the District Court of Appeal as final, were it not for the fact that there the purchasers (cross-complainants) affirmatively pleaded the value of the use of the equipment, and this allegation having been defectively denied by the cross-defendants (sellers), no issue was thereby presented. Buyers having, by their pleading, in effect conceded that they were chargeable with the reasonable value of the use of the vehicle while in their possession, in the amount alleged by them, no question with respect thereto arose, and the statement in the opinion quoted above may well be considered as dictum. Moreover, some doubt appears to have been cast upon this statement of the District Court of Appeal by the decision of the Supreme Court in the later case of Estrada v. Alvarez, 1952, 38 Cal.2d 386, 388–391, 240 P.2d 278, wherein, in passing upon the sufficiency of a complaint by a buyer seeking to recover the money paid by him under a conditional sales contract for the purchase of an automobile, which contract was void for noncompliance with section 2982, it is held that the plaintiff need not plead compliance with the requirements of Civil Code section 1691, prescribing the conditions precedent to the right to rescind a contract (promptness and a restoration of or offer to restore "everything of value which he has received from him under the contract"). While it there appeared from plaintiff's complaint that the defendant had repossessed the vehicle, the complaint was silent as to any restoration or offer to restore the benefits derived by plaintiff from the use of the vehicle while in his possession. True, the Supreme Court did not there undertake to consider or discuss the right of the seller to plead an offset for the value of the use of the vehicle by him, but the necessary implication is that such an action is not to be regarded as one for rescission with its attendant strict requirement that plaintiff do or offer to do equity as a condition to its maintenance.

In Adams v. Caruso Enterprises, supra, 134 Cal.App.2d 403, 285 P.2d 1022, which was an action by a purchaser to recover from the seller the value of an automobile traded in by him and accepted as a down payment under a conditional sales contract of an automobile, which contract did not comply with section 2982, the trial court entered judgment in favor of the plaintiff against the seller for the value of the trade-in, less the difference between the rental value of the purchased automobile while in the possession of the buyer and the rental value for the same period of the automobile traded in by the plaintiff. No appeal was taken from the judgment by the plaintiff purchaser, and hence no question was presented as to the propriety of allowing the seller a set-off in the amount of the rental value of the purchased car. Defendant, however, did appeal, and assigned as error the action of the trial court in reducing the offset allowed it in the amount of the rental value of the automobile traded in by the plaintiff. Without undertaking to consider the propriety of allowing an offset to the seller in the amount of the rental value of the car sold to the plaintiff, the court disposed of defendant's contention in the following language, 134 Cal.App.2d at page 409, 285 P.2d at page 1026: "We perceive no violation of either justice or equity in the action of the court wherein the loss of use of the respective vehicles was equalized."

As a consequence, a considerable difference of opinion appears to prevail among the judges of the various municipal courts as attested by the number of cases before us in which the question has arisen as to the right of a seller to offset the reasonable value of the use of the vehicle while in the possession of the buyer. In the light of this we have been prompted to examine the question as though one of first impression to the end that, insofar as it lies in our power to do so, we may announce what we believe to be the true rule for the guidance of those courts.

[3, 4] We start with the principle long recognized and reaffirmed in Carter v. Seaboard Finance Co., supra, that a member of a class for whose protection a statute is enacted is ordinarily not considered in *pari delicto* with those who violate the same, and as a consequence the general rule that courts will not aid either party to an illegal bargain is without application. Pollak v. Staunton, 1930, 210 Cal. 656, 662, 293 P. 26 (sale of securities not authorized by permit of Commissioner of Corporations); Goodspeed v. Associated Almond Growers, 1929, 208 Cal. 121, 122, 280 P. 530 (sale of lots under contract wherein the lots are described only by reference to an unrecorded map); Bachenheimer v. Palm Springs, etc., Corp., 1953, 116 Cal.App.2d 580, 593, 254 P.2d 153 (lease of subdivided lands where required notice not filed with Real Estate Commissioner). When the parties to an illegal contract are not in *pari delicto* the guilty party may not maintain an action thereon even though the other has received and retained everything he was to receive thereunder, Pacific Electric Ry. Co. v. Bonding, etc., Ins. Co., 1921, 55 Cal.App. 704, 707–708, 204 P. 262; 17 C.J.S., Contracts, § 280, p. 669, but the innocent party may recover the money paid by him thereunder. Carter v. Seaboard Finance Co., supra. While the authorities supporting the latter statement are legion, the question confronting us is to what extent, if at all, must the innocent party make restitution if he seeks the return of the consideration paid by him.

[5] While some of the authorities hereinabove cited declare that contracts or transactions in violation of such statutes are void—indeed, some statutes expressly so provide (e. g., Corporations Code, sec. 26100)—it would appear that they are more properly described as voidable at the behest of the innocent party, who, if he elects so to do, may, nonetheless, treat the same as valid and retain all benefits accrued and to accrue thereunder. Domestic & Foreign Petroleum Co. Ltd. v. Long, 1935, 4 Cal.2d 547, 558, 51 P.2d 73; Western Oil, etc., Co. v. Venago Oil Corp., 1933, 218 Cal. 733, 746, 24 P.2d 971, 88 A.L.R. 1271; disapproving Cecil B. de Mille Productions v. Woolery, 9 Cir., 1932, 61 F.2d 45, to the contrary, as to which see also Laugharn v. Bank of America Nat. Trust & Savings Ass'n, 9 Cir., 1937, 88 F.2d 551, 554; Blackburn v. Union Oil Co., 1949, 90 Cal.App.2d 775, 777–778, 204 P.2d 69. This would appear to suggest that the innocent party to such an illegal contract occupies, in effect, the same status and possesses the same rights and remedies against the wrongdoer as one who is the victim of fraud, including the right to rescind and recover that with which he was induced to part as a result of the fraud, but only if he rescind promptly upon discovery of the fraud and restores or offers to restore to the other everything of value which he has received under the contract. However, as already noted, the seeming analogy is impaired by the Supreme Court's holding in Estrada v. Alvarez, supra, and as a consequence the decisions dealing with rescission for fraud may not be said to shed too much light upon the problem before us.

[6] While plaintiff here, if sued for the possession of the automobile or installments accrued under the contract, doubtless could successfully defeat the action without surrendering the car or making the payments due under the contract, it does not follow that he may retain the automobile and also recover whatever sums he may have paid on account of the purchase price. Cf. Comet Theatre Enterprises v. Cartwright, 9 Cir., 1952, 195 F.2d 80, 30 A.L.R.2d 1229. By instituting an action for the return of the consideration paid by him on account of the purchase of the car, he is, in effect, asserting that the contract as to him is void and as a consequence that he has received no rights in the vehicle which necessarily implies that he claims no right to the possession thereof. Tevis v. Blanchard, 1954, 122 Cal.App.2d 731, 738, 266 P.2d 85. We, therefore, conclude that he may not maintain an action for the recovery of the money paid by him unless

he surrenders or offers to surrender possession of the car or, as in this case, it has been repossessed by the seller.

[7, 8] Having reached the foregoing conclusion, the question remains as to whether, in addition to the return of the car, a defendant seller is entitled to a setoff, against the buyer's recovery, in some amount, by reason of the use which the latter has made of the vehicle during the time it was in his possession. Whatever equitable obligations may rest upon the vendee, we do not agree that he is under the necessity of accounting for the rental value of the automobile, that is to say, the amount for which it could be rented by one who was in the business of letting such vehicle for hire, for such amount necessarily involves a profit to the owner. To permit one guilty of violating the law to so profit not only runs counter to the general principle that the law will not extend its aid to one guilty of unlawful conduct, but as well to section 3517 of the Civil Code, which declares that "No one can take advantage of his own wrong." However proper it may be to allow an owner of personal property who has been *wrongfully* deprived of the possession thereof to recover by way of damages the reasonable rental value of the property during the period of its detention, like considerations are not applicable where the one who seeks the benefit of this rule is himself the wrongdoer. Moreover, authorities in this State are to be found which declare that the proper measure of damages for the wrongful detention of an automobile from a dealer in motor vehicles is the depreciation in value, Spencer Kennelly, Ltd. v. Bank of America Nat. Trust & Savings Bank, 1942, 19 Cal.2d 586, 589, 122 P.2d 552, and still others which declare that where an automobile is kept for sale an award for the value of use while it is wrongfully detained from the owner is not authorized. National Funding Corp. v. Stump, 1943, 57 Cal.App.2d 29, 35, 133 P.2d 855; Morneault v. National Surety Co., 1918, 37 Cal.App. 285, 287, 174 P. 81. Whatever the true rule of damages may be where the owner is wrongfully deprived of possession of his property, these authorities serve to confirm our view that under the circumstances it would be highly inequitable to permit a dealer guilty of violating section 2982 to offset against the recovery to which plaintiff is entitled of the money paid by him under the illegal contract the rental value of the car which, according to the testimony adduced by the seller in cases before us, frequently exceeds the total sales price of the car in the first instance. In our view the most to which a guilty seller is entitled, and which at the same time is equitable to the innocent buyer, is an offset in an amount representing the depreciation in value of the car occasioned by the use made of it by the buyer while in his possession, which necessarily excludes any allowance for depreciation resulting from a general decline in the market value of such automobile during the period in question. Thus the vendee is, in effect, required to return the vehicle in substantially the same condition it was in at the time he received it. It seems hardly necessary to add that in no event may the seller, by way of offset, obtain an affirmative judgment against the buyer. That is to say, the right of offset in any and all events is restricted to an amount not exceeding that which the buyer is entitled to recover.

[9] In the light of the rule which we have announced as to the nature and extent of the seller's right of offset, it necessarily follows that there is no basis for the application of the rule approved in Adams v. Caruso Enterprises, supra, 1955, 134 Cal.App.2d 403, 406, 285 P.2d 1022, to the effect that where the seller is allowed an offset in the amount of the reasonable rental value of the car sold while in the possession of the buyer, the latter is entitled to the reasonable rental value of the car traded in by him on account of the purchase price. Moreover, it seems wholly illogical to award the buyer the full value of the trade-in, treating it as cash paid to the seller, and at the same time award the buyer an additional sum for the value of the use thereof as a car.

[10] While in the case at bar the offset pleaded by defendant was the amount alleged to be the reasonable rental value of

the use of the automobile while in plaintiff's possession, which we have held to be improper, in view of the uncertainty arising from the decisions to which we have adverted in an earlier part of this opinion, we are of the view that the ends of justice will be served by reversing the judgment and remanding the cause for a new trial upon the sole issue of the amount of offset, if any, which is to be allowed defendant in accordance with the views hereinbefore expressed. To this end defendant should be permitted, upon application therefor, to amend his answer accordingly.

The judgment is reversed and the cause is remanded for a new trial upon the sole issue of the amount of offset, if any, to be allowed defendants. Neither party to recover costs on appeal.

BISHOP, P. J., concurs.

SWAIN, J., concurs in the judgment.

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140 Cal.App.2d 959

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas Reed CULBERSON, Jr., Defendant and Appellant.

No. 202068.

Appellate Department, Superior Court, San Diego County, California.

March 15, 1956.

Defendant was convicted of violation of statute generally prohibiting one from being under influence of narcotics. The Municipal Court, San Diego Judicial District, San Diego County, Richard B. Ault, J., rendered judgment, and defendant appealed. The Superior Court, Glen, J., held that "under the influence", within statute generally prohibiting one from being under influence of narcotics, does not have same meaning as similar phrase in statute prohibiting driving while under influence of intoxicants, and it was not necessary to conviction that defendant, charged under first statute, had been so affected as to influence his actions.

Judgment affirmed.

Poisons 🔑4

"Under the influence", within statute generally prohibiting one from being under influence of narcotics, does not have same meaning as similar phrase in statute prohibiting driving while under influence of intoxicants, and it was not necessary to conviction that defendant, charged under first statute, had been so affected as to influence his actions. West's Ann.Health & Safety Code, § 11721; Vehicle Code, § 502.

See publication Words and Phrases, for other judicial constructions and definitions of "Under the Influence".

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Edgar G. Langford, San Diego, and J. Perry Langford, Los Angeles, for appellant.

Jean F. DuPaul, City Atty., and Frank A. DeLuca, Asst. City Prosecutor, San Diego, for respondent.

GLEN, Judge.

Defendant was convicted by a jury of violating Section 11721 of the Health and Safety Code, which provides in part as follows:

> "No person shall be under the influence of narcotics except when such narcotics have been administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. * * *"

It is conceded that the evidence is sufficient to sustain the verdict, but error is claimed by the defendant because the court gave the following instruction:

> "If a narcotic drug is appreciably affecting the nervous system, brain, muscles, or other parts of a person's body, or is creating in him any perceptible abnormal mental or physical condition, then such a person is under

the influence of a narcotic drug within the meaning of the statute."

Defendant draws a close analogy between the language used in Section 11721 of the Health and Safety Code and Section 502 of the Vehicle Code, and points out that any definition of the phrase "under the influence" adopted by the courts is equally applicable to both Section 11721 of the Health and Safety Code and Section 502 of the Vehicle Code.

Defendant earnestly contends that any definition of the phrase "under the influence of narcotics" must in some manner point out that the narcotics have so far affected the nervous system, brain or muscles of the person under consideration as to impair to an appreciable degree his ability to act in a manner like that of an ordinarily prudent man in full possession of his faculties, using reasonable care and doing similar acts under like conditions.

Section 502 of the Vehicle Code condemns driving while under the influence of intoxicating liquor, and in People v. Dingle, 56 Cal.App. 445, 205 P. 705, 706, and subsequent cases, a definition of the words " 'under the influence of intoxicating liquor' " was adopted, defining that phrase as follows:

> "* * * if intoxicating liquor has so far affected the nervous system, brain or muscles of the driver of an automobile as to impair, to an appreciable degree, his ability to operate his car in the manner that an ordinarily prudent and cautious man, in the full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions, then such driver is 'under the influence of intoxicating liquor' within the meaning of the statute."

With defendant's contention we cannot agree, because the evils sought to be controlled by Section 11721 of the Health and Safety Code and Section 502 of the Vehicle Code are not the same. The object of Section 11721 of the Health and Safety Code is to control the taking of a narcotic by an individual, which is deemed harmful to the human body. It does not prohibit any act or conduct while under the influence of the narcotic. On the other hand, the clear purpose of Section 502 of the Vehicle Code is not to prohibit or to control drinking but to prevent the operation of a motor vehicle by one who is under the influence of intoxicating liquor. Thus the liquor must affect the person's ability to drive, as pointed out in the Dingle case, supra. While one under the influence of a drug may be a dangerous individual, both to himself and to others, no particular conduct is required before he may be found guilty of violating the Health and Safety Code section under consideration. On the other hand, while a man under the influence of liquor may likewise be dangerous to himself and others, he cannot be convicted under Section 502 of the Vehicle Code unless he drives an automobile.

The instruction given was clear and concise and properly omitted any requirement that the defendant be performing an act, and it presented a reasonable and logical interpretation of Section 11721 of the Health and Safety Code.

Judgment is affirmed.

TURRENTINE, P. J., and BURCH, J., concur.

140 Cal.App.2d 546

Carl DE MONBRUN et al., Plaintiffs and Appellants,

v.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION et al., Defendants and Respondents.

Civ. 21517.

District Court of Appeal, Second District, Division 2, California.

April 6, 1956.

Action by members of a local labor union to enjoin the international union's general president and others from assuming control of local union and expending funds or assets thereof, unless authorized by vote of its members, to declare such president's taking of such control and suspension of certain officers of local union illegal and void, and to require accounting for its funds or assets expended or diverted without such authorization. From a judgment of the Superior Court of Los Angeles County, Joseph W. Vickers, J., dismissing the action after sustaining a general demurrer to the complaint without leave to amend, plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that trial court's rulings that plaintiffs had remedies by appeals within international union and that plaintiffs' inability to allege their exhaustion of such remedies precluded maintenance of action were erroneous, so that judgment could not be sustained, though court's rulings were correct in other particulars.

Judgment reversed.

1. Judgment ⚷948(2)

Ordinarily, a claim of res judicata cannot be sustained by taking judicial notice in aid of demurrer to complaint.

2. Evidence ⚷43(2)

On general demurrer to complaint containing allegations concerning previous action between same parties, trial judge properly took judicial notice of such action.

3. Appeal and Error ⚷519

A stipulation by counsel for parties to action that complaint in previous action between same parties be transmitted to District Court of Appeal on appeal from superior court's judgment dismissing action after sustaining general demurrer to complaint placed such previous complaint before appellate court as part of record to be considered thereby as if alleged in instant complaint in haec verba.

4. Judgment ⚷585(2, 3)

If a title, right or obligation different from that pleaded in first of two actions between same parties is pleaded in second action, cause of action therein is different, though relief sought is same as in first action, but if second action is based on same right or obligation as first action, cause of action is same, though different or additional relief is sought.

5. Action ⚷1

A "cause of action" is right to secure redress for violation of obligation owing plaintiff and hence springs from and is simply the obligation, as distinguished from the "remedy," which is simply means by which obligation or corresponding action is effectuated, and from relief sought.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause of Action" and "Remedy".

6. Judgment ⚷585(1)

The test of identity of causes of action in successive actions between same parties as to whether second action is based on same right or obligation as first action applies in field of res judicata as well as other areas, such as introduction of new cause of action after running of applicable statute of limitation.

7. Judgment ⚷585(2)

A final judgment of superior court, dismissing local labor union members' action to enjoin international union's general president from taking over local union's affairs and seizing its property, barred plaintiffs' subsequent action to enjoin president from assuming control of local union with respect to alleged violation of its right to autonomy, immunity from seizure of its property, and exclusive conduct of its affairs; plaintiffs' basic cause of action being the same in each case, whether they sued to prevent or redress alleged wrongs.

8. Judgment 🔑570(1)

A holding by superior court that international labor union's general president's seizure of control of local union's affairs, ouster of its officials from participation in its management, suspension of meetings of its members, and refusal to permit audits of its accounts, could not be attacked in action by local union members for injunction until exhaustion of their remedies by appeals within union, was binding in action brought by them, without first pursuing such remedies, against international union, its president and others, to enjoin such acts, after final judgment dismissing first action.

9. Judgment 🔑585(3)

Superior court's final judgment, dismissing local labor union members' action to enjoin international union's general president and others from taking over local union's affairs and seizing or disposing of its funds or other property because of plaintiffs' failure to exhaust their remedies by appeals within union after sustaining general demurrer to complaint alleging that defendants intended to expend such funds to suit their purposes, did not bar plaintiffs' subsequent action for injunction against same acts with respect to allegation of complaint therein that defendants diverted to international union local union's funds not owing to international union and expended additional funds of local union otherwise than for legitimate purposes thereof.

10. Judgment 🔑572(2)

Superior court's final judgment, dismissing local labor union members' action to enjoin international union's general president from ousting or interfering with work of plaintiffs as officers of local union after sustaining general demurrer to complaint for failure to allege plaintiffs' exhaustion of remedies by appeals to international union's general executive council and quadrennial convention, was res judicata as to legality of president's suspensions of local union's officers, as authorized by international union's constitution, in plaintiffs' subsequent action for injunction against and declaration of illegality of such suspensions.

11. Judgment 🔑570(5)

A judgment dismissing action after sustaining general demurrer to complaint, without leave to amend, is judgment on merits to extent that it adjudicates that facts alleged in complaint do not constitute cause of action and hence bar subsequent action wherein complaint alleges same facts.

12. Judgment 🔑572(2)

A judgment dismissing action after sustaining general demurrer to complaint, without leave to amend, on ground equally applicable to subsequent action between same parties for same relief, bars second action, though complaint therein alleges different facts.

13. Judgment 🔑585(5)

A judgment dismissing action after sustaining general demurrer to complaint does not bar subsequent action between same parties for same relief, if complaint therein alleges new or different facts curing defects in original pleading, regardless of whether plaintiff had opportunity to amend complaint in original action.

14. Judgment 🔑677

A representative suit is res judicata of another such suit based on same cause of action.

15. Dismissal and Nonsuit 🔑42

Generally, voluntary dismissal of action before trial is without prejudice to its immediate renewal and adjudges nothing.

16. Dismissal and Nonsuit 🔑42

An action by local labor union members to enjoin international union's general president from assuming control of local union and expending funds or assets thereof was not based on new cause, accruing after superior court's final judgment dismissing such members' previous action to enjoin president from taking over local union's affairs and taking possession or disposing of its funds or other property, except as to alleged dissipation of funds, so that voluntary dismissal of president's action to enjoin local union members from interfering with his control of union's affairs after granting of preliminary injunction was not equivalent to reversal of such injunction and did not require his restitution of such control, in absence of allegation that it was taken over by virtue of or pursuant to injunction order.

17. Pleading 🔑204(1)

A demurrer will not lie to portion of single cause of action alleged in complaint, but court's ruling that cause is barred as to certain paragraphs of complaint may be accepted as statement of part of reasons for sustaining demurrer to complaint as whole.

18. Labor Relations 🔑136

Local labor union members need not appeal within international union before resorting to courts for redress of their grievances against such union and officers thereof when no such appeal is provided for by its constitution or it affirmatively appears that appeal would be futile.

19. Labor Relations 🔑94

Provisions of international labor union's constitution for appeals from decisions or orders of local unions, tribunals thereof or general officers or executive council of international union, and especially provision that general executive council's decision on appeal thereto shall be final, unless changed on appeal to general convention, must be given reasonable and practical construction with view to accomplishing objectives disclosed by instrument as whole.

20. Labor Relations 🔑149

Wrongful suspensions of officers of local labor union, banning of meetings of members thereof, and exclusion of such members from participation in active management of local union, by general president of international union, must be remedied, if at all, by appeal within such union from president's exercise of such phase of his power under union's constitution, rather than by resort to courts, as all such matters involve general president's decisions or orders.

21. Labor Relations 🔑148

In local labor union members' action to enjoin international union's general president from assuming control of local union's affairs and expending funds or assets thereof without authorization by vote of its members, allegations of complaint that president diverted to international union local union's funds not owing to international union, expended additional funds of local union otherwise than for legitimate purposes thereof, and refused to permit trustees of local union to examine or audit financial statements, books or records thereof, showed right of plaintiffs to accounting in equity court for such funds or assets, in absence of remedies to be exhausted within union before court action.

22. Labor Relations 🔑149

The words "decisions and orders" in provision of international labor union's constitution for appeals from union's general president's decisions and orders to union's general executive council did not include president's misappropriations or misapplications of moneys or other property of local union under circumstances described by complaint, alleging that he diverted to international union local union's funds not owing to international union and expended additional funds of local union otherwise than for legitimate purposes thereof, in local union members' action to enjoin president from assuming control of local union and expending funds thereof without authorization by vote of its members, as appeals within union from such fiscal mismanagement of local union's daily affairs would be futile.

23. Labor Relations 🔑149

Local labor union members' remedies by appeal within international union under constitution thereof must be exhausted before resort by them to courts, as for injunction against wrongful acts of international union's general president, only where question is purely social, involving discipline or conduct or standing of a member, but if property rights are involved, member may resort to courts without using such remedies, in absence of express agreement to exhaust them, and he need not first pursue remedies within union, if they would be futile, illusory or vain.

24. Labor Relations 🔑138

Where management in control of local labor union dissipates funds thereof without accounting and redress for such irregularities cannot be obtained through constituted officials of local or international union, court will intervene to grant relief to complaining local union members.

25. Labor Relations ⚿138

A controversy solely over property rights of labor union members affords good ground for equitable relief, notwithstanding charter provision for appeal within union.

26. Associations ⚿7

Courts will interfere to protect property rights of members of unincorporated associations in all proper cases, and after taking jurisdiction, will follow and enforce rules applying to incorporated bodies of same character, so far as applicable.

27. Courts ⚿89

The language used in court's opinion must be understood in light of facts and issue before court.

28. Labor Relations ⚿149

In local labor union members' action to enjoin international union's general president from assuming control of local union and expending funds or assets thereof without authorization by vote of its members, superior court's rulings that plaintiffs had remedies by appeals within international union and that their inability to allege exhaustion of such remedies precluded maintenance of action were erroneous, so that judgment dismissing action after sustaining general demurrer to complaint without leave to amend cannot be sustained on appeal, though court's rulings were correct in other particulars.

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Leo S. Rich, Los Angeles, Carl W. Berueffy and Albert M. Dreyer, Washington, D. C., of counsel, for appellants.

Irl Davis Brett and Charles K. Hackler, Los Angeles, for respondents.

ASHBURN, Justice.

This appeal turns upon the application of two doctrines, (1) res judicata based upon sustaining of demurrer, and (2) necessity of exhaustion of internal remedies by an aggrieved member of a union before appealing to the courts. The trial judge held that the complaint at bar is fatally defective when subjected to those tests and sustained without leave a general demurrer thereto.

This action was brought by twelve members of Local Union 108 of Sheet Metal Workers International Association; defendants are the International Association, Robert Byron its general president, and certain officers and members of Local 108. The complaint avers that defendant Byron, assuming to act under article three (3), section 2(c)[1] of the Constitution and

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[1] Sec. 2(c). "Management of local unions and councils. Whenever a local union or council or the officers or members thereof fail to establish and maintain, within their jurisdiction, wages and working conditions equivalent to those established and maintained within the jurisdiction of other local unions or councils in adjoining territories; fail to comply with orders or decisions or policies of this Association; fail to comply with the provisions of this Constitution; conduct the affairs of such local union or council in such manner as to promote or condone internal strife which is detrimental to the best interest of this Association or any local union or council thereof; or disregard the instructions, decisions or orders properly issued by any officer or tribunal of this Association, the General President, with the approval of the General Executive Council, shall have the authority to take over full control and management of the affairs of such local union or council. During such control and management such local union or council shall take no official action without the approval of the General President or a representative designated by him to supervise and direct the management and control. Such management and control shall continue until the causes thereof have ceased or until, after charges and trial, the charter of such local union or council is revoked.

"During such management or control of any local union or council, the General President shall have authority to take such action as he deems necessary to protect the interest and welfare of such local union or council and this Association, and the funds, property and membership thereof, including, but not limited to, the authority to suspend local union officers or business representatives, fill vacancies in such offices with any representatives of this Association or members of such local union, or call elections for that purpose, and impound the books, records, funds and property of any such local union or council."

Ritual (which governs the International and the locals), declared on May 11, 1954, that he was then "taking over the management and control of Local Union 108" because certain of its officers "have conducted the affairs of such Local Union in a manner which has promoted and condoned internal strife which is detrimental to the best interest of this Association and Local Union One Naught Eight."[2] Plaintiffs attack the validity of such assumption of control by president Byron, which was done with the approval of the general executive council; this they do upon the basis of allegations of bad faith on Byron's part, falsity of the reasons set forth in his telegram, absence of any good ground for such action by the general president, failure to serve advance charges or give an opportunity to refute charges, assumption of full control of the affairs of the local thus preventing holding of membership meetings, excluding members or officers from participating in the management of local affairs, expending large amounts of funds of the local without the vote of members (alleged to be required by section 14 of article ten of the Constitution and Ritual), diversion to the International of large amounts of funds from the local though not due or owing to it, misapplication of other funds of the local, refusing to permit examination or audit of the accounts of the local as required by section 6 of article thirteen of the international constitution, appointment of five business representatives of Local 108 and payment of compensation to them, suspension of certain officers and business representatives of the local. The prayer is for injunction, temporary and final, restraining Byron and others "from assuming control or management of the affairs of Local 108 from in any manner interfering with autonomy of said Local 108 or the management and control of its affairs by its members and duly elected officers;" from expending funds or assets of the local unless authorized so to do by vote of the members; and a judgment declaring that the action of Byron and the International in taking over control of the affairs of the local was illegal; requiring them to account for funds or assets expended or diverted without authorization of the membership of the local; declaring that suspension of certain officers and business representatives was illegal and void; and granting general relief.

This action was filed on May 9, 1955, and it appears that the telegram advising of the assumption of control by the general president was sent almost exactly one year prior to the filing of this suit. At the hearing of the demurrer and other pending matters an allegation of paragraph IX to the effect that plaintiff DeMonbrun had unsuccessfully attempted to appeal was withdrawn by consent and it was further stipulated in open court that plaintiffs "could not at this time allege by amendment that they have exhausted the administrative remedies afforded to them and Local Union 108 by the Constitution and Ritual."

[1–3] The trial judge ruled that the action was barred by res judicata as to all matters other than the allegations of paragraphs XI to XIV inclusive of the first count, and the suspension of certain officers and business representatives alleged in the second cause of action. This ruling requires an explanation of a former action entitled Nichols v. Byron and number 628,638 in the superior court.[3]

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[2] Telegram, which declares the seizure by the national president and which is addressed to the president of the local, is as follows:

"Ben Anisman
2008 West 7th Street
Los Angeles May 11, 1954

"Because certain officers of Local Union One Naught Eight, Los Angeles, California have conducted the affairs of such Local Union in a manner which has promoted and condoned internal strife which is detrimental to the best interest of this Association and Local Union One Naught Eight, I am, as of this date taking over the management and control of Local Union One Naught Eight pursuant to the authority vested in me by Article Three Section Two C of the Constitution of the Sheet Metal Workers' International Association. You are hereby instructed that Local Union One Naught Eight and its officers and business representatives shall take no official action without my approval and that no action taken by Local Union One Naught Eight, its officers or business representatives shall have any validity until further instructions from me.

Robert Byron."

Plaintiffs therein were nine members of Local 108 and seven of them are plaintiffs in the instant action; defendants in the Nichols case include the International Association and Robert Byron, its general president. Both are representative actions brought on behalf of Local 108 and its members. The former complaint alleges the same preliminary matters concerning the status and relationship of the Sheet Metal Workers International Association and its Local 108; also as to the official positions occupied by Byron and others; complains of the same telegram of May 11, 1954 sent by Byron and asserting an immediate taking over of control of Local 108; challenges the factual basis for and legality of such assumption of control; alleges that the International will take over large assets of the local; that Byron has appointed two agents for the purpose of taking possession of property and records and has directed them to oust from their positions and usual places of work "all of the plaintiffs herein and any other officers, agents, and employees of said Local 108 who will not carry out the wishes of said defendant Byron." It also alleges that unless enjoined defendant Byron will prevent the election of any delegates to the approaching national convention; that defendants will take over the management and possession of the affairs and property of the local; will oust the plaintiffs from their positions in the management of its affairs; will take possession and control of $280,000 worth of bonds and a $40,000 bank account belonging to the local, and will disburse and expend the same to suit defendants' own purposes. This complaint was filed on May 13, 1954, two days after the date of the president's telegram. The prayer is for an injunction against taking over the affairs of the local, taking possession or making any disposition of any of its funds or other property, ousting or interfering with the employment or work of plaintiffs as officers of the local, interfering in any manner with the holding of elections of officers or delegates; or interfering with the due and regular administration of the affairs of the local by its own officers then in office, or those elected thereto in the future. The complaint contains no allegation of pursuit or exhaustion of internal remedies for plaintiffs' alleged grievances, such as appeal to the general executive council of the International and thence to the quadrennial convention.[4] For this reason

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[3] Ordinarily a claim of res judicata cannot be sustained by taking judicial notice in aid of a demurrer, Willson v. Security First-Nat. Bank, 21 Cal.2d 705, 710–711, 134 P.2d 800, but the rule is not without exceptions. The complaint at bar refers to the Nichols action, as do the demurrer and the judgment of dismissal. The trial judge undoubtedly took judicial notice of the Nichols file, and properly so in view of the allegations of the pleadings concerning the same. Roberts v. Roberts, 81 Cal.App. 499, 501–502, 253 P. 1112; Mann v. Mann, 76 Cal.App.2d 32, 40–41, 172 P.2d 369; In re Estate of Wilson, 116 Cal.App.2d 523, 527, 253 P.2d 1011. Moreover, it was stipulated by counsel that the Nichols complaint be transmitted to this court on this appeal, and that places it before us as a part of the record to be considered by us. See Willson v. Security First-Nat. Bank, supra, 21 Cal.2d at page 714, 134 P.2d at page 805. The Nichols complaint is to be considered as if it were alleged in the instant pleading in haec verba, and counsel for the parties on appeal do not argue contra.

[4] Article Nineteen.

"Sec. 1. Any local union, council, officer, representative, or member of this Association or any officer, representative, or member of any local union or council thereof who is affected by any decision or order of a local union or council or a legally constituted tribunal thereof or by any decision or order of any general officer or officers, representative, or the General Executive Council of this Association shall have the right to appeal as provided in this Article.

* * * * *

"Sec. 3(a). All appeals from decisions or orders of the General President, whether made initially or upon appeal, and all original appeals properly prethe general demurrer to the complaint was sustained without leave and judgment of dismissal entered on July 12, 1954. An appeal from the judgment was taken but was abandoned on May 24, 1955, and the ruling thus became final.

The trial judge in his ruling at bar confined the application of the rule of res judicata to matters other than those occurring after Byron took control of the local; counsel for respondent asserted on oral argument that res judicata applies to both counts of the complaint in their entirety. As will appear from the ensuing discussion the court agrees with respondents' counsel except with respect to alleged diversion and dissipation of funds of the local.

[4–6] It will be observed from an examination of the foregoing summary of the contents of the Nichols and DeMonbrun complaints that both challenge the right of Byron, as International President, to take over the affairs of Local 108 in the manner in which he did; that the Nichols suit sought in advance to prevent by injunction the violation of the plaintiffs' alleged rights, and that the instant action seeks after the event to undo the fact and effects of such seizure of control by Byron. Nichols complains of what will happen as an incident to such seizure if it takes place, and the instant complaint complains that those things did occur, were wrongful and should be undone. Except as to alleged dissipation of funds of the local the two suits are but attempts to secure different types of relief upon the same cause of action. "If a different title, right or obligation is pleaded in the second action, the cause of action is different, even though the relief sought is the same. Ball v. Stephens, 68 Cal.App.2d 843, 851, 158 P.2d 207. But if the second is based upon the same right or obligation the cause of action is the same even though different or additional relief is sought." Ideal Hardware & Supply Co. v. Department of Emp., 114 Cal.App.2d 443, 448, 250 P.2d 353, 356. To the same effect see: Owl Drug Co. v. Bryant, 115 Cal.App.2d 296, 302, 252 P.2d 69; 50 C.J.S., Judgments, § 608, p. 31; 30 Am.Jur., § 176, p. 919. A cause of action is the right to secure redress for violation of an obligation owing to the claimant. Though phrased in varying ways, this is the result of the authorities. In Frost v. Witter, 132 Cal. 421, 426, 64 P. 705, 707, the court said: "The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation." Again: "The 'cause of action' is therefore to be distinguished also from the 'remedy,' which is simply the means by which the obligation or the corresponding action is effectuated; and also from the 'relief' sought. Pom. Pl. & Prac. § 453." This test of identity of causes of action applies in the field of res judicata as well as other areas, such as introduction of a new cause of action after running of the applicable statute of

sented to the General Executive Council shall be filed in writing, in duplicate, with the General Secretary-Treasurer within sixty (60) days after the decision or order from which such appeal is taken and shall include all documentary evidence and argument which the appealing party or parties may deem necessary for the proper consideration of the appeal. The General Secretary-Treasurer shall thereupon compile such other evidence and data, upon which the decision or order appealed from was based, as may appear necessary for a fair and complete presentation of the appeal and shall mail the same, together with the appeal and other documents submitted by the parties in connection therewith, to the parties and to each member of the Executive Council.

* * * * *

"Sec. 3(c). The decision of the General Executive Council shall be by majority vote of those participating and shall be final unless changed upon appeal to the General Convention, and the General Secretary-Treasurer shall furnish each party to the appeal, in writing, by registered mail, a copy of the decision of the Executive Council.

"Sec. 4. Unless otherwise provided in this Constitution, all appeals from decisions made by the Executive Council shall be referred to the Grievances and Appeals Committee for consideration and report and the decision of the General Convention shall be recognized and accepted as final. All such appeals must be filed with the General Secretary-Treasurer within sixty (60) days from date of decision by the General Executive Council."

limitation. In Panos v. Great Western Packing Co., 21 Cal.2d 636, 134 P.2d 242, an action for personal injuries, plaintiff had charged defendant with one type of negligence and, having failed, brought a new action alleging a different act of negligence. At page 638 of 21 Cal.2d, at page 244 of 134 P.2d, the court said: "In an effort to avoid application of this settled doctrine [res judicata] to the facts of this case, plaintiff contends that the present litigation is based upon a cause of action separate and distinct from that underlying the prior litigation because the negligence charged to defendant in this action differs from the negligence charged against it in the prior action. In so contending, plaintiff misconceives the nature of his cause of action. The cause of action is simply the obligation sought to be enforced. [Citing cases.] The negligence of defendant alleged in the prior action and that alleged against it in this action represent but different invasions of plaintiff's primary right and different breaches of the same duty that it owed to him. There was one injury and one cause of action." To the same effect see: Klopstock v. Superior Court, 17 Cal.2d 13, 20, 108 P.2d 906, 135 A.L.R. 318; Smith v. Los Angeles Bookbinders Union, 133 Cal.App.2d 486, 496, 284 P.2d 194.

[7] Plaintiffs' major grievance in each instance—Nichols and DeMonbrun—is the same, violation of the right of Local 108 to autonomy, to immunity from seizure of its property and exclusive conduct of its affairs by the general president. Whether they sue to prevent or to redress the alleged wrong their basic cause of action is the same and the final judgment in the Nichols case would be a bar to this entire action were it not for the wrongful diversion of property alleged in the first count.

[8] The acts of seizure of complete control, ouster of local officials from participation in management, suspending of membership meetings, refusal to permit audits of accounts of the local,—all these things are subject to appeal within the union for they clearly involve orders and decisions of the president. A holding that they cannot be attacked in the courts until the appeal remedy has been exhausted is binding in a later suit seeking redress for these same things without first pursuing an internal appeal.

[9] As will appear, the matter of dissipation of local funds does not fall within the appeal provisions of the constitution and hence a judgment based upon failure to exhaust internal remedies cannot be res judicata with respect thereto. The former complaint alleged that defendants intended to "disburse and expend the same [funds and property of local] to suit the purposes of said defendants." This allegation is not the equivalent of the present charge that defendants "have diverted to the defendant International large sums of the funds of said Local 108 which were not due or owing to defendant International and have expended additional funds of Local 108 otherwise than for the legitimate purposes of said Local 108." The case of Keidatz v. Albany, infra, is applicable, and discloses that the former judgment is not a bar on this phase of the present complaint.

[10] The suspensions averred in the second cause of action fall within the bar of res judicata. They are suspensions from exercise of the functions of an officer or business representative, not suspensions of membership, and are specifically authorized by Article three (3), sec. 2(c) quoted in footnote 1, supra. Such suspensions may be made by the president when in control of the local and any abuse of this power must be redressed within the International Union, if at all.

[11–14] The fact that the former judgment was based upon the sustaining of a demurrer to the complaint without leave to amend does not affect the foregoing conclusions. Keidatz v. Albany, 39 Cal.2d 826, 828, 249 P.2d 264, 265: "Since the former judgment was entered after a general demurrer had been sustained with leave to amend, it is necessary to determine the scope of the doctrine of res judicata in such circumstances. The procedural effect of such a judgment appears to be *sui generis*. It is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts. [Citing cases.] Moreover, even though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar. [Citing cases.] If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint." To the same effect see Crowley v. Modern Faucet Mfg. Co., 44 Cal.2d 321, 323, 282 P.2d 33. Of course, one representative suit is res judicata of another such suit when based upon the same cause of action. King v. International Union, etc., Engineers, 114 Cal. App.2d 159, 164, 250 P.2d 11.

[15, 16] Except as to dissipation of the local's funds, the present action is not one based upon a new cause accruing after the Nichols judgment, cf. 15 Cal.Jur. § 214, p. 179; 50 C.J.S., Judgments, § 669b, p. 115, as appellants vainly contend. Their argument is but another assertion in different form of an invasion of the right of the local to autonomy, the fundamental claim that has been adjudged against them. Counsel's argument in this behalf is deduced from the fact of dismissal of an action brought by Byron against DeMonbrun and others (Byron v. Nichols et al., No. 628,724, in the superior court) to enjoin them from interfering with Byron's taking over the affairs of the local pursuant to his constitutional power. That action was filed on May 17, 1954; a preliminary injunction was granted on July 28, 1954, and the action voluntarily dismissed without prejudice on May 2, 1955.[5] It is argued that a voluntary dismissal is the equivalent of a reversal and carries with it a right of restitution; that "[b]y virtue of this injunction, defendant Byron as General President of the International took over the control and management of the affairs of Local 108"; and that, the authority for such possession having been reversed in effect, that possession must be surrendered by way of restitution. Cases cited by appellants are Moore v. Maryland Casualty Co., 100 Cal.App. 658, 663, 280 P. 1008; Asevado v. Orr, 100 Cal. 293, 299, 34 P. 777; Frahm v. Walton, 130 Cal. 396, 398, 62 P. 618, and Dowling v. Polack, 18 Cal. 625, 627. They are not in point. All of them deal with the liability of sureties upon an injunction bond, and for the purpose of determining that question it is held that voluntary dismissal of the suit is equivalent to a court's holding that the injunction was wrongfully issued. The general rule is that the voluntary dismissal of an action before trial is without prejudice to its immediate renewal, and adjudges nothing. In re Estate of Cook, 205 Cal. 581, 584, 271 P. 1083; Breznikar v. T. J. Topper Co., 23 Cal.App.2d 298, 303, 72 P.2d 895. It is unnecessary to inquire whether the rule invoked by appellants could be extended to cover the matter of restitution as the result of dismissal of the action where there is something to be restored,—where possession has been taken by virtue of the injunction. It is not actually alleged that control and management of the affairs of the local were taken over by virtue of or pursuant to the injunction order. The allegations are that on the basis of the third amended complaint Byron obtained a preliminary injunction against DeMonbrun and others "from interfering with the defendant Byron's control of Local 108," and that "From and after the issuance of the aforesaid preliminary injunction and until the present time, defendant Byron, as general president of defendant International, acting by and through defendants Artman, Anisman, and others, has assumed full and complete control and management of the affairs and assets of Local 108." It thus appears that the argument of appellants' counsel does not have foundation in fact and therefore must be rejected whatever might be its merit if the facts were as assumed by them.

[17] The trial judge treated as new matter, not governed by res judicata, the allegations of paragraphs XI to XIV of

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5. The pertinent portions of this record are before us in the same manner as Nichols v. Byron. See footnote 3, supra.

the first count of the complaint and paragraphs II to VII of the second cause of action.[6] Said paragraphs XI to XIV refer to matters occurring after Byron took over control and management of the local, such as preventing the holding of membership meetings, excluding members and officers from participation in management of the local's affairs, expending funds of the local without authorization of the membership, diverting to the International large sums of money belonging to the local, refusing to permit examination and audit of the records, etc. The second cause of action avers a series of suspensions of local officers or business representatives, all occurring on February 11, 1955, and based upon charges prepared by Byron himself but signed by other defendants, "which charges alleged that plaintiff had violated the Constitution of defendant International by defending the action brought against him by defendant Byron as alleged in Paragraph X of the First Cause of Action." The court held that these averments stated no cause of action because plaintiffs had not pursued or exhausted their internal remedies, such as appeal. No allegation of the taking of any appeal appears in the complaint and it was stipulated at the hearing (as recited in the minutes and the judgment) that plaintiffs could not make such an averment by way of amendment. The applicable provisions of the constitution are copied in footnote 4, supra.

Appellants argue that "plaintiffs had no internal remedies to exhaust" and "plaintiffs are not complaining of any decision or order, but of the maladministration of the affairs of the Local by the defendants and the betrayal of their stewardship. The provisions of the union's Constitution relating to appeals are therefore inapplicable. See Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833." With respect to the suspensions alleged in the second count they assert there was no right of appeal because, forsooth, there was no valid basis for the suspensions. Respondents, relying upon Holderby v. International Union, etc., Engrs., 45 Cal.2d 843, 291 P.2d 463, assert that there was a clear right of appeal and failure to pursue it waived any right to relief through the courts. The Constitution and Ritual, in section 8 of article nineteen, says: "No member shall appeal to the Civil Courts for redress until after having exhausted all rights of appeal provided by this Constitution."

The case of Polin, cited by appellants, points to the necessity of careful construction of the constitution in order to determine the scope of the phrase, "any decision or order" of the general president (Art. Nineteen, §§ 1 and 3(a)). In effect Polin holds that an action brought by a member of a local union against one of its officers for misappropriation of funds will lie without pursuing any appeal " 'to the Local Union from its own or its officers' decision.' " [257 N.Y. 277, 177 N.E. 834] The court said there had been no such decision and the action would lie. It did not discuss the necessity of seeking a decision but ruled in effect that that was not a condition to maintenance of a civil action.

[18] Labor Relations and The Law, at page 934, says: "Where mishandling of finances is involved, the requirement of exhausting internal remedies is much less stringent. In Local No. 104 [etc.] v. International Brotherhood of Boiler Makers, 1930, 158 Wash. 480, 291 P. 328 the court said that exhaustion of remedies was required primarily in matters of internal discipline and was not required in disputes over money or tangible assets. In the latter cases, resort to the courts would be barred only on express agreement to submit such controversies to a specified method of arbitration. Frequently the court avoids the requirement by finding that the constitution provides no internal remedies. Therefore, immediate resort to the court is proper." Of course if there is no appeal provided by the governing

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[6] A demurrer will not lie to a portion of a single cause of action (2 Witkin California Procedure, p. 1474), but the ruling that the cause is barred as to certain paragraphs may be accepted as a statement of a part of the reasons for sustaining the demurrer to the complaint as a whole.

instrument that ends the problem. Harris v. National Union of Marine Cooks & Stewards, 98 Cal.App.2d 733, 736, 221 P.2d 136; Grand Grove of U. A. O. of Druids of California v. Garibaldi Grove, No. 71, of U. A. O. of Druids (Duchein) 105 Cal. 219, 224, 38 P. 947; Marchitto v. Central R. Co. of New Jersey, 9 N.J. 456, 88 A.2d 851; Sullivan v. Barrows, 303 Mass. 197, 21 N.E.2d 275, 278; 87 C.J.S., Trade Unions, § 49, p. 857. And no appeal is necessary where it affirmatively appears that it would be futile. Elevator Operators, etc., Union, Local 117, of San Francisco, v. Newman, 30 Cal.2d 799, 810, 186 P.2d 1; Holderby v. International Union, etc., Engrs., supra, 45 Cal.2d 843, 291 P.2d 463.

[19] Not a narrow but a reasonable and practical construction is to be given to article nineteen, and especially § 3(a) thereof, with a view to accomplishing the objectives disclosed by the instrument as a whole. Anent this matter of construction, Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131, 137, 111 P.2d 948, 952, says: "Any uncertainty which exists must be considered in the light of the intention of the parties and that intention must be determined from a consideration of the language employed and the subject-matter of the by-laws. * * * Where one construction would make the contract unusual or extraordinary, courts are to disregard such construction if the contract may reasonably be subject to a construction which is fair and just. Indeed it must be presumed that the parties intended the contract to be reasonably construed."

[20] No difficulty is encountered with respect to the suspensions of officers and other representatives of the local, banning meetings of members of the local, excluding them from participation in active management and like matters; all these things are encompassed by the seizure power, see footnote 4, supra; Davis v. International Alliance, etc., Employees, 60 Cal.App.2d 713, 719, 141 P.2d 486; and must be remedied, if at all, by an internal appeal from the exercise of that phase of the power. Cf. Stoica v. International, etc., Employees, 78 Cal.App.2d 533, 538, 540, 178 P.2d 21; Killeen v. Hotel & R. Emp., etc., League, 84 Cal.App.2d 87, 93, 190 P.2d 30. Clearly, all of these matters involve the decision or order of the general president.

[21] There can be no dispute about the fact that a disbursement of moneys by the general president does not constitute an "order" in the sense of the constitutional provision. The word "decision" like most others, expands or contracts with the mental images of the speaker—a word is but "the skin of a living thought"—and the application of that word to dissipation of local funds presents practical considerations which are not without significance. The allegations of the complaint are quite general, namely, that Byron has "diverted to the defendant International large sums of the funds of said Local 108 which were not due or owing to defendant International," and that he has "expended additional funds of Local 108 otherwise than for the legitimate purposes of said Local 108." But the record (including the trial judge's opinion) indicates that all parties treated these averments as sufficient in the face of the general demurrer. Moreover, they are fortified by factual allegations that defendant Byron refused to permit the trustees of the local to examine financial statements, books or records of the local or to conduct an audit of the same. Byron, having assumed full charge of the affairs of the local, stands in a fiduciary relationship and these allegations in the aggregate make a showing of a right to an accounting in a court of equity unless there are internal remedies which must be exhausted in advance of court action.

[22] These things, diversion and misapplication of funds and other property, go on from day to day; as alleged, they amount to mismanagement and misapplication on the part of the general president, whose acts they are. In a broad sense, each one requires a decision by him,—a making up of his mind as to a course of action to be followed. They have been occurring since May 11, 1954, according to the complaint. If it be said that an appeal lies therefrom, a practical problem arises as to how often must an appeal be

taken and does it hold any likelihood of success. If misappropriations are decisions, each one of them would be a ground for appeal, but the members who would complain have no means of learning of them immediately or directly; they are excluded from participation in active management and are denied access to the books and records. The best they can do is to demand an accounting and when that is refused appeal from that denial (if it be construed to be a decision).

It appears that the appeal which must be taken is one from a decision of the general president and it goes directly to the general executive council (Art. Nineteen, § 3(a), quoted in footnote 4, supra). The principal office of the International Association is in Washington, D. C. (Art. One, § 1). The general executive council meets when and where the general president directs (Art. Six, § 1(a)), and he ordinarily acts as chairman of the meeting (§ 1(b)); this council is composed of the said president and eleven general vice presidents (Art. Six, § 1(a)) who are nominated by the president (Art. Two, § 7; Art. Two, § 9), and who have only such authority and duties as are specified by him (Art. Four, § 1). When reviewing actions of the president, especially maladministration of the funds of the local, this tribunal offers little certainty of an unbiased hearing or decision; this is true even though the president cannot participate in the particular hearing (Art. Eighteen, § 3(e)). In event of dissatisfaction with the ruling of the executive council the appellant must pursue his appeal to the general convention, footnote 4, supra; Bush v. International Alliance, 55 Cal.App.2d 357, 365, 130 P.2d 788; Hughes v. American Trust Co., 134 Cal.App. 485, 488, 25 P.2d 491, where it is handled by a Grievances and Appeals Committee before going to the members assembled in convention. The members of this committee are appointees of the president and the nominations are made just before the convention (Art. Seven, § 7); they function only quadrennially for the convention is held only that often (Art. Seven, § 1). During the pursuit of his appeal the appellant must accept the challenged decision on penalty of having the appeal rejected for failure so to do (Art. Nineteen, § 5). The complaint at bar (filed May 9, 1955) alleges that the next annual meeting after Byron took over the local was to be held at Montreal, Canada, during the week of August 16, 1954, which means that any diversions of funds made after that date would be immune to correction until the 1958 convention; and meantime the dissatisfied members of the local would have to submit to the diversions of which they would complain on appeal. When such an appeal is finally heard, the general convention "shall have the right to affirm, amend, modify, or reverse any decision which has been submitted to them on appeal, and fix the penalty, if any, in connection therewith." (Art. Nineteen, § 7.) There are no penalties prescribed by the constitution which could apply to a situation such as that described by the instant complaint, and it would be impossible for the appellate tribunal to make any order for repayment of any money to the local. It could rule that appellant is entitled to the accounting demanded by him but it could go no further; it could not take the accounting or effectively declare restoration of any amount found owing to the local. Concerning the propriety of a money judgment against the treasurer of a local union for funds which he had refused to turn over to its trustees, the Supreme Court said, in Grand Grove of U. A. O. of Druids of California v. Garibaldi Grove, No. 71, of U. A. O. of Druids (Duchein), supra, 105 Cal. 219, 224, 38 P. 947, 948, "as the payment of money or the delivery of property cannot be enforced by the machinery of these organizations, the aid of the judicial tribunals of the state is required."

Bell v. Sullivan, 183 Misc. 543, 49 N.Y. S.2d 388, 390: "None of these provisions [of constitution and by-laws] is adapted toward furnishing the relief sought in this action; nowhere therein is there jurisdiction vesting in any of the association tribunals power to compel an accounting and for the awarding of judgment thereon, or any process or means provided to compel obedience and payment other than punitive impositions. It is very clear that no such state of affairs was anticipated and hence it is not surprising that it is unprovided for.

"Assuming, arguendo, that under the mentioned articles jurisdiction resides in the organization agencies to direct an accounting and payment under penalty of expulsion, which is the maximum of punishment which can be imposed, it would be wholly unavailing and utterly inadequate, for though this would be the extreme punishment which could be inflicted upon the individual defendants, yet it would not enable plaintiffs to enforce payment and so resort to union tribunals would, under the circumstances, be an entirely and wholly futile procedure, so that resort to a court becomes an imperative necessity. There is no other mode by which plaintiffs can obtain adequate relief except by such a suit as this and the employment of coercive processes for enforcement of the redress which a court of equity might award, as provided for by law."

To the effect that the long, burdensome and fruitless procedure prescribed by the constitution under discussion does not constitute a real remedy which must be pursued in advance of court action, see Local Lodge No. 104, etc. v. International Brotherhood of B. M., etc., 158 Wash. 480, 291 P. 328, 330; Nissen v. International Brotherhood, etc., 229 Iowa 1028, 295 N.W. 858, 866, 141 A.L.R. 598; Collins v. International Alliance of T. S. E., etc., 119 N.J. Eq. 230, 182 A. 37, 45, 46; Fritz v. Knaub, 57 Misc. 405, 103 N.Y.S. 1003, 1009, 1010; Bricklayers' Plasterers' & Stonemasons' Union v. Bowen, Sup., 183 N.Y.S. 855, 863; 168 A.L.R. 1473, Annotation. In the Local Lodge case, supra, 291 P. at page 330 the court said: "It appears from the evidence that the international convention of appellant, which would normally have convened during the year 1928, was regularly postponed, and that no other international convention would convene until some time during the year 1931. Under these circumstances we think this a proper case for the application of the rule laid down in 19 Ruling Case Law, at page 1231, § 41, to the effect that, if the procedure outlined by the constitution of the organization is so complicated, and the expense and delay incident to the invoking of such machinery are so great, as, all being considered, to amount practically to a denial of justice, and indicate clearly that the procedure provided by the organization fails to provide adequate redress, the party deeming himself aggrieved may resort to the courts of the forum in the first instance. Under the circumstances disclosed by this record, we hold that respondent was not required to present its claim to appellant's international convention, but was, at the time it instituted this action, justified in invoking the aid of the courts of this jurisdiction. This conclusion is supported by the following authorities: Brown v. Supreme Court I. O. F., 176 N.Y. 132, 68 N.E. 145; Lindahl v. Supreme Court I. O. F., 100 Minn. 87, 110 N.W. 358, 8 L.R.A.,N.S., 916, 117 Am.St.Rep. 666."

It cannot fairly be said that an internal appeal or series of appeals from fiscal mismanagement of the daily affairs of the local could be anything other than a futile pursuit of a putative remedy. The fair construction of the words "decisions and orders" in Article Nineteen, § 3(a) is that they do not include misappropriations or misapplications of the moneys or other property of the local in circumstances described by the complaint at bar. The Holderby decision, supra, is not opposed to this conclusion. It proceeds upon the assumption of an existing right of appeal—from suspension or expulsion of a member—one which clearly did exist. Our construction leaves the appeal provisions of the instant constitution in harmony with the general law on the subject.

[23, 24] Washington Local Lodge etc., v. International Brotherhood, 28 Wash.2d 536, 183 P.2d 504, 509, 189 P.2d 648, says that the "weight of authority appears to be in accord * * * to the general effect that where the controversy is financial in nature, rather than wholly disciplinary, the courts make an exception to the general rule that it will not adjudicate the question presented." Nissen v. International Brotherhood, etc., supra, 229 Iowa

1028, 295 N.W. 858, 866, 141 A.L.R. 598: "Such remedies need be exhausted before resort to the courts only where the question is purely social, involving discipline or the conduct or standing of a member. But if property rights are involved in the absence of an express agreement to exhaust the remedies provided within the association, the member may resort to the courts without using the within-the-Union remedies. And where property rights are involved the member need not first pursue the remedies within the association, if they would be futile, illusory, or vain." This case was cited with apparent approval in Elevator Operators, etc., Union, Local 117, of San Francisco v. Newman, 30 Cal.2d 799, at page 810, 186 P.2d 1. To the same effect see Local Lodge No. 104, etc. v. International Brotherhood of B. M., etc., supra, 158 Wash. 480, 291 P. 328, 330; Robinson v. Nick, 235 Mo.App. 461, 136 S.W.2d 374; Dangel and Shriber on Labor Unions, p. 232. In Bell v. Sullivan, supra, 49 N.Y.S.2d 388, 389, it is said: "Such provisions deal with membership status, rights, violations of constitution, by-laws, rules and regulations, and matters pertaining to punishment, basically intra-union affairs." Dusing v. Nuzzo, 178 Misc. 965, 37 N.Y.S.2d 750, 752: "Where the management in control of a labor union * * * dissipates union funds without accounting, and where redress for any of these irregularities cannot be obtained through constituted local or international officials, the court will intervene to grant relief."

[25, 26] If the court were to conclude that the phrase, "decision or order" is broad enough to cover the matter of mismanagement and misappropriation of funds, it would nevertheless follow that resort to the courts is not precluded thereby. The case at bar has now been reduced to a claim for accounting and recovery of moneys wrongfully misappropriated; all else is barred by the former judgment. There is no question of discipline or incidental damages here involved. It has long been the rule in this state that a controversy over property rights, one confined to such rights, affords good ground for equitable relief notwithstanding the existence of a charter provision for an internal appeal. Oil Workers International Union, C.I.O. v. Superior Court, 103 Cal.App.2d 512, 571, 230 P.2d 71, 106: "In fact, as early as 1888 it was recognized in this state that 'Courts will interfere for the purpose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character.' Otto v. Journeymen Tailors' P. & B. Union, 75 Cal. 308, 17 P. 217, 219 [7 Am.St.Rep. 156]." Ellis v. American Federation of Labor, 48 Cal.App.2d 440, 445, 120 P.2d 79, 81: "The undenied allegations of the verified complaint sufficiently show property rights of the local unions in the Central Council to justify the interposition of the courts. 'Something more than mere membership in a voluntary association is embraced in this case. It involves the life of the organization known as Local 263, with its funds and property, its associations and reputation, and all the rights and privileges of its members. * * * Their right to enjoy whatever advantages membership in this union would bring them in their calling could not be taken away by the unlawful action of the general executive board. In our opinion property rights are involved and equity will assume jurisdiction to protect them.' Barbrick v. Huddell, 245 Mass. 428, 435, 436, 139 N.E. 629, 631."

Although the Supreme Court in the Holderby opinion, supra, 45 Cal.2d 843, 291 P.2d 463, limited some of the language of Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, 208 P.2d 1009, it did not directly or impliedly overrule the case, which involved an attack upon a new constitution that was held not to have been validly adopted. The litigation involved the right to control of the entire property of the union and the nature of the litigation was thus summarized at page 340 of 93 Cal.App.2d, at page 1017 of 208 P.2d: "When a common fund is maintained for the benefit of a number of persons bound together by association and a contract exists between the association and its members directing the course of action in changing the personal and property rights of the members, and an effort is made to break the contract and substitute another which impairs and injures the rights of the beneficiaries, then the successful maintenance by a few for the benefit of many of an equitable action resulting in the protection of the contractual rights as originally established is ground for allowing attorney's fees to those who battle to redress the wrong and maintain the previous personal rights although no actual court order to return the erroneously spent funds has been made." It was held that in this situation there was no necessity of invoking or exhausting any internal remedy and the Supreme Court denied a hearing. The Holderby case, supra, does not mention any of the other cases just cited and certainly did not intend to overrule without making any mention of them.

[27] As stated in Eatwell v. Beck, 41 Cal.2d 128, 136, 257 P.2d 643, 648, "it is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." Holderby, supra, was an action by a union member who had been suspended and then expelled from membership; he sought reinstatement and damages but did not exhaust his remedy within the union. The Supreme Court held that this last fact was fatal to his action. The primary right involved was reinstatement; incidental thereto damages were claimed. There was no other property right in issue. None was claimed in the briefs. Against this background, the court said: "The plaintiff claims that an exception to the general rule made it unnecessary that he pursue the internal remedies for review before commencing this action. In Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal.App.2d 327, at page 338, 208 P.2d 1009, at page 1016, it is stated that 'where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal.' See Harris v. National Union, etc., Cooks & Stewards, 98 Cal.App.2d 733, at page 736, 221 P.2d 136. If such an exception is construed as broadly as the quoted language would permit, it would make it unnecessary for any party with a justified grievance involving personal and property rights against an organization of which he is a member, including the plaintiff in the present case, to have the matter corrected internally by the machinery provided before resorting to the courts. The exception in such a case would swallow the rule, a result clearly not intended by the cases relied on as authority for the broad interpretation sought by the plaintiff to justify this action. It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts." 45 Cal.2d at page 846, 291 P.2d at page 466. As previously observed, Holderby did not overrule the Weber case, supra. In effect it held that incidental and consequential damage growing out of expulsion (a disciplinary measure) does not render the appeal procedure inapplicable or obviate the necessity of exhausting it before invoking the aid of the courts. The incident was not permitted to control the principal. But in those cases where the property wrong is the gravamen of the complaint the immediate resort to the courts is still recognized in the authorities and Holderby, supra, does not state the contrary.

[28] The ruling of the trial court in the instant case to the effect that plaintiffs had an internal appeal with respect to misappropriation and misapplication of funds by General President Byron and that their inability to allege that they had exhausted internal remedies precluded maintenance of the action is erroneous. As a demurrer cannot be sustained to only part of a single cause of action, 2 Witkin California Procedure, p. 1474; Reed v. Drais, 67 Cal. 491, 492, 8 P. 20; Fairbairn v. Eaton, 6 Cal.App.2d 264, 269,

43 P.2d 1113, the judgment cannot be sustained, although the ruling was correct in other particulars.

The judgment is reversed.

MOORE, P. J., and FOX, J., concur.

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140 Cal.App.2d 818

John F. DUNASKY, Plaintiff and Respondent,

v.

Lillian H. DUNASKY, Defendant and Appellant.

District Court of Appeal, Third District, California.

April 16, 1956.

Rehearing Denied May 16, 1956.

Husband's divorce action on ground of extreme cruelty. The Superior Court, Napa County, Mervin C. Lernhart, J., granted a divorce and ordered the sale of certain property. The wife appealed. The District Court of Appeal, McMurray, J. pro tem., held that findings were sufficient to support the judgment as to divorce but that the trial court had exceeded its jurisdiction in ordering the sale of joint tenancy property which was in part separate property and in part community property.

Judgment modified and, as modified, affirmed.

1. Divorce 🔑249(3)

Unless it is found by competent evidence that real property held under joint tenancy deed is community property, court in a divorce action is without power to dispose of such property.

2. Divorce 🔑249(3)

Where court in divorce action found that certain property held under joint tenancy deed was not community property, court had power to declare that it was not community property and was separate property of each of the parties, but court exceeded its power in ordering sale of the property.

3. Divorce 🔑93(3)

In divorce complaint, general allegation of cruelty was sufficient to sustain decree of divorce in absence of demurrer. West's Ann.Code Civ.Proc. § 426b.

4. Divorce 🔑150(2)

Though trial court's finding, in divorce action, that defendant had been guilty of extreme cruelty was erroneously designated as a conclusion of law, it was a finding of fact sufficient to support decree of divorce. West's Ann.Code Civ.Proc. § 426b.

5. Divorce 🔑287

Where trial court in divorce action exceeded jurisdiction by ordering sale of joint tenancy property which was in part separate and in part community property, finding that the property should be sold and judgment ordering the property sold and net proceeds divided would both be modified on appeal to read that the described property was joint tenancy property of the parties.

James W. Halley, San Francisco, for appellant.

Francis H. Frisch, Napa, for respondent.

McMURRAY, Justice pro tem.

On November 5, 1951, plaintiff sued defendant for divorce, on the ground of extreme cruelty. On October 9, 1953, a judgment awarding him the divorce was filed. Between these dates, the court held numerous hearings and a referee's hearing was conducted relative to the character of certain property.

The parties hereto had been married for a little less than ten months when the action was filed. By prenuptial agreement, appellant's earnings were to be her separate property, and throughout the somewhat short matrimonial adventure, the record shows that there was a complete segregation of the parties' property. Certain differences arose and there is ample testimony which would support the granting of a divorce on the ground of extreme cruelty to either party.

On this appeal appellant urges: First, that the trial court committed prejudicial error in ordering the sale of the separate property of the appellant over her objections; second, that the court committed prejudicial error in failing to make an express finding of fact on the issue of extreme cruelty; third, that it was prejudicial error to fail to make a finding of fact on the issue, reserved by the referee to the court, as to whether or not respondent should reimburse appellant for expenditures from her separate property which appellant claims were made; fourth, that the findings made by the referee went beyond the scope of the order of reference and were therefore void, and that the trial court committed prejudicial error in adopting these findings as its own, there being no evidence in the record before the trial court on these issues; and, fifth, that, when findings of fact are inconsistent and contradictory, the judgment rendered must be set aside, must be reversed upon the appeal, and a new trial must be granted.

[1, 2] The trial court found certain real property which was being purchased by the parties by having made a down payment comprised of equal amounts of money from each of the parties' separate funds and other payments out of community property was not community property, but was purchased with separate funds of the plaintiff and defendant, each contributing one-half of the down payment, and that other contributions thereto were made from community property and ordered that this real property, the family residence, should be sold and the proceeds be equally divided between the parties. This, the court had no power to do. From the record before us, it appears that this was in fact joint tenancy property, and it is established that in a divorce proceeding the court is without power to grant one spouse separate property of another; and unless it is found by competent evidence that real property held under a joint tenancy deed is community property, the court in a divorce action is without power to dispose of such property. Walker v. Walker, 108 Cal.App.2d 605, 239 P.2d 106. The court exceeded its power in ordering the sale of the property but did have power to declare that it was not community property but was the separate property of each of the parties.

[3, 4] The appellant's next contention is that the court failed completely to find upon the issue of extreme cruelty by either party against the other. In its findings, the court indisputably found that the allegations as to extreme cruelty which were in general terms, in the defendant's cross-complaint, were untrue. The court made no express finding of fact that defendant had been guilty of extreme cruelty so as to cause grievous mental or bodily injury to the plaintiff. However, in the findings of fact, the court does refer to the plaintiff as the "prevailing party". Inasmuch as the only relief sought in the complaint was for a divorce, it is difficult to see how this finding can fail to refer to the complaint which alleged cruelty in general terms. No demurrer was filed in this action, and, under the provisions of Section 426b of the Code of Civil Procedure, there is a sufficient allegation of cruelty. In its findings of fact and conclusions of law, the court does find as a conclusion of law that the defendant has been guilty of "extreme cruelty and that plaintiff, * * *, is entitled to a divorce upon the grounds of defendant's said extreme cruelty." The case of LaMar v. LaMar, 30 Cal.2d 898, 902–903, 186 P.2d 678, holds that since cruelty may be pleaded in general terms in the absence of a request for specific findings, a finding of extreme cruelty is a sufficient finding of an ultimate fact to support the trial court's determination. That the finding of fact is erroneously designated as a conclusion of law does not deter this court from treating it as a finding of ultimate fact. Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 293, 105 P.2d 984. This is not to say that the findings before us are to be taken as models for future findings in such matters.

The third point urged by appellant is without merit; the record shows substantial evidence that the referee was acting within his power under the terms of the reference. Appellant's fourth contention finds no support in the record. The fifth contention of appellant that the findings of fact are inconsistent and contradictory is not well taken.

[5] Respondent has requested that this court make further findings in aid of supporting the judgment under established principles of appellate procedure. In view of our interpretation of the findings of fact, such further findings would appear to be unnecessary. However, since the court exceeded its jurisdiction in attempting to dispose of or cause the disposition of the joint tenancy property which was in part separate property of the parties hereto and in part community property, this court will at this time modify the findings of fact heretofore entered by the trial court and the judgment made in accordance therewith in the following particulars:

> That portion of Finding 6, lines 6–8, reading, "and as to said real property the same should be sold and the net proceeds equally divided between the plaintiff and the defendant" shall be stricken therefrom; that portion of the Conclusions of Law numbered 3, which reads, "That the family residence located at 1415 Maxwell Avenue, in the City of Napa, County of Napa, State of California, shall be sold and the proceeds equally divided between the parties", shall be stricken therefrom; and in the Judgment that portion of the Judgment which reads, "4. That the real property belonging to the parties hereto situated at 1415 Maxwell Avenue in the City of Napa, County of Napa, State of California, shall be sold and the net proceeds divided equally between the parties hereto", shall be stricken therefrom. In lieu of the Conclusion of Law numbered 3, heretofore mentioned, there shall be inserted the following: "That the family residence located at 1415 Maxwell Avenue, in the City of Napa, County of Napa, State of California, is joint tenancy property of the parties hereto"; and that in lieu of the matter stricken from the Judgment shall be inserted the following: "That the real property situated at 1415 Maxwell Avenue, in the City of Napa, County of Napa, State of California, is joint tenancy property of the parties hereto."

As so modified, the judgment appealed from is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

140 Cal.App.2d 917

In the Matter of the ESTATE of Frank BLAIN, Deceased.

Bettie TREASTER, Appellant,

v.

F. Kenneth HAMLIN, Guardian of the Person and Estate of Sonia Lambert, a Minor, Contestant and Respondent.

Civ. 4998.

District Court of Appeal, Fourth District, California.

April 19, 1956.

Rehearing Denied May 14, 1956.

Hearing Denied June 6, 1956.

Proceeding in the matter of the estate of deceased. From judgment in the Superior Court of Tulare County, Robert K. Meyers, J., denying probate to an alleged integral portion of a holographic will and determining that the granddaughter of the deceased as his sole surviving heir at law, was entitled to take the whole estate, the contestant appealed. The District Court of Appeal, Conley, J. pro tem., held that the doctrine of "integration" could not be applied so as to include a slip of paper wrapped around a ring box disposing of a ring to the granddaughter of the deceased and thereby validate the holographic will of the deceased and that hence the granddaughter was entitled to take all his property as in intestacy.

Orders and judgment affirmed.

1. Wills ⚷386

In a contested proceeding in probate, the limitations imposed upon an appellate court's review of the facts are the same as in any other civil case.

2. Wills ⚷130

Strict compliance with requirements of the probate code as to handwriting, date and signature of a holographic will is absolutely essential. West's Ann.Prob.Code, § 53.

3. Wills ⚷130

A holographic will must be complete in itself. West's Ann.Prob.Code, § 53.

4. Wills ⚷72

Proof of testamentary intent must be made with respect to the very paper proposed before any document may be admitted to probate as a last will.

5. Wills ⚷448

Principle of interpretation that the law favors testacy over intestacy is usually only operative, when the existence of testamentary intent has already been ascertained and the subject-matter of the doubt is one of construction, and where there is doubt as to the existence of the animus testandi, rule in favor of testacy is not applicable. West's Ann.Prob.Code, § 102.

6. Wills ⚷130

Where seven sheets of paper constituting a holographic will were each complete in itself as to date, signature and handwriting, they were properly considered as one will under the theory of integration where the writings were in close physical proximity, were physically attached by being folded together and the continuity of purpose was apparent through the readings of the documents and all the sheets were enclosed by testator in a sealed envelope bearing the endorsement in his own handwriting that it was his last will.

7. Wills ⚷130

Where a slip of paper was wrapped around a ring stating it was "to" the granddaughter of deceased, and it was found in the deceased's deposit box which also contained papers constituting his holographic will and the slip of paper was physically excluded from everything outside the ring box and there was no reference in the pages of the will to the paper in the ring box, doctrine of "integration" was not applicable so as to include the slip of paper in the will and thereby save the holographic will from invalidity for failure to comply with the statutory requirements, and hence the granddaughter as sole heir, was entitled to take deceased's estate as in intestacy. West's Ann.Prob.Code, §§ 53, 222.

See publication Words and Phrases, for other judicial constructions and definitions of "Integration".

Robert H. Haden and John P. Hyland, Visalia, for appellant.

Crowe, Mitchell & Hurlbutt, Visalia, for respondent.

CONLEY, Justice pro tem.

These are appeals from two complementary judgments denying probate to an alleged integral portion of a holographic will and determining that a granddaughter of the decedent, who is his sole surviving heir at law, is entitled to take the whole of his estate, valued at more than $115,000, to the exclusion of the devisees and legatees named in the will.

The decedent, Frank Blain, and his wife Wanda Berta Blain had one child, Carol, who married Otto Lambert; their only child is Sonia Lambert. The Blains had executed a property settlement agreement and an interlocutory decree of divorce had been issued to them about six months before the happening of an airplane accident in which Mrs. Blain and Mr. and Mrs. Lambert were killed. This left Sonia as the only lineal descendant of Frank Blain; the girl went to live in Los Angeles at the home of Mrs. George Wakefield, sister-in-law of Mrs. Lambert, but she occasionally visited with her grandfather, Frank Blain; he operated certain of the Tulare properties which her mother, father and grandmother had left her and accounted for the income to Sonia's guardian, F. Kenneth Hamlin; the guardianship estate shortly before Mr. Blain's death was valued in excess of $120,000.

Frank Blain died on February 7, 1953. Prior to the commencement of the proceedings leading to the decrees from which the appeals are taken, his will was admitted to probate. It consisted of seven separate sheets, each of which was wholly in his own handwriting and dated and signed by him; these seven sheets were found in his safe deposit box in the Bank of America at Visalia folded together and enclosed in a sealed envelope which was endorsed in the handwriting of the decedent, "Last Will F. B.". Three of these complete pages were dated June 1, 1949, and four of them April 9, 1952; each of six of the seven parts of the will as admitted to probate dealt with a separate devisee or legatee, and the seventh directed the sale of an additional parcel of real property for the payment of inheritance taxes and probate expenses. Sonia Lambert was not mentioned in any of the seven sheets.

If the will as admitted to probate is the complete will of decedent, there can be no question but that Sonia Lambert was a pretermitted heir entitled to the whole estate of her grandfather by virtue of the provisions of Section 90 of the Probate Code:

> "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

Sonia Lambert is not provided for in the will admitted to probate, and in fact is not mentioned in it in any way; there is no proof or even contention that she was previously provided for by the grandfather in any settlement or by way of advancement; there is nothing in any of the seven pages to indicate that the omission of all provision for the grandchild and only heir at law of the testator was intentional. Pursuant to Section 222 of the Probate Code she would have inherited all of the decedent's property if he had died intestate. Therefore, it is clear that if the will as admitted to probate was the entire will of Frank Blain, the court's decree determining heirship is correct, and Sonia Lambert is entitled to inherit all of the real and personal property owned by him.

The entire case thus turns on the question whether the court erred in denying the petition for the probate of the alleged integral portion of the will; this petition was filed by Bettie Treaster, a niece of Frank Blain, and one of the devisees named in the will admitted to probate; the alleged integral portion of the will is admittedly in the handwriting of the decedent and consists of five words, including the signature, as follows: "to Sonia Lambert Frank Blain" written on a small piece of paper which was wrapped around a dinner ring worth $120 and enclosed in a small ring box found in the bank safe deposit box of decedent, which also contained miscellaneous papers of Mr. Blain and the sealed envelope marked "Last Will F. B." in which had been placed the seven sheets of the will as admitted to probate.

[1] This court's enquiry must be: was there substantial evidence to support the trial court's findings that the document in question "* * * was not made or executed in the manner provided by law for the execution of a holographic will", that it "* * * is not testamentary in character, contains no testamentary disposition, and exhibits no testamentary intent," that it "* * * cannot be related to the last Will and Testament of said deceased, either by sequence of thought, physical proximity, physical attachment, or continuity of purpose" and the judgment that it formed no part of the will of Frank Blain. For in a contested proceeding in probate the limitations imposed upon an appellate court's review of the facts are the same as in any other civil case. As is said in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690:

> " 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as

> being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." In re Estate of Teel, 25 Cal.2d 520, 526, 154 P.2d 384; In re Estate of Miller, 16 Cal.App.2d 154, 159, 60 P.2d 498.

The foregoing rules have been applied to judgments in cases where the conflict in the record was between inferences which the trier of fact might draw. In re Estate of Stickney, 101 Cal.App.2d 572, 576, 225 P.2d 649; In re Estate of Trefren, 86 Cal.App.2d 139, 142, 194 P.2d 574; In re Estate of Dotta, 18 Cal.App.2d 763, 765, 64 P.2d 741; In re Estate of Hathaway, 38 Cal.App.2d 526, 528, 101 P.2d 741, and in cases specifically involving the question of integration. In re Estate of Fritz, 102 Cal.App.2d 385, 388, 227 P.2d 539; In re Estate of Goldsworthy, 54 Cal.App.2d 666, 670, 129 P.2d 949.

[2] Unless the piece of paper with the five words on it can be integrated with the will as admitted to probate, In re Estate of Moody, 118 Cal.App.2d 300, 306, 257 P.2d 709; In re Estate of Plumel, 151 Cal. 77, 90 P. 192, it cannot pretend to any consideration as a holographic will; it is fatally defective in form in that it bears no date; and strict compliance with the requirements of Section 53 of the Probate Code as to handwriting, date and signature is absolutely essential. In re Estate of Towle, 14 Cal.2d 261, 267, 93 P.2d 555, 124 A.L.R. 624; In re Estate of Billings, 64 Cal. 427, 1 P. 701; In re Estate of Martin, 58 Cal. 530, 532; In re Estate of Thorn, 183 Cal. 512, 514, 192 P. 19; In re Estate of Vance, 174 Cal. 122, 123, 162 P. 103, L.R.A.1917C, 479; In re Estate of Carpenter, 172 Cal. 268, 269, 156 P. 464, L.R.A.1916E, 498; In re Estate of Wunderle, 30 Cal.2d 274, 280, 181 P.2d 874. The trial court's finding that it "* * * was not made or executed in the manner provided by law for the execution of a holographic will" is incontestably true, unless there was integration with the seven written pages in the envelope.

[3] Has the trial court substantial support in the record for the finding that this proposed portion of the will "is not testamentary in character, contains no testamentary disposition, and exhibits no testamentary intent"? We think that a fair consideration of the record compels an affirmative answer. The writing itself "to Sonia Lambert Frank Blain" contains no description or specification of any property. In re Estate of Coffin, 44 Cal.App.2d 178, 182, 112 P.2d 34. A holographic will must be complete in itself; there is no authority given by the code section or decided cases to incorporate physical objects as part of the dispositive instrument. But even if the trier of fact had taken the unauthorized step of saying that the words referred to the ring, the court had before it evidence that the ring was already the property of Sonia through inheritance from her grandmother, and that Frank Blain was merely holding it for her; with this background of fact, the words "to Sonia Lambert" could be inferred to mean "This is the property of Sonia Lambert, deliver it to her." If, in a document constituting a will, there should appear the statement "To Jane Doe, my diamond ring" the word "to" in its particular context would be dispositive, In re Estate of Weber, 76 Cal.App. 723, 245 P. 776, but the word "to" is certainly not a term of art applicable only to testamentary disposition. It is a common word used in sundry circumstances. Letters, telegrams, packages are often addressed with the word "to" preceding the name of the addressee, and the inference could be drawn by the trier of fact from the circumstances developed in the record that no disposition by way of will was intended.

[4] It is, of course, elementary that proof of testamentary intent must be made with respect to the very paper proposed before any document may be admitted to

probate as a last will and testament. In re Estate of Wunderle, supra, 30 Cal.2d 274, 181 P.2d 874; In re Estate of Sargavak, 35 Cal.2d 93, 95, 216 P.2d 850, 21 A.L.R.2d 307; In re Estate of Kisling, 68 Cal.App.2d 163, 167, 156 P.2d 57; In re Estate of Button, 209 Cal. 325, 331, 287 P. 964; In re Estate of Kelleher, 202 Cal. 124, 129, 259 P. 437, 54 A.L.R. 913; In re Estate of Spencer, 87 Cal.App.2d 591, 597, 197 P.2d 351; In re Estate of Hathaway, supra, 38 Cal.App.2d 526, 528, 101 P.2d 741; In re Estate of Logan, 29 Cal.App.2d 60, 84 P.2d 245. And the court's finding that there was no testamentary intent is supported by substantial evidence.

[5] It should be noted in passing that the principle of interpretation that the law favors testacy over intestacy, Section 102, Probate Code; In re Estate of Olsen, 9 Cal. App.2d 374, 379, 50 P.2d 70; In re Estate of Wierzbicky, 69 Cal.App.2d 690, 692, 159 P. 2d 699, is usually only operative when the existence of testamentary intent has already been ascertained, "and the subject-matter of the doubt is one of construction. Where there is a doubt as to the existence of the *animus testandi* the rule in favor of testacy is not applicable". In re Estate of Anthony, 21 Cal.App. 157, 160, 131 P. 96, 98. See also: In re Estate of Kelleher, 202 Cal. 124, 259 P. 437, 54 A.L.R. 913. And a rule of construction can never serve to create a will where one does not exist. In re Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052.

The testimony of the witness Harriet Young that on one occasion Mr. Blain showed her the ring and said he was going to leave it to his granddaughter and "he was fixing it to take it to the Safe Deposit Box that day" does not, as in the In re Estate of Sargavak, supra, 35 Cal.2d 93, 216 P.2d 850, 21 A.L.R.2d 307, cited by appellant, relate to oral declarations of a testator with relation to an existing written instrument as tending to show the intent with which it was executed, but rather to a mere intention at some time in the future to make a will; in any event, this evidence only furnishes a conflict with other evidence, direct and indirect, which it was the trial court's duty to resolve.

[6] Finally, in our consideration of the findings, we ask: Was the trial court justified under the record in finding that there was no integration of the slip of paper in the ring box with the seven sheets in the envelope, or, using the language of the court, that the slip of paper "* * * cannot be related to the last Will and Testament of said deceased, either by sequence of thought, physical proximity, physical attachment, or continuity of purpose?"

In Re Estate of Wunderle, supra, 30 Cal. 2d 274, 281, 181 P.2d 874, 878, it is said:

> "In the law of wills, integration, as distinguished from incorporation by reference, occurs when there is no reference to a distinctly extraneous document, but it is clear that two or more separate writings are intended by the testator to be his will. In re Estate of Francis, 191 Cal. 600, 601, 217 P. 746; In re Estate of Clisby, 145 Cal. 407, 409, 78 P. 964, 104 Am.St.Rep. 58; In re Estate of Taylor, 126 Cal. 97, 100, 58 P. 454; In re Estate of Bauer, 51 Cal.App.2d 636, 638, 124 P.2d 630; In re Estate of Swendsen, 43 Cal.App.2d 551, 555, 111 P.2d 408; see Atkinson on Wills, Secs. 139, 143; 16 Cal.L.Rev. 154, 155. Thus several writings, connected by sequence of thought (In re Estate of Swendsen, supra; In re Estate of Johnston, 64 Cal.App. 197, 221 P. 382), folded together (In re Estate of Merryfield, 167 Cal. 729, 141 P. 259) or physically forming one document (In re Estate of Clisby, supra; see, In re Estate of Skerrett, 67 Cal. 585, 8 P. 181), have been admitted to probate as constituting an holographic will."

The seven sheets of paper constituting the will as admitted to probate, each of which was complete in itself as to date, signature and handwriting, were nevertheless properly considered as one will under the very theory of integration which appellant invokes. The seven writings were in close physical proximity, were physically attached by being folded together, and the sequence of thought and continuity of purpose are apparent through the reading of the documents and by the fact that all of these sheets were enclosed by the testator in a sealed envelope bearing the endorsement in his own handwriting "Last Will F. B."

[7] The suggested integration of the slip of paper in the ring box with the admittedly integrated seven sheets in the envelope, has no such evidentiary support. The slip of paper was physically excluded from everything outside of the ring box; even the ring box was not attached physically in any way to the envelope containing the seven sheets. Both closed ring box and sealed envelope were in a bank safe deposit box with numerous other papers, all of which would normally be kept in a bank vault. There is no reference direct or indirect in any of the seven pages in the will envelope to the paper in the ring box, or to the ring, and there is, of course, no reference by any wording on the slip of paper to the will envelope or its contents.

We have been unable to find any case which would authorize an extension of the doctrine of integration to include the slip of paper from the ring box. The three cases principally relied upon by appellant, In re Estate of Dumas, 34 Cal.2d 406, 210 P.2d 697, In re Estate of Moody, 118 Cal.App.2d 300, 257 P.2d 709 and In re Estate of Swendsen, 43 Cal.App.2d 551, 111 P.2d 408, deal with differing factual situations which furnish a basis for the application of the doctrine. In the Dumas case, supra [34 Cal.2d 406, 210 P.2d 702], the testatrix declared all three papers to be her will, they were folded in proper and chronological sequence and placed in an envelope; shortly before the death they were at her direction placed together in a sealed envelope; she indicated on the first sheet that the other sheets would carry out her purpose of making a complete testamentary disposition and the "continuity of the context is manifest". In the Moody case, supra [118 Cal.App.2d 300, 257 P.2d 716], the will was on two sheets of paper, and both sides of the first sheet were written on by the testator; it is apparent from their contents that the testator intended all written parts to constitute his will. "Both parts are wholly testamentary in character; they are integrated by their context; they are congruous, continuous, and make a consistent whole; they were obviously written for the single purpose of disposing of the testator's estate." In the Swendsen case, supra, the testator stated that both pieces of paper on which he had written constituted his will and then affixed his signature to one; he kept the papers together and handed an envelope containing them to his chief beneficiary and executrix. These cases differ factually from the instant case and constitute no authority to warrant a reversal of the judgment.

Entirely outside of the writings themselves, the record shows that Frank Blain did not intend to leave any part of the substantial estate referred to in the will to his granddaughter, for he expressed himself as believing that she already had inherited sufficient property from her father, mother and grandmother; he wished to have his sister, niece, nephews and friends receive the land and personalty specified in the seven pages of his will. But, unfortunately, the testator knew just enough about probate law to think he could safely prepare his own will; by acting for himself he saved an attorney's fee amounting to perhaps ten dollars and caused a loss to his intended devisees and legatees of well over a hundred thousand; "a little learning is a dangerous thing."

The orders and judgments appealed from are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

140 Cal.App.2d 751

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Herman TORRES, Defendant and Appellant.

Cr. 3187.

District Court of Appeal, First District, Division 1, California.

April 16, 1956.

Defendant was convicted in the Superior Court, Alameda County, Donald K. Quayle, J., of unlawful possession of narcotics, and he appealed. The District Court of Appeal, Bray, J., held that knowledge of narcotic character of article possessed was an essential ingredient of offense of possession of narcotic, and evidence of fresh needle marks on defendant's arm when arrested was admissible to show knowledge and to show that defendant had had possession of narcotics found at scene of his arrest.

Affirmed.

1. Poisons ⚿4, 9

Knowledge of narcotic character of article possessed was an essential ingredient of offense of possession of narcotic; and evidence of fresh needle marks on defendant's arm when arrested was admissible, in prosecution for such offense, to show knowledge and to show that defendant had had possession of narcotics found at scene of his arrest. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⚿369(2)

The general test of relevancy is whether evidence tends logically, naturally, and by reasonable inference to establish any fact material for People or to overcome any material matter sought to be proved by defense, and if it does, evidence is admissible, whether or not it embraces commission of another offense and whether other crime be similar or dissimilar.

3. Criminal Law ⚿370

In prosecution for unlawful possession of narcotics, evidence as to prior acquaintanceship of defendant with arresting officers and their automobile was admissible as showing guilty knowledge in ducking into doorway to hide narcotics at time of his arrest, and fact that jury might conclude from such evidence that defendant's prior acquaintanceship with officers and their vehicle might have been due to an arrest did not render evidence inadmissible.

4. Criminal Law ⚿338(1), 1169(2)

In prosecution for unlawful possession of narcotics, question as to whether officer-witness had been observing defendant for any length of time prior to date of arrest should not have been permitted, but there could have been no prejudice in allowing answer to stand where record was replete with testimony, admitted without objection, to effect that officers had seen defendant numerous times, and had had him in their automobile on several occasions.

5. Criminal Law ⚿370

In prosecution for unlawful possession of narcotics, evidence as to a prior offense was admissible as a circumstance tending to show that defendant had falsified in disclaiming knowledge of presence of marijuana as well as knowledge of narcotic character of objects found in his possession. West's Ann.Health & Safety Code, § 11500.

Gladys Burke Schwatka, Orinda, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a jury conviction of two counts of violation of section 11500, Health and Safety Code: first count, unlawful possession of heroin; second count, unlawful possession of marijuana. He had admitted a prior conviction under the same section. He also appeals from an order denying his motion for new trial.

Questions Presented.

Admission of evidence: (a) fresh needle marks; (b) evidence of prior acquaintanceship with the officers; (c) prior offense of possession of marijuana.

Evidence.

June 7, 1955, about 10 p. m., Officers Hilliard and Myall of the Special Services Detail of the Oakland Police Department, while cruising in an unmarked police car, turned off Broadway into one-way 8th Street. They drove along the lane nearest the curb and saw defendant approaching them on the sidewalk about 125 feet away. When he was about 20 feet from them and apparently saw the officers, defendant quickened his pace and turned suddenly into a doorway which extended about 8 feet in from the sidewalk. The officers stopped opposite the doorway, next to some parked cars. Officer Myall turned his flashlight on defendant who was standing in the rear of the doorway facing a meter box located on the wall. Myall saw defendant's left hand with a white object in it being raised above his head and over the top of the meter box, where the officer lost sight of the hand. It remained there not over 5 or 6 seconds and then defendant pulled it down empty. Officer Hilliard's view of defendant at first was blocked by Myall. Hilliard saw defendant's hand coming down empty from the meter box. The officers called defendant to their car. As Officer Hilliard started toward the meter box, defendant called to him, "Ted," "I want to talk to you, come back * * *. Why don't you search me?" Hilliard, however, went to the box. It had no top on it. Opening the sliding door he saw a white object stuck between the box and the side of the building. It was a white paper napkin containing a "bindle" of heroin and marijuana cigarettes. An inspection of defendant's left arm revealed fresh marks similar to those made by hypodermic needles. An inspection of his arm made three days prior revealed no such marks. Defendant denied that he had dropped the package in the box or knew anything about it or its contents. On the stand he testified that he went into the doorway because he was looking for his wife. Besides denying any connection with the package, he denied he had needle marks on his arm or even knew what heroin was.

(a) Needle Marks.

[1] No contention is made as to the sufficiency of the evidence to support the verdict. Defendant contended that the evidence of the fresh needle marks on defendant's arm when arrested was inadmissible. He contended, contrary to the usual contention made by a defendant in a narcotic case, that on a charge of possession of a narcotic, knowledge that the article possessed is a narcotic is not involved, that the mere fact of possession is sufficient to support a conviction. Hence, evidence to show he knew of the narcotic character of the objects was immaterial and prejudicial. This contention, however, was made prior to the decision in People v. Winston, 46 Cal.2d 151, 293 P.2d 40, which cited several of the cases in California holding that "knowledge of the narcotic character of the article possessed is an essential ingredient of the offense charged", 46 Cal.2d at page 161, 293 P.2d at page 46, and laid at rest any question upon the subject, if any question existed.[1] Moreover, the evidence was admissible as tending to show that defendant had possession of the articles found in the meter box.

In People v. Gin Hauk Jue, 93 Cal.App.2d 72, 208 P.2d 717, the defendant was found in possession of hypodermic needles, opium pipes and opium. The defendant denied ownership to the officer. At the trial, after evidence of the possession and the defendant's denial was admitted, one of the officers testified that he had examined the defendant's arms and found evidence of the use of needles. On appeal the defendant made the same contention as defendant here, namely, that he was charged only with *possession* of the narcotic and that to inject this testimony which showed *use* of narcotics was highly prejudicial. The court held, 93 Cal.App.2d at page 74, 208 P.2d at page 718: "This evidence was clearly admissible as a circumstance showing 'possession' by defendant of the opium there found by the officers."

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[1] Counsel on appeal was appointed by this court. We feel constrained to state that her brief, filed before People v. Winston, supra, was decided, is an excellent one.

(b) Prior Acquaintanceship.

[2-4] Without objection the police officers testified to prior acquaintanceship with defendant. As to this, defendant properly states: "The defendant is not objecting to evidence showing acquaintanceship, since it tends logically to show that he ducked into the doorway to hide the narcotics after recognizing the officers. This shows guilty knowledge." Defendant then states that evidence was admitted "showing the reasons and basis for the acquaintanceship, i. e. prior arrests and investigations * * *." With the single exception hereafter discussed, defendant cites no portion of the record showing such evidence. We have carefully examined the record and failed to find any such evidence. For the purpose of showing that defendant was acquainted not only with the officers but with their car, and recognized them and it just before he dashed into the doorway, evidence was given that defendant had been in the same automobile with the officers six or seven times. At no time did the officers testify, nor were they asked anything concerning why defendant was in their automobile on these other occasions, nor anything concerning the "reasons and basis" for their acquaintanceship with him, nor the fact that defendant had been arrested on a prior occasion for possession of narcotics. Naturally the jury must have concluded that defendant's prior acquaintanceship with the officers and his prior presence in their car might have been and probably was due to an arrest, but the fact that such a conclusion would be drawn did not make the evidence inadmissible. As said in the above quotation from defendant's brief, evidence showing acquaintanceship logically tended to show that "he ducked into the doorway to hide the narcotics after recognizing the officers." The fact that such evidence might show the commission of other offenses does not make the evidence inadmissible. "The general test of relevancy is whether the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the people or to overcome any material matter sought to be proved by the defense. If it does, then the evidence is admissible whether or not it embraces the commission of another offense and whether the other crime be similar or dissimilar. People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924." People v. Torres, 98 Cal.App.2d 189, 192, 219 P.2d 480, 481.

One of the officers was asked if he had been observing defendant for any length of time prior to the date of arrest. After he replied that he had, defendant's counsel stated: "I don't see what relevancy this has * * *. The Court: Well, I will let it stand. It is in now." While this question should not have been permitted, there was no prejudice in allowing the answer to stand. The record is replete with testimony without objection that the officers had seen defendant numerous times, and had him in their automobile on several occasions. A juror would have to have been very blind to the evidence and very unrealistic not to have inferred from the admissible evidence that these police officers had been observing defendant for some time. Nevertheless, as stated before, that evidence was admissible to show defendant's acquaintance with the officers as explaining why he suddenly entered the doorway on seeing them. We find no error in the admission of this evidence.

(c) Prior Offense of Possession.

[5] On cross-examination of defendant, after defendant had denied knowing what heroin looked like, he was asked without objection if he knew what it looked like on January 9, 1950.[2] He denied such knowledge. He was then asked if he knew what marijuana looked like and if before he had seen cigarettes wrapped in brown paper such as those in evidence. He replied that he had and did. Then the district attorney asked "and that was what

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[2] The date of his conviction of violating section 11500, Health and Safety Code, which conviction he admitted on arraignment. Unfortunately the record does not show whether this conviction was for possession of heroin or of marijuana.

occurred on January 9, 1950, is that right?" and he replied "yes." This is the only direct reference to a prior offense which the jury heard, if it rises to the dignity of being a prior offense. There was no suggestion of a conviction for such offense. Such evidence was admissible as "a circumstance tending to show that he falsified in disclaiming knowledge of the presence of the marijuana", People v. Torres, supra, 98 Cal.App.2d at page 192, 219 P.2d at page 482, as well as knowledge of the narcotic character of the objects found in his possession.

The order and judgment are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

* * *

140 Cal.App.2d 913

Hettie Alma PULOS, an Incompetent person by R. R. Watson, her guardian ad litem. Plaintiff and Respondent,

v.

Aleck PULOS, Defendant and Appellant.

Civ. 21571.

District Court of Appeal, Second District, Division 3, California.

April 19, 1956.

Hearing Denied June 6, 1956.

Action by incompetent wife's guardian ad litem for separate maintenance and for annulment of property settlement agreement with husband. The Superior Court, Los Angeles County, Lewis Drucker, J., required husband to make certain payments for support, costs, and attorney's fees, and husband appealed. The District Court of Appeal, Shinn, P. J., held that award of $100 per month pendente lite for support of incompetent wife, $25 costs, and $350 attorney's fees was within trial court's discretion, in view of fact that husband received $475 per month rental from apartments, $50 per month from another investment, and $275 per month from business, even though husband paid $363 per month on his debts and $727 per year for taxes.

Order affirmed.

1. Divorce 🔑71
Husband and Wife 🔑290

Guardian ad litem could not maintain an action for divorce on behalf of his ward but could maintain action for separate maintenance.

2. Judgment 🔑252(1)

Relief may be granted in accordance with the facts alleged in a complaint, and appropriate relief will not be denied even though it be at variance with prayer of complaint.

3. Appeal and Error 🔑1010(1)
Marriage 🔑40(10)

Disputable presumption that man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage is evidence to be weighed by trier of fact with any evidence which tends to overcome it, and factual conclusion reached in process of determining whether the presumption has been overcome will be respected and accepted by a reviewing court unless it is deemed unsupportable in reason. West's Ann.Code Civ. Proc. § 1963.

4. Evidence 🔑597

Presumption, as evidence, is sufficient to sustain a verdict or judgment for party in whose favor the presumption operates.

5. Marriage 🔑50(1)

In action for separate maintenance, evidence, which revealed that plaintiff's ward and defendant had gone out of state for avowed purpose of getting married and had thereafter returned and held themselves out as husband and wife, was sufficient to establish existence of a marital relationship. West's Ann.Code Civ.Proc. § 1963.

6. Husband and Wife 🔑299(3)

Where incompetent wife's guardian ad litem sought annulment of property settlement agreement under which husband was to pay wife $100 per month for her interest in certain property until she had received $7,000, but husband asserted that he could not keep up such payments and also comply with court's order in separate maintenance action, if payments of $100 per month were to be resumed under the agreement, there would exist a change of circumstances which would justify court in entertaining an application by husband for a modification of the allowance.

7. Husband and Wife ⚷295, 298(1), 301

In separate maintenance action, award of $100 per month pendente lite for support of incompetent wife, $25 costs, and $350 attorney's fees was within trial court's discretion, in view of fact that husband received $475 per month rental from apartments, $50 per month from another investment, and $275 per month from business, even though husband was paying $363 per month on his debts and $727 per year in taxes.

◆

Nessen & Becker, Los Angeles, for appellant.

Francis Ray Brown, Alhambra, for respondent.

SHINN, Presiding Justice.

The trial court made an order requiring Aleck Pulos, defendant, to pay to R. R. Watson, guardian ad litem of Hettie Alma Pulos, an incompetent person, $100 per month pendente lite for support, $25 costs, and $350 as attorney's fees. Defendant appeals from this order.

An action for divorce was instituted on behalf of Hettie by her guardian ad litem seeking a division of community property, support, costs, and attorney's fees. In a second cause of action it was alleged that the parties had made a property settlement agreement, that Hettie had executed to defendant a deed to certain real property situated in South Pasadena and that the property settlement and deed were procured by defendant through the exercise of undue influence. The prayer also sought annulment of the agreement and deed. The answer denied the allegations that the parties were husband and wife and while admitting they had owned the real property as joint tenants and had entered into an agreement pursuant to which Hettie conveyed her interest to defendant, denied the allegations of the use of undue influence. The order from which the appeal is taken was made on the hearing of an order to show cause.

The grounds of appeal are that a guardian ad litem of an incompetent person may not maintain an action for divorce, that there was insufficient evidence of a marriage, and that the award under the circumstances was an abuse of discretion.

[1, 2] Plaintiff concedes that a guardian ad litem may not maintain an action for divorce on behalf of his ward. It was so held in Cohen v. Cohen, 73 Cal.App.2d 330, 166 P.2d 622. In that case the court adopted the view that a suit for divorce must be regarded as one which is so strictly personal that it cannot be maintained at the pleasure of a guardian or committee of an insane person. 73 Cal.App.2d at page 335, 166 P.2d 622. It is a sufficient reason for taking the same view in the present case that there was no evidence that Hettie had requested the institution of an action for divorce or that she was competent to exercise sound judgment either as to her desires or her best interests in that respect.

Plaintiff contends, however, that the action should be construed as one for separate maintenance, and that so considered it was a proper one for the making of an order such as the one in question. Defendant says there is but slight difference between an action for divorce and one for separate maintenance and that if a guardian ad litem may not institute and maintain the one he is without capacity to institute the other. We think there are marked differences and that they are self-evident. We can conceive of no reason why an incompetent wife may not, through a guardian ad litem, sue for separate maintenance. She has a right of action and the proper, if not the only way to pursue it is through a guardian ad litem or a general guardian. The facts alleged in the present complaint were sufficient to justify an award for support. It is well-settled that relief may be granted in accordance with the facts alleged in a complaint and appropriate relief will not be denied even though it be at variance with the prayer of the complaint. Neblett v. Neblett, 13 Cal.App.2d 304, 56 P.2d 969; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Greenwood v. Greenwood, 112 Cal.App. 691, 297 P. 589.

Two other grounds of appeal are urged; first, that there was insufficient proof of the existence of a marital relationship of the parties and, second, that defendant was ordered to pay excessive amounts.

In support of the first point it is urged that there was no evidence of a ceremonial or a common law marriage and that defendant testified that he and Hettie never engaged in a marriage ceremony. It is argued that in this state of the evidence the court was bound to accept as true that there had been no ceremonial marriage and find that the parties were not husband and wife; therefore, it is contended, the court was without authority to make an award for Hettie's support. We cannot agree with this contention.

[3-5] Defendant testified that he and Hettie had been living together as husband and wife since 1934. They had held themselves out as a married couple to their friends and relatives; they had executed a chattel mortgage as husband and wife and as such had taken title to real property. They lived in a single home and were supported by defendant's earnings. R. R. Watson, the guardian ad litem, a son of Hettie, testified that in 1933 or 1934 Hettie and defendant went out of the state for the avowed purpose of getting married; they returned representing that they had become married and continuously thereafter lived and held themselves out publicly as husband and wife. One of the disputable presumptions is "That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civ.Proc. § 1963. Defendant understands that this presumption is to be given effect only in case there is no evidence to the contrary, and that where there is such evidence it must prevail over the presumption. This, of course, is contrary to the rule that prevails in California. Our courts have long held that such a presumption is evidence, that it is to be weighed by the trier of fact with any evidence which tends to overcome it, and that the factual conclusion reached in the process of determining whether the presumption has been overcome will be respected and accepted by a reviewing court unless it is deemed unsupportable in reason. Scott v. Burke, 39 Cal.2d 388, 398, 247 P.2d 313. A presumption, as evidence, is sufficient to sustain a verdict or judgment for the party in whose favor the presumption operates. (18 Cal.Jur.2d, Evidence § 68.) There was sufficient proof of the existence of a marital relationship.

[6, 7] There was evidence that defendant holds title to a new rental property of 7 units with additional quarters in the rear in which he lives; he receives $475 per month rental from the apartments, $50 per month from another investment and about $275 per month from a business which he operates. He pays $203 per month on one indebtedness, $110 upon another and $50 per month upon a third, also taxes of $727 per year. Hettie is in a sanitarium under commitment by the court; her expenses amount to $100 per month, which has been paid by the county. It appears that under the agreement of the parties defendant undertook to pay Hettie $100 per month for her interest in the property until she had received $7,000. It is argued that he cannot keep up these payments and also comply with the court's order. He testified that he made two payments under the agreement and "then we broke the contract." In view of plaintiff's attempt to have the agreement annulled, it is reasonable to assume that she would not accept further payments from defendant if he offered to make them. If payments of $100 per month are resumed under the agreement a change of circumstances will have taken place which would justify the court in entertaining an application by defendant for a modification of the allowance. The order was well within the discretion of the trial court.

The order is affirmed.

PARKER WOOD and VALLÉE, JJ. concur.

140 Cal.App.2d 848

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Maurice A. RAPOPORT, Defendant and Appellant.

Cr. 5444.

District Court of Appeal, Second District, Division 1, California.

April 17, 1956.

Hearing Denied May 15, 1956.

Prosecution for making and subscribing false income tax returns in violation of state statutes. Jury trial in Superior Court, Los Angeles County, Clement D. Nye, J., resulted in a verdict of guilt and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained the verdict.

Judgment and order affirmed.

Taxation ⚷1103

In prosecution for making and subscribing false income tax returns in violation of state statutes, evidence sustained verdict of guilt. West's Ann.Rev. & Tax Code, §§ 18431.1, 19405; West's Ann.Pen. Code, § 1382.

Bertram S. Harris, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

DORAN, Justice.

In an information filed February 24, 1954, by the District Attorney of Los Angeles County, appellant was charged in Count I with the crime of making and subscribing a false return in violation of Section 18431.1 of the Revenue and Taxation Code, committed on or about March 14, 1951; and appellant was charged in Count II with the crime of making and subscribing a false return in violation of Section 19405 of the Revenue and Taxation Code, committed on or about March 18, 1953.

A jury trial resulted in a guilty verdict. Appellant contends that,

"II

"The lower Court erred when it failed to grant the motion to dismiss the cause pursuant to Section 1382, Penal Code, State of California; and all proceedings thereafter were null and void for want of jurisdiction.

"III

"The verdict of the jury is not supported by the evidence.

"IV

"The conduct of the Trial Court in refusing to admit certain evidence prejudiced the defendant thus affecting his substantial rights.

"V

"It was error to try defendant on the two counts of the information inasmuch as both counts concerned one taxable year; the end result being that the jury was thus prejudiced against defendant, thereby affecting his substantial rights.

"VI

"The record before the District Court of Appeal is not complete; and prosecution of this appeal without benefit of the complete record affects the substantial rights of appellant in contravention of Article 1, Section 13, of the Constitution of the State of California and Article 14, of the Amendments to the Constitution of the United States of America.

"VII

"The legislature is without power to impose criminal sanctions for failure of a taxpayer to correctly estimate or determine liability on a civil obligation such as personal income tax.

"VIII

"The Superior Court of Los Angeles County, California was without jurisdiction to try defendant; it had neither jurisdiction of the subject matter or of the defendant.

"IX

"In the absence of specific legislation to the contrary, the authority to prosecute the defendant under the charges as alleged in the information is vested only in the Attorney General of the State of California; and no prosecution may proceed against any defendant on these charges unless first authorized by the Attorney General of the State of California and prosecuted by him."

The offense relates to the alleged failure of appellant to pay state income tax. As recited in respondent's brief,

> "At the Franchise Tax Board for the State of California, Sacramento, there were received certain income tax returns filed by appellant. One of these, People's Exhibit No. 1, was received March 16, 1951, and was an individual income tax return under the name of appellant and Beverly Rapoport for the calendar year 1950 (although the printed year on the form was 1949). No money was included with this return. Another return was People's Exhibit No. 2, the amended return of appellant for the year 1950. It was received March 20, 1953. The form indicated that $39.52 tax was due and this amount was remitted. In conjunction with People's Exhibit No. 2 there were received two documents comprising People's Exhibit No. 3. One was a return with the name of Beverly Rapoport on it and the other, attached to it, was a typewritten schedule headed by appellant's name, doing business as Music Capital Service, purporting to be a statement of income and expenses. People's Exhibit No. 3 indicated that a tax of $39.52 was due and this amount was remitted. People's Exhibit No. 1 was signed by both appellant and his wife. The signature on People's Exhibit No. 2 was appellant's. The signature on People's Exhibit No. 3 in the name of appellant's wife was in fact written by appellant. The proper filing period for a State income tax return for the year 1950 was January 1st to April 15th, 1951."

Appellant's store was located on Hollywood Boulevard in Los Angeles and was known as Musical Capital Service. "The merchandise with which appellant dealt was records, television sets and some stoves and frigidaires". Business apparently was extensive. As recited in appellant's brief, "A certified public accountant testified that he made an audit of the cancelled checks for a seven months period and found that purchases made during this period of time was in the amount of $125,336.13, or an average of $18,000 per month, and that averaging these figures out on a 12 month basis, taking into consideration the lost records, it would indicate total purchases in the amount of approximately $166,000.00. The defendant testified that purchases for the year, after he himself took an audit, amounted to $166,820.68, and that he made purchases from one supplier in excess of $150,000.00."

The evidence obviously related to book accounts, bank records, checks, etc., covering a period of months. In addition to appellant, the principal witnesses were income tax auditors employed by the state, and certified public accountants both for the prosecution and defense. As another example of the amounts involved, as recited in respondent's brief, "On the original State income tax return for 1950 filed by appellant the total receipts were listed at $40,948.18 whereas the actual amount as computed by Mr. LaMorte was $212,907.96, leaving a difference of $171,959.78. On the original return the cost of goods sold was listed at $32,414.17 whereas the actual amount was $110,939.81, leaving a difference of $78,525.64. On the original return the gross profits were listed at $8,543.01 whereas the actual amount was $101,968.15, leaving a difference of $93,434.14. On the original return the expenses were listed at $4,449.55 whereas the actual amount was $59,317.42, leaving a difference of $54,867.87. On the original return the net profit was listed at $4,084.46, whereas the actual amount was $42,650.73, leaving a difference of $38,566.27. With respect to the net profit as shown on the original return there would have been no tax liability. With respect to the actual net profit, however, as computed by Mr. LaMorte, there would be a tax liability of $1,557.04."

Mr. LaMorte was an income tax auditor for the State of California.

In the light of the record and the law, appellant's contention that the evidence is insufficient cannot be upheld.

It would serve no useful purpose to go into detail with regard to the other contentions of appellant recited above. Although they are highly controversial and ably presented by appellant, in the light of the record and the law they cannot be upheld.

The judgment and order are affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SCHAUER, J., dissenting.

140 Cal.App.2d 833

The MOST WORSHIPFUL SONS OF LIGHT GRAND LODGE, etc., et al., Plaintiffs, Cross-Defendants and Appellants,

v.

SONS OF LIGHT LODGE NUMBER 9 et al., Defendants, Cross-Complainants and Respondents,

and

J. S. Pough, etc., et al., Cross-Defendants and Appellants.

Civ. 16714.

District Court of Appeal, First District, Division 2, California.

April 17, 1956.

Hearing Denied June 6, 1956.

The Superior Court of the City and County of San Francisco, Frank T. Deasy, J., entered an order requiring plaintiffs to pay referee's fees, and plaintiffs appealed. The District Court of Appeal, Dooling, J., held that where plaintiffs requested referrence, and judgment was rendered against plaintiffs after referee's services were completed, fact that judgment was reversed on appeal would not deprive Superior Court of power to order payment of referee's fees by plaintiffs, and plaintiffs, if ultimately successful, could include sum paid for referee's fees in costs against defendants.

Order affirmed.

1. Reference ⚷76(5)

Where services of referee were completed with filing of his report, and almost two years had elapsed without payment for his services, he had standing to petititon court to fix his fees and was not required to wait indefinitely the action of the court or the parties in the matter of the fixing and payment of the fees.

2. Appeal and Error ⚷170(1)

Where plaintiffs, who had requested reference, stated in the trial court that there was no question about the reasonableness of fees claimed by referee for his services, and plaintiffs merely denied liability for the fees, the plaintiffs on appeal from order requiring plaintiffs to pay the requested fees could not contend that the fees were unreasonable.

3. Reference ⚷76(3)

Court has power to order referee's fees paid initially by party who sought the reference.

4. Costs ⚷191

Where court orders referee's fees to be paid initially by party who sought the reference, and such party is ultimately successful, such party may include sum paid for referee's fees in party's costs against losing party.

5. Appeal and Error ⚷1203(1)

Where plaintiffs requested reference, and judgment was rendered against plaintiffs after referee's services were completed, fact that judgment was reversed on appeal would not deprive trial court of power to order payment of referee's fees by plaintiffs, and plaintiffs, if ultimately successful, could include sum paid for referee's fees in costs against defendants.

Lewis, Field & DeGoff, Marvin E. Lewis, San Francisco, for appellants.

Appel, Liebermann & Leonard, Alexis J. Perillat, San Francisco, for respondent.

DOOLING, Justice.

Plaintiffs appeal from an order of the superior court that a fee of $800 for his services as referee be paid to Joseph P. Mouille by plaintiffs. The parties have been engaged in protracted litigation which is not yet concluded. The referee was appointed on May 3, 1950, on the motion of appellants. His report was presented to the court on October 2, 1951. Thereafter a judgment was entered against appellants herein, including an item for costs which is said to have included $800 as a fee for the referee. This judgment was reversed. Most Worshipful Sons of Light Grand Lodge, etc. v. Sons of Light Lodge, 118 Cal.App.2d 78, 257 P.2d 464.

Thereafter on August 27, 1953, Mouille filed his petition for an order fixing his fee as referee at $800 and asking for the payment of the fee so fixed. On the hearing of this petition counsel for plaintiffs made the following statement to the court: "There is no question about the reasonableness of his fee, it is just a question if we should pay for it; that is all."

The court fixed the fee at $800 and ordered plaintiffs to pay it. On appeal appellants state three questions which we quote verbatim from their brief:

> "1. Court had no jurisdiction to order the payment of costs which were part of a judgment that had been reversed. 2. Fees of referee should not have been over fifteen dollars. 3. The referee was not a party to the above entitled action and had no right to appear before the court in the said action."

We take up these points in the inverse order.

[1] 3. It is appellants' position that the referee had no standing to petition the court to fix his fee and order it paid. The referee's services were completed with the filing of his report on October 2, 1951. He waited almost two years and, not having been paid for his services, filed his petition. We cannot agree with appellants that the referee must await indefinitely the action of the court or the parties in the matter of the fixing and payment of his fee. He has a personal right to payment for his services as an officer of the court which he is legally entitled to assert in the manner in which he did.

[2] 2. Appellants, in view of their statement to the court: "There is no question about the reasonableness of his fee", cannot now claim that the fee is unreasonable. The referee was prepared to testify to the nature and extent of his services when appellants' counsel interjected the quoted concession. They cannot blow hot in the trial court and blow cold on the appeal. Harris v. Board of Education, 72 Cal.App.2d 43, 163 P.2d 883.

[3–5] 1. Appellants argue that since the referee's fee was taxed against them as costs in the judgment which was reversed "(t)he Court was in effect reaffirming its previously reversed judgment." Not so. The court has power to order the referee's fees paid initially by the party who sought the reference and if appellants are ultimately successful they may include this sum in their costs against the losing party. Rauer v. Hatfield, 9 Cir., 295 F. 48. The fact that the original judgment was reversed does not deprive the court of power to order the payment of the referee's fees. Associated Almond Growers of Paso Robles v. Wymond, 9 Cir., 69 F.2d 912. It would be intolerable if, as in this protracted litigation, the referee must await years (it is now over four years since the referee rendered his report and the litigation is still undetermined) for payment for his services.

Order affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

140 Cal.App.2d 681

Lenore T. CLAY, Plaintiff and Respondent,

v.

Marie Teague SAUTE, Defendant and Appellant,

Charles B. Teague, an Individual, Gloria Dale, an individual, and Charles B. Teague, as Administrator of the Estate of Charles C. Teague, deceased, Defendants.

Civ. 5301.

District Court of Appeal, Fourth District, California.

April 11, 1956.

Action to quiet title. The Superior Court, Fresno County, Philip Conley, J., entered judgment quieting title to the property in the plaintiff and defendant, who alleged prior ownership and possession of the land appealed. The District Court of Appeal, Barnard, P. J., held that under the circumstances the plaintiff's grantor was authorized by virtue of power of attorney to convey his property in daughter's name to plaintiff.

Judgment affirmed.

1. Evidence ⚷265(5)

Statement on part of plaintiff's grantor, in prior action, that 40 acres of land was owned by defendant in instant action, was an admission against interest on part of grantor but was not conclusive, in subsequent quiet title action between different parties, as to ownership of land, but presented a conflict in evidence as to whether defendant actually had ownership of the property in question.

2. Principal and Agent ⚷45

Statute providing that one of the ways in which agency may be terminated is by incapacity of the agent, refers to the incapacity of the agent at the time he performs questioned act and does not automatically terminate the effect of the general power of attorney regardless of circumstances, and regardless of prior and future acts and conduct disclosing the real situation. West's Ann.Civ.Code, § 2355.

3. Principal and Agent ⚷45

Where daughter gave general power of attorney to father who thereafter bought and sold a good deal of his property in her name without her knowledge, and power was in effect prior to adjudication of father's incompetency and father and daughter acted as though power were in effect after order of restoration to capacity and father was not actually incapacitated and there were other reasons for guardianship proceeding, the declaration of incompetency did not so terminate agency created by power as to deprive father of authority, after restoration, to give by deed his realty in daughter's name to another daughter. West's Ann.Civ.Code, § 2355.

4. Evidence ⚷20(1)

It is common knowledge that 40-acre tract of land, which tract is unenclosed and has no water on it, cannot be leased for pasturage except in connection with a larger tract.

5. Adverse Possession ⚷27

In action to quiet title to 40 acres of land, evidence was sufficient to sustain finding that plaintiff made sufficient use of the 40 acre tract of land for five year period, to satisfy requirements of adverse possession.

6. Adverse Possession ⚷17

If but slight use can be made of land claimed adversely, then the requirements of continuous and uninterrupted occupancy are satisfied, if such slight use is made.

7. Quieting Title ⚷10(1)

A party to a quiet title action must rely on the strength of his own title and not on any weakness in that of his adversary.

R. Arthur Bellman, Berkeley, Stutsman, Hackett & Nagel, Fresno, for appellant.

L. Kenneth Say, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to 40 acres of land. The plaintiff and the individual defendants are the children of Charles C. Teague, now deceased. His son, as administrator of his estate, was also named as a defendant. The complaint, which is in the usual form, was filed on November 12, 1954. Marie Teague Saute, who was a half sister of the other parties, filed an answer alleging that she is and for a long time has been the owner and in possession of this land, denying that any of the other defendants have any interest therein, and praying that title to the land be quieted in her. Gloria Dale and Charles B. Teague, individually and as administrator, filed a separate answer alleging that the deceased was the equitable and beneficial owner of this land, and praying that title be quieted in Charles B. Teague as administrator of the estate of the father.

From the evidence at the trial it appears that a general power of attorney from Marie Teague Saute to Charles C. Teague was recorded on July 24, 1923, and that thereafter as long as he lived Charles C. Teague had and kept all of his property in Marie's name. During some 20 years he bought and sold a great deal of property in her name that she never knew about. The record does not disclose when the title of the land here in question was taken in her name except that it was prior to 1929, but there is evidence that during his lifetime she did not know that title to this property stood in her name.

On April 1, 1942, Charles C. Teague conveyed this land to the plaintiff by a deed from Marie Teague Saute, which he signed as her attorney in fact. On April 3, at the hospital where Mr. Teague had gone for an operation, he told the plaintiff to be sure to go to a title company before she went home and pick up a deed that a Mr. Patterson had for her. He also explained it to her and told her he wanted her to have the property so that her son would eventually benefit from it. Mr. Teague was operated on the next morning, April 4, 1942, and died that night. The plaintiff went to see Mr. Patterson immediately after the funeral and at her request he recorded the deed, which was then mailed to the plaintiff. A week or two later Charles B. Teague asked her to deed the property to him, which she refused to do. He made similar demands at several times in later years, which were refused. He was appointed administrator of the father's estate in 1951, but nothing was done by any of the defendants to further assert a claim to this property until after this action was brought by the plaintiff.

There was also evidence that on October 26, 1927, Charles C. Teague was declared incompetent and incapable of managing his property, and that he was restored to capacity on January 24, 1929. There was also evidence that a judgment was entered in the superior court of Fresno County on February 27, 1940, decreeing that Marie Teague Saute was the owner of this land. In this connection, it appears that two attorneys had sued Mr. Teague for attorneys' fees and had attached 80 acres of land, which included the land here in question. In that action Mr. Teague filed an answer alleging that Marie Teague Saute was the owner in fee of the property. Before Mr. Teague was called on to testify in the action the matter was compromised, and a stipulated judgment was entered giving the attorneys 40 acres of the land and decreeing that Marie was the owner of the remaining 40 acres. An attorney, who had represented Mr. Teague from 1925 until the time of his death, testified that in the beginning Mr. Teague told him that he was going to hold his property in Marie's name and that he had her power of attorney; that he did this because of some trouble he was having with his old partners; that on many occasions he conveyed property in Marie's name by using his power of attorney; that this was the way he handled his property through the years and this was the way he did his business; that the property here in question was included as a part of Mr. Teague's property in the guardianship proceeding; that Mr. Teague had always dealt with the property in question as his own; that he talked to Mr. Teague a few minutes after the deed to the plaintiff was executed on April 1, 1942; that Mr. Teague then told him that he had deeded this property to Lenore; and that he did not say that he had deeded it to Lenore for the purpose of having her deed it to the other children.

The court found in all respects in favor of the plaintiff finding, among other things, that on April 1, 1942, and prior thereto, Charles C. Teague was the equitable and beneficial owner and in possession of the land in question; that the bare legal title to said land was in the name of Marie Teague Saute; that aside from the holding of said bare legal title Marie had no right, title, interest or claim in or to said property; that at said time and prior thereto she well knew that she had no right, title or interest in or to said property, except for holding the bare legal title for the use and benefit of her father; that on April 1, 1942, Charles C. Teague was the attorney in fact of Marie Teague Saute and was empowered and authorized by her to execute and deliver a valid deed conveying said property; that on that day Marie Teague Saute by said Charles C. Teague, her attorney in fact, executed and delivered to the plaintiff a grant deed conveying title to said property to the plaintiff; and that since said date the plaintiff has been and now is the owner of and entitled to the possession of said real property. It was also found that for more than five years last past the plaintiff has been and now is in the open, notorious, exclusive and adverse possession of this real property under claim of right and by virtue of said deed, and that for more than five years last past the plaintiff has paid all taxes levied or assessed on said property. Judgment was entered quieting title to this property in the plaintiff, from which judgment the defendant Marie Teague Saute has appealed.

[1] This is an equity case and there is very strong evidence that Charles C. Teague was the equitable and beneficial owner of this land at the time he conveyed it to this respondent, and for many years prior thereto. There was no evidence tending to show that the appellant had any beneficial interest in the land or equitable right thereto, with the possible exception of the statement made by Mr. Teague in his answer in the 1940 suit for attorneys' fees, to the effect that this appellant was the owner in fee of the property. The appellant now contends that the judgment entered in that action is conclusive of her ownership under the doctrine of res judicata. That judgment was entered by stipulation as a result of a compromise between the parties to that action which, in effect, left the 40 acres here in question in the same situation as it was before the action was filed. None of the parties to the present action was a party to that action. Nothing in that proceeding is important here except as an admission against interest on the part of Mr. Teague, and that admission is not conclusive as to the rights of the parties involved in the present action. The most that can be said is that it presents some conflict in the evidence. It clearly appears that the purpose and intent of the judgment was to settle the controversy between the parties, and to leave the title to this 40 acres where it was before that action was commenced.

[2, 3] It is next contended that Mr. Teague had no authority to execute the deed to the respondent on April 1, 1942, and that this conveyance is void. It is argued that under Section 2355 of the Civil Code an agency is terminated by the incapacity of the agent to act as such; that the fact that Mr. Teague was declared incompetent in 1927 terminated the agency created by the power of attorney rather than merely suspending it; that in any event a general power of attorney does not authorize the agent to act for the benefit of himself or a third person; and that since this deed purported to be a gift of real property it was an unauthorized act of the agent.

While one of the ways in which an agency may be terminated under Section 2355 of the Civil Code is because of the incapacity of the agent to act as such, this may reasonably be construed as referring to the incapacity of the agent at the time he performs the questioned act. It cannot fairly be construed as automatically terminating the effect of a general power of attorney regardless of the circumstances, and regardless of prior and future acts and conduct disclosing the real situation. The evidence here indicates that Mr. Teague was not actually incompetent and that that proceeding was instituted for other reasons. While that fact does not alter the effect of the adjudication of incompetency, it is a matter of evidence in connection with other equitable considerations. The property here in question was listed in the guardianship proceedings as belonging to Mr. Teague, and the order restoring him to capacity which was entered fifteen months later authorized him to act with respect to that property. The power of attorney was in effect for several years before the adjudication of incompetency was made, and all parties continued to act as though it were still in effect for many years after the order of restoration was made. Under the circumstances, including the conduct of the parties, it may not be held, in this equitable action, that the guardianship proceeding had the effect of absolutely terminating the agency created by the power of attorney. As shown by all of the evidence that agency was created and maintained for many years for the sole purpose of enabling Mr. Teague to keep title to his property in the name of the appellant and at the same time enabling him to dispose of and handle his property as he saw fit. It was thoroughly understood that the appellant had no interest in the various properties which her father handled in that way, that he was authorized to dispose of them, and that she was merely holding the bare legal title for his benefit. Since he was the equitable owner, his failure to act for her benefit would not involve a violation of trust on his part. All of the evidence indicates that Mr. Teague was authorized by the appellant to convey this property and he was free to make a gift of it if he chose.

[4-6] Finally, appellant contends that the evidence is not sufficient to support the findings with respect to adverse possession. It is admitted that the appellant paid taxes on the property for the 5-year period and that she claimed under color of title through her deed. It is argued, however, that the evidence is not sufficient to show actual possession, open and notorious, for five years. Appellant relies on Lofsted v. Murasky, 152 Cal. 64, 91 P. 1008 and Klein v. Caswell, 88 Cal.App.2d 774, 199 P.2d 689. The first of these cases had reference to the "actual" possession required under the special provisions of the McEnerney Act, St. 1906, Ex.Sess., p. 78, as distinguished from the mere constructive possession which follows from the legal title. In the Klein case, the party had not used the lot in the manner for which it was adapted and in which such a lot was commonly used.

The evidence here disclosed that this 40-acre tract was situated in what was commonly known as the west side of Fresno County. It was uninclosed and had no water on it. It could not be used for farming without water. While there may have been some pasturage in the spring in some years it was common knowledge that such a small tract could not be leased for pasturage except in connection with a larger tract. There was evidence that the plaintiff leased it in September, 1953, for five years at $5 an acre to a man who was then carrying on large cotton farming operations in that vicinity. In her closing brief the appellant contends that there is evidence that the respondent had an opportunity to lease the land in an earlier year. The respondent testified that she could not remember when this was, and explained her refusal to lease it at that time by some statement concerning a road and ditch that the proposed renter wanted on the property. The facts were not sufficiently brought out to disclose whether or not there was a fair opportunity to lease it at that time. The respondent testified that she visited the property on an average of once a year, and there is no question that she openly claimed ownership at all times after 1942, and opposed all attempts made by her brother to claim an interest therein. The question was one of fact for the trial court, and the evidence sustains the conclusion that the respondent had made such use of the property as she could, considering the use for which it was adapted and the manner in which such property was commonly used at the time. The evidence was sufficient, under the principles relied on in the case of Posey v. Bay Point Realty Co., 214 Cal. 708, 7 P.2d 1020, 1022. The language there used is appropriate here:

> "If but slight use can be made of land claimed adversely, then the requirements of continuous and uninterrupted occupancy are satisfied, if such slight use as can be made is made thereof. This is the plain meaning of the clause 'for the ordinary use of the occupant'; it means a use appropriate to the location and character of the property, each case resting upon its own peculiar facts."

[7] A further consideration, insofar as this appellant is concerned, is that a party to a quiet title action must rely on the strength of his own title and not on any weakness in that of his adversary. No evidence was introduced or offered which would in any way tend to indicate that this appellant was equitably entitled to any interest in this property. No attempt was made to establish that she ever had any equitable right to a beneficial interest therein, or that she had ever asserted any claim to such an interest during a period of about 25 years. She did not appear at the trial and any claim on her part first appears, so far as disclosed by the record, through her answer in this action, which was signed and verified by her attorney.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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140 Cal.App.2d 812

Albert L. SNELL, Jr., Plaintiff and Appellant,

v.

Fern A. WICKERSHAM, Defendant and Respondent.

Civ. 21234.

District Court of Appeal, Second District, Division 3, California.

April 16, 1956.

Action for commission for services as realty broker in allegedly obtaining a purchaser for vendor's realty. The Superior Court, Los Angeles County, Walter S. Gates, J., entered judgment for vendor and broker appealed. The District Court of Appeal, Parker Wood, J., held that where broker did not obtain a purchaser upon terms stated in listing contract with vendor, but by an oral agreement that broker's commission was to be payable as funds from sale of realty in question were received by vendor, induced vendor to enter into escrow agreement with purchaser for sale of realty at a lower price than that provided for in the listing agreement, and due to condemnation of a portion of the land the sale was never completed, broker could not hold vendor to payment of commission provided for in listing contract or to portion of escrow agreement requiring payment of commission to broker and ignore oral agreement making such payment contingent on sale price of realty being paid.

Judgment affirmed.

Brokers 🔑**60**

Where broker did not obtain a purchaser upon terms stated in listing contract with vendor, but by an oral agreement that commission was to be payable as funds from sale of realty in question were received by vendor, induced vendor to enter into escrow agreement with purchaser for sale of realty at a lower price than that provided for in the listing agreement, and due to condemnation of a portion of land sale was never completed, broker could not hold vendor to payment of commission provided for in listing contract or to portion of escrow agreement requiring payment of commission to broker and ignore oral agreement making such payment contingent on sale price of realty being paid.

Houston A. Snidow, Azusa, for appellant.

Nichols, Cooper, Hickson & Lamb and R. G. Lamb, Pomona, for respondent.

PARKER WOOD, Justice.

Action for commission for services as real estate broker. Plaintiff appeals from judgment in favor of defendant.

On December 12, 1951, defendant signed and delivered to plaintiff a writing whereby defendant, in consideration of the services of plaintiff as agent of defendant, granted to plaintiff an "Open Listing right," for 90 days thereafter, to sell defendant's real property consisting of approximately 30 acres for $2,500 per acre on terms of "At Least ½ cash." The writing also provided: "I hereby agree to pay said agent as commission 5 per cent of the selling price that is accepted by me."

It is not disputed that plaintiff obtained a purchaser for said property, namely, Sponseller & Sons, a partnership, which entered into a written escrow agreement on January 2, 1952, with defendant for the purchase of the property. The escrow instructions stated that the total consideration to be paid to plaintiff was $72,500; that the amount of cash to be paid to plaintiff through escrow was $25,000; that no cash was paid outside the escrow; that the buyers would give a promissory note for the balance of the purchase price, $47,500, which note would be secured by a trust deed on the land; that certain payments on the balance would be made each time a lot (in a proposed subdivision of land) was sold and released from the provisions of the trust deed. It thus appears that the terms of the escrow agreement were different from the terms stated in the listing, in that, the price per acre was approximately $2,417 per acre instead of $2,500 per acre, and the cash payment was $25,000 instead of $37,500 (one-half the price of 30 acres at $2,500 an acre, as stated in the listing). Plaintiff did not obtain a purchaser upon the terms stated in the listing, but the defendant did execute escrow instructions which provided for a sale of the property to said purchaser upon other terms and conditions. A provision in the escrow instructions of defendant was: "Commission of $3625.00 is to be paid to Albert L. Snell, Jr., Broker * * * [license number, telephone number, and address of broker] and this is to be paid as funds from this sale are received by the Seller. From the $25,000.00 initial payment hereunder you will pay to said broker the sum of $1250.00." It was stipulated at the trial that there was an oral agreement between plaintiff and defendant that the remainder of the commission, after the payment of $1,250 from the initial $25,000 cash payment, was to be paid from certain payments (of approximately $490 each) which defendant was to receive as a part of the balance of the purchase price when a lot in the proposed new subdivision was sold; and that the portion of each such payment to be paid to plaintiff was "the same percentage that $1250 bore to the $25,000.00."

On March 5, 1952 (while the escrow was pending), an action in eminent domain was commenced by the Covina Union High School District against this defendant (Mrs. Wickersham) wherein the school district sought to condemn, for school purposes, 10 of the 30 acres involved herein. The partnership, Sponseller & Sons, was sued therein as Doe I and, on May 13, 1952, it filed an answer in which it claimed an interest in the 10 acres.

On June 25, 1952, the defendant herein and Sponseller & Sons made and filed escrow instructions stating that the escrow "is hereby cancelled."

On July 10, 1952, the parties to the eminent domain action stipulated that an interlocutory judgment condemning the 10 acres be entered; and that the judgment provide for payment of $14,832.17 to defendant herein (Mrs. Wickersham), and for the payment of $5,000 to Sponseller & Sons. On July 21, 1952, a final judgment of condemnation was filed.

It was stipulated at the trial in the present action "that the buyer did everything required of him to be done in *con*cluding the making of the money available and everything that was required." It was also stipulated herein that the failure to complete the escrow "was due to the fact that a condemnation action was instituted," as to 10 acres of the property, and "the buyers refused to buy." It was also stipulated that ten acres were condemned, and that the buyer "would not go ahead with twenty acres, at least not on the same terms." The $25,000 cash payment was not deposited in escrow.

It is clear that plaintiff did not obtain a buyer who was willing to buy the property upon the terms stated in the listing; and of course he is not entitled to a commission on the basis that he obtained a buyer who was ready, able, and willing to buy upon the terms of the listing. Plaintiff's claim for commission is based principally upon defendant's agreement, as evidenced by the escrow instructions, to accept a "selling price" which was different from the price stated in the listing. Plaintiff stipulated at the trial, as above shown, to the effect that he agreed orally with defendant that his commission was to be paid from funds received by defendant from the sale referred to in the escrow. The court found that plaintiff and defendant agreed, and the escrow agreement so provided, that the commission was to be payable as funds from the sale were received by defendant. It is true, as plaintiff argues, that plaintiff did not sign the escrow instructions; but it is also true that defendant's agreement to accept a different "selling price," as evidenced by the escrow instructions, included a provision which embodied plaintiff's admitted oral agreement as to payment of commission. The court further found that the commission to be paid by defendant was contingent upon the escrow being completed. It is implicit in that finding that the defendant, in agreeing to accept a different "selling price" (from that stated in the listing), relied upon plaintiff's oral agreement that the commission was to be paid from funds received by defendant from the sale. It is apparent that a material part of defendant's agreement to accept such different price was, as stated in the escrow instructions of defendant, that the broker's commission of $3,625 was "to be paid as funds from this sale are received by the Seller," and that $1,250 of the commission was to be paid by the escrow holder from the initial payment of $25,000. Under such circumstances, plaintiff's oral agreement as to payment of commission was in effect a condition upon which defendant agreed to accept a different "selling price." Under such circumstances the plaintiff, in basing his claim for commission upon defendant's agreement to accept a different "selling price," cannot disregard such conditional part of the agreement of acceptance. In Mitchell v. Green, 110 Cal.App. 259, 293 P. 879, which was an action for real estate broker's commission, a demurrer to the third amended complaint was sustained without leave to amend. That complaint set forth a writing, signed by the owner of the property, whereby the agent (plaintiff) was authorized to sell the property, and whereby the owner agreed to pay 15 per cent commission. It was also alleged therein that plaintiff procured a purchaser, and that the purchaser and owner entered into a written agreement to exchange certain properties; that as a condition precedent to the execution of the exchange agreement the plaintiff (agent) orally agreed to accept payment of her commission of $16,500 from payments to be made by the purchaser under a deed of trust. (The opinion therein does not show that the agreement of the agent was oral. The allegation that the agreement was oral is shown in appellant's opening brief in that case—in a supplement where a copy of said complaint is set forth.) There were further allegations therein to the effect that the seller and buyer entered into a further exchange agreement which modified the prior agreement; and that the exchange of properties was then consummated and various notes and trust deeds were executed. There was no allegation therein that the buyer paid the sellers anything on the promissory notes secured by the trust deeds. The court said therein, 110 Cal.App. at page 264, 293 P. at page 880: "With the default of De Vries [buyer] and his failure to pay, the right of the agent to receive her commission failed. The parties are bound by their contract. If the appellant [agent] expected to demand her commission from respondents [sellers] without regard to any payments made by De Vries, she should not have made its payment conditioned and contingent upon De Vries fulfilling the obligations of his contract."

In the present case, by reason of the condemnation action, defendant could not convey title as provided in the escrow instructions. It was not the fault of defendant that the escrow was not completed. No money was received by defendant from the sale referred to in the escrow instructions.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

140 Cal.App.2d 852

Doniphan R. JACKS, Sr., Plaintiff and Appellant,

v.

Andrew R. JACKS, Mary O. Jacks, Doniphan R. Jacks, Jr., and Georgia P. Jacks, Defendants and Respondents.

Civ. 16673.

District Court of Appeal, First District, Division 1, California.

April 18, 1956.

Action wherein the Superior Court, City and County of San Francisco, Harry J. Newbarth, J., rendered judgment for defendants after sustaining a demurrer, and plaintiff appealed. The District Court of Appeal, Bray, J., held that no action for damages lies in favor of husband against wife for refusal to have matrimonial relations.

Affirmed.

1. Husband and Wife 🔑323

The so-called "Anti-Heart Balm Statute" is constitutional, and no action may be maintained in California for alienation of affection. West's Ann.Civ.Code, § 43.5.

2. Husband and Wife 🔑205(2)

No action for damages lies in favor of husband against wife for refusal to have matrimonial relations.

3. Husband and Wife 🔑205(2)

Divorce action was proper one in which to assert wife's alleged refusal to have matrimonial relations.

4. Husband and Wife 🔑340

An action by husband against another for damages because of latter's alleged sexual intercourse with plaintiff's wife is an action for criminal conversation.

5. Husband and Wife 🔑341

Cause of action for criminal conversation is barred by the so-called "Anti-Heart Balm Statute". West's Ann.Civ.Code, § 43.5.

Joseph A. Garry, San Francisco, for respondents.

Doniphan R. Jacks, Sr., in pro. per.

BRAY, Justice.

Plaintiff in propria persona purported to allege three causes of action for which he asked damages in varying but large amounts: count 1, against his son, his daughter and his brother for alienation of plaintiff's wife's affections; count 2, against his wife (whom he designates as "correspondent") for "Refusal to have matrimonial relations"; count 3, against his brother for adultery.[1] Defendants demurred generally and that the alleged causes of action were barred by the statutes of limitation. The demurrer was sustained without leave to amend. Plaintiff appeals from the judgment entered thereon.

[1] Count 1. In 1939 the so-called "Anti-Heart Balm Statute," section 43.5, Civil Code, was adopted providing "No cause of action arises for: (a) Alienation of affection." Plaintiff vigorously attacks the constitutionality of the statute. However, that it is constitutional is well established in this state. See Langdon v. Sayre, 74 Cal.App.2d 41, 168 P.2d 57; Thome v. Macken, 58 Cal.App.2d 76, 136 P.2d 116; Rudley v. Tobias, 84 Cal.App.2d 454, 190 P.2d 984; Ikuta v. Ikuta, 97 Cal.App.2d 787, 218 P.2d 854. See also Fearon v. Treanor, 273 N.Y. 645, 8 N.E.2d 36, appeal dismissed 301 U.S. 667, 57 S.Ct. 933, 81 L.Ed. 1332, rehearing denied 302 U.S. 774, 58 S.Ct. 6, 82 L.Ed. 600. No action may be maintained in California for alienation of affection.

[2, 3] Count 2. No action for damages lies in favor of a husband against a wife for refusal to have matrimonial relations. Moreover, plaintiff alleged that subsequently to the refusal charged, his wife sued him for and obtained a decree of divorce. The divorce action was the proper one in which to assert such refusal.

[4, 5] Count. 3. The cause of action attempted to be alleged here, while de-

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[1] Apparently this count includes a change of conspiracy by the other defendants to cause plaintiff's wife and his brother to commit adultery.

nominated "adultery," is actually one for criminal conversation.[2] Such cause of action is barred by subdivision (b) of section 43.5, Civil Code. See Hirschy v. Coodley, 116 Cal.App.2d 102, 253 P.2d 93.

Additionally—did the purported causes of action alleged in plaintiff's complaint exist, they would all be barred by section 340, subdivision 3, Code of Civil Procedure (action for injury caused one by the wrongful act of another), as the complaint alleges that they all occurred more than one year prior to the filing of the complaint.

The complaint did not state any cause of action, and if it had, such cause of action would have been barred by the statutes of limitation. Hence, the court properly sustained the demurrers without leave to amend.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

140 Cal.App.2d 784

David Livingstone ROBERTSON, Plaintiff, Cross-defendant and Respondent,

v.

Mary Jane Smiley ROBERTSON, Defendant, Cross-complainant and Appellant.

Civ. 21426.

District Court of Appeal, Second District, Division 1, California.

April 16, 1956.

Action by husband for a divorce, wherein wife filed a cross-complaint. From orders of Superior Court of Los Angeles County, Kurtz Kauffman, J., by which decree granting husband a divorce and awarding custody of minor daughter to her mother was modified so as to permit father of child to have her with him on alternate weekends and for two weeks during summer vacation period and mother's request for attorney's fees was denied, the mother appealed. The District Court of Appeal, Fourt, J., held that such modification of decree with respect to custody of minor child was not abuse of discretion.

Judgment affirmed.

1. Divorce 🔑298(1)

In determining custody of minor child as between divorced parents, the welfare of child is the primary consideration.

2. Divorce 🔑296, 312.6(5)

Trial court is given a wide discretion in the matter of determining custody of minor child of divorced parents and its determination will not be disturbed on appeal in absence of a manifest showing of abuse of discretion.

3. Divorce 🔑303(3), 312.6(3)

Every presumption supported the reasonableness of order, by which divorce decree awarding custody of minor daughter to mother was modified so as to permit father to have daughter, then almost five years of age, with him on alternate weekends and for two weeks during summer vacation period and such modification of decree with respect to custody of child was not abuse of discretion.

◆

Charles R. Hand, Alhambra, for appellant.

George H. Pratt, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by defendant from orders modifying certain orders theretofore made with reference to the custody, support and maintenance of the minor child of the parties to the action.

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[2] "* * * an action by a husband against another for damages because of the latter's alleged sexual intercourse with the plaintiff's wife * * * [is] an action for criminal conversation." Hirschy v. Coodley, 116 Cal.App. 102, 103, 253 P. 2d 93.

The parties hereto were formerly husband and wife. On March 5, 1951, the plaintiff husband was granted an interlocutory decree of divorce from the defendant. The custody of the minor child, who at that time was approximately nine months of age, was awarded to defendant. The plaintiff was granted the right to visit the child on each Saturday from 2 p. m. until 4 p. m., and was ordered to pay $50 per month toward her support. A final judgment of divorce was made and entered March 11, 1952, adopting the provisions of the interlocutory decree with respect to the custody, support and maintenance of the child.

On October 28, 1954, defendant filed an order to show cause and affidavit in re modification of the interlocutory decree wherein she sought to have the plaintiff pay $75 per month for the support and maintenance of the child and a reasonable attorney's fee. This matter was continued from time to time. On March 14, 1955, plaintiff filed an order to show cause and affidavit in re modification of the order with respect to the custody of the child, wherein he requested that he be allowed to take the child with him on alternate week-ends from 8 a. m. on Saturday to 7 p. m. on Sundays, and for one month during the summer vacation period; he further requested that defendant be restrained from removing the child from Los Angeles county without an order of court.

Defendant thereupon, on March 24, 1955, filed an order to show cause and affidavit in re modification of child support wherein she requested $90 per month for the support and maintenance of the child, and that the plaintiff pay her attorney a reasonable attorney's fee.

The matters were heard on April 1, 1955, and after a full and complete hearing the court ordered that the plaintiff was to have the child with him on alternate weekends from 10 a. m. Saturday until 7 p. m. Sunday, starting April 9, 1955; that if the plaintiff did not wish to exercise the right of visitation, he was to give the wife twenty-four hours' notice thereof; that the plaintiff was to have the child with him for two weeks during the summer vacation period and during such time the child support payment was reduced accordingly; the payments for the child support were increased to $65 per month, starting May 1, 1955, and to continue until the further order of the court; the defendant's request for attorney's fees was denied. On April 6, 1955, by a nunc pro tunc order, both parties were restrained from removing the child from the Southern California area without an order of court first had and obtained.

Defendant's notice of appeal sets forth that she appeals from that part of the order which in effect gives the plaintiff custody of the child on alternate weekends from 10 a. m. Saturdays to 7 p. m. Sundays, and two weeks during the summer vacation period, and which denies attorney's fees for her attorney.

At the hearing there was testimony by a pediatrician, who was called as a witness for the defendant, to the effect that the father should be allowed to visit the child and that it would be to the best interests of the child for her to get better acquainted with her father. The doctor further stated that the physical health of the child was good. There was evidence as to the earnings of each of the parties; that the plaintiff received about $320 net per month for his work and labor. The plaintiff testified that he was supporting himself and his second wife; that the second wife of the plaintiff was gainfully employed. There was testimony that the defendant earned about $245 net each month, and that she had saved several $25 war bonds since she had started to work. There was no evidence whatsoever to indicate that the plaintiff's conduct, standards of living, moral principles or integrity were anything other than wholly satisfactory insofar as such matters had to do with his having the child on week-ends.

It was admitted that the plaintiff had complied with all orders of the court theretofore made with reference to the support and care of the child.

The judge had the opportunity to observe the parties and the other witnesses in the proceeding; his comment at the conclusion of the case was to the effect that there had been but little cooperation on the part of the defendant as far as the visitations to the child were concerned.

[1–3] The primary consideration in this matter is the welfare of the child. The law is well settled in this state that the court is given a wide discretion in such matters and its determination will not be disturbed upon appeal in the absence of a manifest showing of abuse. Gantner v. Gantner, 39 Cal.2d 272, 275, 246 P.2d 923; Gudelj v. Gudelj, 41 Cal.2d 202, 208, 259 P.2d 656. Every presumption supports the reasonableness of the order, and there is not the slightest showing here of an abuse of discretion.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

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140 Cal.App.2d 926

In the Matter of the ESTATE of Abkar SETRAKIAN, Deceased.

Souren SETRAKIAN and Kourken Setrakian, as executors of the estate of Abkar Setrakian, deceased, Appellants,

v.

Hasmick S. BESOYAN, Gladys Serabian, Zabelle DeOrian, individually and as guardian ad litem of Pamela DeOrian, a minor, Kesana Setrakian, Takouhi Setrakian, Mid-State Horticultural Company, Inc., a corporation, and Delkar Vineyards, Inc., a corporation, Respondents.

Civ. 5307.

iDstrict Court of Appeal, Fourth District, California.

April 19, 1956.

Rehearing Denied May 14, 1956.

Hearing Denied June 6, 1956.

Proceeding in the matter of the estate of the deceased. From orders of the Superior Court of Fresno County, Arthur C. Sheppard, J., directing the executors to sell corporate stock, construing a will, defining the liability of the executors and right of the heirs in the probate proceedings, the executors appealed. The District Court of Appeal, Mussell, J., held that the respondents were entitled to petition the court for sale of the stock in order to pay expenses and legacies, that the minimum price fixed by the trial court was proper and that the trial court sitting as a probate court, had jurisdiction to restrain the executors from voluntarily dissolving the corporations.

Affirmed.

1. Executors and Administrators 🔑321

Where the estate involved at time of petition to sell stock therein was filed, had been in probate administration for approximately six years and there were insufficient funds to pay debts, expenses and legacies, respondents were entitled to petition the court for sale of the stock under the statute. West's Ann.Prob.Code, §§ 758, 771.

2. Executors and Administrators 🔑339

On petition for a sale of stock belonging to an estate in order to raise funds to pay debts, expenses and legacies, evidence did not establish that the minimum price set for the sale of the stock was disproportionate to the value thereof or that the trial court abused its discretion in fixing the minimum amount of the bids therefor. West's Ann.Prob.Code, §§ 758, 771.

3. Executors and Administrators 🔑339

On petition to sell stock belonging to an estate in order to raise funds for payment of debts, expenses and legacies, in fixing a minimum price, the trial court properly considered report of the appraisers, reappraisement testimony of accountants, deductions to be made from values fixed in reappraisement report by reason of income tax liabilities, costs and other factors in determining the minimum prices to be stated in the order of sale. West's Ann.Prob.Code, §§ 758, 771.

4. Executors and Administrators 🔑346

On a petition to sell stock belonging to an estate in order to raise funds for the payment of expenses and legacies, trial court sitting as a probate court, did not err in restraining the executors from voluntarily dissolving the corporation, where the executors' action was taken without notice to the respondents, without prior application to the trial court and without its approval. West's Ann.Prob.Code, §§ 758, 771; West's Ann.Corp.Code, §§ 4600, 4603.

L. Kenneth Say, Fresno, for appellants.

Crossland, Crossland & Richardson, William C. Crossland, and James T. Barstow, Fresno, for respondents Gladys Serabian and Zabelle DeOrian, individually and as guardian ad litem of Pamela DeOrian, a minor.

Paul Staniford, Staniford, Harris & Loomis, Fresno, for respondent Mid-State Horticultural Company.

MUSSELL, Justice.

Abkar Setrakian died on November 22, 1948, and his will was admitted to probate on December 24 of that year. His sons, Souren Setrakian and Kourken Setrakian, qualified as executors on that date and since their qualification have managed the affairs of the estate. The will provides that the testator's daughters, Hasmick S. Besoyan, Gladys Serabian, Kesana Setrakian and Zabelle DeOrian, shall each be paid $125,000 in 15 annual installments from a trust fund comprised of the residue of the estate, and that his granddaughter, Pamela DeOrian, is to be paid a specific legacy of $10,000. It is conceded that these legacies have not been paid and that the executors have not been able to pay the costs of administration or the federal and state taxes.

It is conceded that the estate owes the respondent Mid-State Horticultural Company, a corporation, (hereinafter referred to as "Mid-State") the sum of $113,017.87, together with interest; that in 1953 this corporation made a cash loan to the estate to pay death taxes and to the executors individually to make loans of approximately $8,000 to each daughter, and that these loans are unpaid. The estate owns 50 per cent of the stock of Mid-State and approximately 25 per cent of the stock of Delkar Vineyards, Inc. (hereinafter referred to as "Delkar"). There are 7,000 outstanding shares of stock in Mid-State and 50 per cent thereof is owned by the decedent's brother, Arpaxat Setrakian, and his immediate family. Takouhi Setrakian, decedent's widow, owns 141 shares of Delkar independent of the estate, the estate of Abkar Setrakian owns 142½ Delkar shares, and Arpaxat and his family own 283½ shares, making a total of 567 shares outstanding.

On August 10, 1954, the respondents, Hasmick S. Besoyan, Gladys Serabian, and Zabelle DeOrian, individually, and as guardian ad litem of Pamela DeOrian, filed in the superior court a petition seeking a sale of the estate stock so that the debts and legacies could be paid and the estate closed. On October 25, 1954, following the first hearing on the petition for the sale of stock, the executors, without prior authority from or approval by the probate court, filed a certificate of election for the voluntary winding up and dissolution of Mid-State and Delkar under the provisions of sections 4600 and 4603 of the Corporations Code. The trial court restrained the executors from proceeding with the dissolution until the petition to sell stock had been heard, and in its subsequent order that the stock of both corporations be sold, ordered that the restraining order be continued until further order of the court.

During the hearing on the petition to sell stock, the court, with the consent and agreement of the parties, appointed three appraisers for the purpose of advising the court as to what was for the best interests of the estate and to enable the court to determine whether or not "any offer made in court for the purpose of satisfaction was within the bounds of reason" and to determine "whether the action of dissolution was justified". The appraisers filed a voluminous and detailed report in which they fixed the net worth of Mid-State at $2,101,024.44 and Delkar at $1,396,746.78, making the gross value of the 7,000 shares of Mid-State, without the tax deductions and current debt deductions, approximately $300 per share, and the gross value of Delkar, without the deductions, at $2,460 per share. Certified public accountants testified as to the value of the shares of stock in both corporations and as to the various tax problems and tax deductions involved. One of the accountants fixed the value of Mid-State stock at $260 per share and Delkar at $2,150 per share, after making deductions for matters not considered by the appraisers. The trial court found in accordance with these values and further found:

> "No. 12. That the decedent's estate has now been in the course of probate administration for over 6 years, and the reason said estate has not been heretofore expeditiously closed and distributed is that said estate has had no funds wherewith to pay the aforesaid debts, expenses of administration and legacy, which while not determinable with entire accuracy at this time, will approximate $170,000.00; That the decedent's estate has no workable or practicable way or method of raising the cash funds necessary to be raised in order to close and distribute the decedent's estate except by a sale or sales of capital assets of said estate, which said capital assets consist almost wholly of the shares of Midstate Horticultural Company and Delkar Vineyards, Inc."

On February 15, 1955, the court ordered the executors to sell all of the stock owned by the estate in both corporations for a price not less than $260 per share for Mid-State stock and not less than $2,150 per share for the stock in Delkar.

On February 23, 1955, the executors filed a notice of motion to set aside the findings of fact and conclusions of law and judgment and reopen the cause on the ground of newly discovered evidence. This motion was denied after hearing was had thereon and the executors appeal from said order of sale made and entered by the court on February 15, 1955.

Appellants present only two contentions on this appeal: (1) That the trial court erred in arriving at the value placed on the corporate stock in both the Mid-State and Delkar corporations; and (2) That the court erred in restraining the executors from voluntarily dissolving the corporations and acted in excess of its jurisdiction sitting as a probate court. Appellants further state in their opening brief that the main question on appeal is whether or not the order directing the executors to sell shares of corporate stock is a valid and proper order.

[1] The record shows that the estate involved at the time the petition to sell stock therein was filed had been in the course of probate administration for approximately six years and that there were insufficient funds to pay the debts, expenses, and legacies. Under such circumstances the respondents were entitled to petition the court for a sale of stock under the provisions of section 758 of the Probate Code. Section 771 of said code provides:

> "Stocks * * * may be sold * * * and title thereto passed without the necessity for confirmation, upon obtaining an order of the court. * * * The order shall fix the terms and conditions of sale, and when the minimum selling price is fixed or when the securities are to be sold upon an established stock or bond exchange, or surrendered for redemption or conversion, no notice of sale or of such redemption or conversion need be given."

In the instant case the sale was ordered to be made by posting and publication of notice. Anyone interested in buying was free to bid, and the highest and best bidder, bidding equal to or more than the minimum price set by the court, would be the purchaser at such sale. The trial court found that the estate's only workable or practicable way or method of raising funds wherewith to close and distribute the estate was by a sale of the estate stock in both corporations, and endeavored to ascertain a minimum price therefor which would not be disproportionate to the fair value of the shares and at the same time not fixed so high as to deter a prospective buyer.

[2] The inventory and appraisement of the estate was filed on March 9, 1953, and the appraised value of the stock involved was stated therein as 3,500 shares of Mid-State, $490,000, and 142½ shares of Delkar, $142,500. The reappraisement, after the filing of the petition herein, was 3,500 shares of Mid-State $1,050,512.22 and Del-

kar (142½ shares), $350,550, values substantially higher than fixed by the previous appraisal. While the value of the Mid-State stock was fixed in the reappraisement at $300 per share and Delkar at $2,460 per share, these values were without deductions for taxes and other items and there was substantial testimony that after the necessary deductions were made, the fair value of Mid-State stock was $260 per share and Delkar $2,150 per share, as found by the trial court. We cannot say as a matter of law that the minimum price set for the sale of the stock involved was disproportionate to the value thereof or that the trial court abused its discretion in fixing the minimum amount of the bids therefor.

Appellants argue that the trial court should have followed the rules set forth in Re Estate of Felton, 176 Cal. 663, 169 P. 392, and In re Estate of Rowell, 132 Cal. App.2d 421, 282 P.2d 163, 168, in determining the minimum price to be set for the sale of the corporate stock. However, the court in Estate of Felton did not attempt to lay down an exclusive rule or to foreclose consideration of relevant facts in determining the value of corporate stock. In that case it was held that a proper way to establish the market value, under the circumstances there shown, for the purpose of inheritance taxation, of shares of stock in a close family corporation, which have never been on the market and have never been sold privately, is to ascertain the value of the property represented by the corporation stock, and assign to each share its proportionate worth. In re Estate of Rowell, this court, in commenting on the rule in the Felton case, held:

> "We are not in accord with the contention of the Inheritance Tax Appraiser that in all so-called 'close corporations', where the shares of stock have never been upon the market, 'the *only* way to establish the market value of such shares of stock is to ascertain the value of the property which they represent, assigning to each share its proportionate worth.' (Italics ours.) While this may have been the only way of making such determination under the circumstances of that case, it is clearly not the *only* way in *all* so-called 'close corporations'. In the instant case there is no evidence that this is a 'close family corporation'. Secondly, it is not indicated that the deceased owned a majority interest in the shares of stock. There are many allowable factors which must be considered in determining not only the value of the assets but also the value of the stock in question. California Administrative Code, Title 18, Sec. 783, supra."

[3] Estate of Felton and Estate of Rowell both involved the valuation of corporate shares for inheritance tax purposes, while in the instant action the trial court was endeavoring to fix the minimum sale price of the corporate shares at a price fair to the decedent's estate and not disproportionate to the value of such shares, and the stock was ordered sold to the highest bidder. The minimum prices set were greatly in excess of the values fixed by the inventory and appraisement filed on March 9, 1953. The trial court properly considered this report of the appraisers, the reappraisement and report, the testimony of the accountants, the necessary deductions to be made from the values fixed in the reappraisement report by reason of income tax liabilities, costs, and other factors in determining the minimum prices to be stated in the order of sale.

In County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard, 136 Cal.App. 2d 205, 288 P.2d 880, 886, the court said:

> "In the Wain case, this court had occasion to approve the following statement of the rule: '"The actual value of corporate stock which has no market value, that is, where it is all common stock closely held and not listed or actively traded in on any stock exchange, * * * is ordinarily determinable from the then net worth of the corporation divided by the number of bona fide shares issued and outstanding. For that purpose, evidence of the factors and elements, such as assets, liabilities, and all other matters pertinent to the value of the particular corporation involved, may be admitted and considered."'".

The trial court herein followed the rule there stated and we cannot say as a matter of law that it abused its discretion in fixing the minimum bid provided for or that the amount so fixed was disproportionate to the value of the stock.

[4] The second and remaining contention of appellants is that the court erred in restrainng the executors from voluntarily dissolving the corporation and acted in excess of its jurisdiction sitting as a probate court. This contention is without merit. Section 300 of the Probate Code provides as follows:

> "When a person dies, the title to his property, real and personal, passes to the person to whom it is devised or bequeathed by his last will, or, in the absence of such disposition, to the persons who succeed to his estate as provided in Division 2 of this code; but all of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division 3 of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

In County of Los Angeles v. Morrison, 15 Cal.2d 368, 371, 101 P.2d 470, 472, 129 A.L.R. 443, it is held that:

> "The probate court or judge is the guardian of estates of deceased persons and all proceedings are under the direction of the judge. An executor or administrator derives his power to act from the order of the court." See also In re Estate of Garnier, 147 Cal. 457, 460, 82 P. 68; In re Estate of More, 121 Cal. 635, 639, 54 P. 148; and In re Estate of Palm, 68 Cal.App.2d 204, 212, 156 P.2d 62.

The executors herein attempted to bring about a voluntary dissolution of Mid-State and Delkar corporations pursuant to section 4600 et seq. of the Corporations Code. Their action in this respect was initiated while the trial court was considering the petition for the sale of the stock. The executors filed a certificate of election to wind up and voluntarily dissolve the two corporations without notice to the respondents, without prior application to the trial court therefor, and without its prior or subsequent approval. It clearly appears that under the provisions of section 300 of the Probate Code and the cases heretofore cited the probate court had jurisdiction over the estate for the purpose of administration and that the court could not be divested of its jurisdiction by the action of the executors in attempting to effect a voluntary dissolution of the corporation. Moreover, in this connection, the trial court found as follows:

> "No. 15. That a voluntary dissolution of Midstate Horticultural Company and Delkar Vineyards, Inc., or of either of said corporations, under Section 4600 et seq., of the Corporations Code as proposed by the decedent's executors is not in the best interests of the decedent's estate, or of the persons interested therein; That such a dissolution would extend over a considerable time, substantial sales and legal costs would be entailed, and the large and extensive real property holdings of each of said corporations would be placed on the market for sale under forced sales conditions, and under said conditions of sale said extensive properties would not return their fair market value; That if this court orders said executors to sell all of the shares of the decedent's estate in Midstate Horticultural Company for a minimum sales price of $260.00 per share and orders said executors to sell all of the shares of the decedent's estate in Delkar Vineyards, Inc., for a minimum sales price of $2,150.00 per share, and if said executors obtain such respective minimum selling prices for all of said shares, the decedent's estate will realize and receive a far greater net financial return thereby than it would realize or receive through a voluntary dissolution of said corporations."

This finding is supported by substantial evidence and cannot be here disturbed.

While the notice of appeal herein indicates that the executors appeal from an order construing the will of the testator, defining the executors' liability on loans and their position on court petition, appellants do not raise objections to these orders in their brief and state that they are minor in comparison as the order directing the sale of corporate stock necessarily disposes of all the assets of the estate. Under these circumstances we do not here pass upon the validity of the order in this connection, made by the court on January 20, 1955.

The order for the sale of the corporate stock of Mid-State and Delkar Corporations, dated February 15, 1955, is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

140 Cal.App.2d 858

Dorothy BLACKBURN, Adm'r, etc., Plaintiff and Respondent,

v.

CONSOLIDATED ROCK PRODUCTS CO., Defendant and Appellant.

Civ. 21299.

District Court of Appeal, Second District, Division 1, California.

April 18, 1956.

Rehearing Denied May 9, 1956.

Action for wrongful death of truck driver who was employed by contractor to haul material from defendant's quarry and who was allegedly killed when struck by rock in quarry. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Doran, J., held that where assumption of risk was not pleaded as a defense, giving instruction that truck driver did not assume risk of injury that could have come to him only through negligence of defendant or defendant's agents or employees, when considered with instructions as entirety and evidence, was not reversible error.

Affirmed.

1. Trial 🔑295(7)

In action against owner of quarry for wrongful death of truck driver employed by contractor to haul material from quarry, where assumption of risk was not pleaded as defense, giving instruction that driver did not assume risk of injury that could have come to him only through negligence of owner or owner's agents or employees, when considered with instructions as entirety and evidence was not reversible error.

2. Negligence 🔑134(11)

In action for wrongful death, evidence was sufficient to sustain findings that defendant's negligence in maintaining its quarry caused death of truck driver who was employed by contractor to haul material from quarry and who was allegedly killed when struck by rock in quarry.

3. Negligence 🔑32(2.10, 3)

Where contractor contracted to haul material from quarry, truck driver employed by contractor to haul material was invitee of quarry and if contractor motioned driver to come over to disabled truck in quarry, and driver was allegedly killed by rock which fell because of claimed negligent maintenance of quarry, driver had not stepped outside scope of invitation.

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Schell, Delamer & Loring, Los Angeles, for appellant.

I. W. Rainer, North Hollywood, and Frank J. Sexton, Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment awarding plaintiff the sum of $65,000 for the wrongful death of plaintiff's husband, James Blackburn. The complaint alleges that on April 1, 1953, the decedent was, "by the express invitation of the defendant", upon the gravel quarry premises of the defendant; that the defendant "so carelessly, negligently and unlawfully maintained, operated and controlled said premises as to cause some hard rock-like object to strike the body of said James Blackburn, deceased", proximately causing death. Defendant's answer in addition to a general denial, pleaded contributory negligence and unavoidable accident. A jury returned a verdict of $100,000 which was later reduced by plaintiff's remittitur to $65,000 upon denial of a motion for a new trial.

The decedent, a truck driver, was in the employ of one Christiana, who had a contract to haul material from the defendant's gravel quarry to a mill or processing plant. The quarry is a large pit with sloping walls approximately 110 feet high, and the method of operation involves the use of a crane working from the top of the pit which in turn operates a scarifer attached to a drag line. This procedure causes the earth to be loosened and rocks and gravel to fall to the bottom of the pit where a large power shovel loaded the material into trucks.

From the record it appears that a safety engineer made an inspection of the slopes approximately once a month; that the pit contained no warning signs, and had no watchmen or guards to warn men in the quarry when loose rocks were about to fall; that when the crane was working rocks would fall "all over the place". The decedent had been employed for approximately five weeks prior to the accident.

On the day of the accident the truck which Blackburn, the deceased, had been driving, suffered a broken axle. Blackburn was then assigned another truck, and immediately preceding the accident this truck was being loaded by the power shovel. Christiana, the decedent's employer, was engaged in attempting to repair the disabled truck which was located about 25 feet from the bank and some 45 feet from the power shovel. The crane was not operating on the day of the accident. The decedent went over to help Christiana with the disabled truck, and a witness testified to having seen the employer, Christiana, motion to the decedent to come over. Christiana denied calling Blackburn, stating, "No, I didn't call him over. He walked over by himself".

Christiana, who was on the opposite side of the disabled truck from Blackburn, had been trying to remove the broken axle, and testified, "I had trouble getting the broken piece out and just as I was picking up my tools to go back to get some more tools to use when it happened". Christiana heard Blackburn "yell like in pain", and found the latter "laying parallel with the truck right in front of the back wheel. * * * Well, he said a rock had hit him and he said, 'You better call an ambulance', so I told him to lay quiet and I took off to call the ambulance. * * * he was clutching at his side with his hand and he was kind of drawn up like he was in pain".

Christiana did not look for any rocks at the time, and did not see or hear any falling rocks nor "observe any dust in the air". It was the autopsy surgeon's opinion that Blackburn was killed by an irregular shaped object, and that "it would be improbable" that an object an inch in diameter caused the injury.

As against plaintiff's contention that Mr. Blackburn's death was due to the defendant's negligent maintenance of the quarry bank, causing a rock to fall, defendant argues that "the more logical and probable cause of death * * * was occasioned by the conduct of Mr. Christiana, the employer of the deceased * * * in attempting to knock out a broken axle part, used the 8′-long crowbar, struck it with a sledge hammer, causing it to go through the other side of the truck and violently strike the deceased". The respondent's brief calls attention to the fact that the shovel operator who walked over to Blackburn's side, "found no evidence of tools or steel objects of any kind around the scene of the accident". Appellant's brief also states that if a rock did strike the decedent, the latter "had assumed the risk by wandering away from his truck and duties".

[1, 2] Appellant seeks a reversal of the judgment on the ground that the trial court erred in the giving of an instruction which stated: "During the trial of this case you heard something said about 'assumption of risk'. The plaintiff did not assume the risk of any injury that could have come to him only through the negligence of the defendant or of said defendant's agents or

employees". It is claimed that this instruction "could be tantamount to the court declaring that the deceased, James Blackburn, had not assumed any risk under the facts as a matter of law. This could not have been the intention of the court since it had previously instructed the jury on the legal principles of assumption of risk by three other instructions".

As pointed out by the respondent, "Assumption of risk was not pleaded as a defense, and the evidence, as a matter of fact, presented no such issue". Moreover, the record discloses that the court had previously given three full and clear instructions on this subject, and had admonished the jury "not to single out any certain instruction and ignore the others but to consider all the instructions as a whole and to regard each in the light of the others". Considering the instructions as an entirety, the circumstances of the accident, and the evidence in reference thereto which furnishes substantial support for the verdict and judgment, it cannot be said that this isolated instruction resulted in any miscarriage of justice.

In Prescott v. Ralphs Grocery Co., 42 Cal.2d 158, 265 P.2d 904, cited by appellant, the reviewing court held that it was not prejudicial error for the trial court to refuse to give such a requested instruction, which was erroneous, but did not hold that the giving of an instruction of that nature would necessarily amount to reversible error. On the contrary, in Lunsford v. Standard Oil Co., 84 Cal.App.2d 459, 191 P.2d 82, it was held that while that type of instruction, with others given, may not be a model, it would not mislead the jury where active operating negligence existed, and under the facts of that case could not be deemed reversible error. Such is the situation in the instant case. Nor is any other reversible error found in the instructions, taken as an entirety.

[3] Appellant's contention that reversible error was committed in the refusing of certain requested instructions, is likewise without merit. By way of B.A.J.I. and other instructions, the trial judge adequately covered the situation as presented by the evidence and appellant's argument that incorrect instructions given, plus the failure to give requested instructions, "actually provided no legal guidance for the jury upon which to base their consideration", is untenable. This is particularly true in reference to the subject of res ipsa loquitur, where the special circumstances necessary to the application of that rule, were adequately presented by the instructions given. So likewise, the jury was given proper instructions on the status of the decedent as an invitee. If, as testified to by the power shovel operator, Christiana motioned the decedent to come over to the disabled truck, the decedent had not stepped outside the scope of the invitation.

Other specifications of error relate to alleged "Prejudicial misconduct and errors resulting in unfair trial to defendant", particularly, "Unnecessary and improper reference to and emphasis on the large size and wealth of the corporate defendant". A survey of the record discloses various remarks, allusions, and examples of conduct on the part of the participating attorneys, occurring in the heat of trial, which might well have been omitted, but nothing which can be deemed to have deprived the defendant of a fair trial or which can justify a reversal herein.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

140 Cal.App.2d 787

Beulah Gladys KAPPLE, Plaintiff and Respondent,

v.

Neil Dow KAPPLE, Defendant and Appellant.

Civ. 21331.

District Court of Appeal, Second District, Division 2, California.

April 16, 1956.

Proceedings on motion by husband to vacate default and interlocutory decree of divorce entered in favor of wife. The Superior Court, Los Angeles County, Bayard Rhone, J., made an order denying the motion and the husband appealed. The District Court of Appeal, Ashburn, J., held that although the parties had attempted reconciliation and had obtained continuance of order to show cause and husband allegedly understood that he would be given opportunity to protect his interest in community property, where affidavits were in conflict, husband failed to show mistake, inadvertence or excusable neglect essential to successful motion.

Affirmed.

1. Divorce ⚷184(4)

On appeal from order denying motion to vacate default and interlocutory decree of divorce, where affidavits on motion were in conflict, it was presumed that trial court resolved conflicts in favor of prevailing party.

2. Divorce ⚷161

On husband's motion to vacate default and interlocutory judgment decree of divorce, fact that husband had no attorney in divorce action was no substitute for necessary statutory showing of mistake, inadvertence, surprise or excusable neglect. West's Ann.Code Civ.Proc. § 473.

3. Divorce ⚷161

On motion to vacate default and interlocutory decree of divorce, although parties had attempted reconciliation and had obtained continuance of order to show cause and husband allegedly understood that he would be given opportunity to protect his interest in community property, where affidavits were in conflict, husband failed to show mistake, inadvertence or excusable neglect essential to successful motion. West's Ann.Code Civ.Proc. § 473.

◆

Albert S. Friedlander, Los Angeles, for appellant.

Claude L. Welch, Los Angeles, for respondent.

ASHBURN, Justice.

Defendant appeals from an order denying a motion to vacate his default and the interlocutory decree of divorce entered thereon in favor of the plaintiff wife. Appellant complains principally of the award of the real property to the wife. The affidavits upon the motion are in conflict and appellant's counsel devotes himself to an argument as to the effect of that evidence.

[1] It is of course presumed that the trial court resolved any conflicts in favor of the prevailing party, Warren v. Warren, 120 Cal.App.2d 396, 400, 261 P.2d 309; Baratti v. Baratti, 109 Cal.App.2d 917, 922, 242 P.2d 22, and the order will not be set aside in the face of such conflict and the ruling thereon. Warren v. Warren, supra; Elms v. Elms, 72 Cal.App.2d 508, 513, 164 P.2d 936.

Viewing the evidence in the light most favorable to respondent it appears that plaintiff, after 29 years of marriage to defendant, had been talking about a divorce for a year and a half before the instant action was filed in November, 1954. In the spring of 1953 her attorney, Mr. Claude L. Welch, had prepared a complaint and discussed it with defendant who said he had mistreated his wife but would do so no more, that he wanted to effect a reconciliation and if he could not do so he would not contest the suit. Before the present complaint was filed defendant had been convicted of felony drunk driving, and had served a year in jail; on his release he sought a reconciliation and plaintiff decided to give him a "chance to make good." But in October, 1954, plaintiff advised her attorney that it was impossible for her to continue the marriage and instructed him to proceed with a divorce action; this was done on November 5, 1954, and defendant was served on that date with summons, complaint and order to show cause. The order related, of course, to support money, attorney fees, etc. It was returnable on November 15th. A few days before the return date, defendant told Mr. Welch he believed he could patch up everything with plaintiff if he had a little time; he asked for 60 more days, and that the hearing on the order to show cause not proceed. Mr. Welch telephoned plaintiff who said she would be willing to have the hearing continued if it would not prejudice any of her rights, but that she was leaving the entire matter to the attorney. Defendant then told him if he could have 60 days he would ask nothing more, and that if he could not convince plaintiff that he had reformed he would give her everything and ask for no part of the property for himself, as he knew he had given her good grounds for divorce; he was emphatic in his determination to make good or to give plaintiff everything. On November 15, 1954, Mr. Welch and defendant appeared in court; Welch made a motion for continuance which defendant approved, and the order to show cause was continued to January 17, 1955. The Welch affidavit says "that affiant fully advised defendant of the nature of what had been done and that it referred only to the attorneys fees, alimony, etc., and had nothing to do with the trial, but that nothing would be done about setting the case for trial until after January 17, 1955; that defendant expressed his thanks and appreciation and assured affiant that he would make good with plaintiff." Before the new hearing date arrived, and on December 14, 1954, defendant was back in jail for driving an automobile without a license. There he stayed until after judgment was entered. That occurred on February 21, 1955, and defendant was still incarcerated when he made his affidavit in support of the motion to vacate on March 22, 1955. The court at the hearing of February 21st found that the real property stood of record in the joint names of the parties but was community property and it awarded same in its entirety to the plaintiff.

[2] Defendant moved seasonably after learning of the judgment and its provisions; he alleged in his supporting affidavit that upon being served with the papers on November 5, 1954, he and his wife fully discussed the action and "it was agreed between them that the divorce proceedings be completely suspended for a period of sixty days, during which time they would attempt to effect a reconciliation, or in the absence thereof, a property settlement agreement between them." The affidavit also says that a few days prior to January 17th defendant wrote from the county jail to Judge Doyle, advising that he would be unable to appear on the 17th, and within a few days he received a reply "advising that the matter had been placed off calendar and that in the event that it was again placed on calendar he would be served with new process." The letter was not attached to the affidavit nor was any copy supplied. What "the matter" was that the judge referred to does not appear, but presumably it was the order to show cause, the only matter before him. Again defendant says that he was never represented by counsel, "it being his understanding and impression from conversations with his wife and his wife's attorney that if no reconciliation could be effected then a property settlement agreement between affiant and his wife would be entered into before his wife would proceed further with her divorce proceedings and further, that if affiant and his wife could not enter into a mutually satisfactory property settlement agreement then in that case, affiant would be given time and an opportunity, after notice, to take steps to protect his interests in the community property by retaining an attorney of his choice to take whatever legal steps were necessary for affiant in the matter." Defendant's "understanding and impression" falls far short of the clear factual showing necessary to the successful presentation of such a motion. Having been convicted of a felony he stood impeached and his testimony could be rejected on that ground

as well as others. Both Mr. Welch and Mrs. Kapple refuted these allegations, and their versions must be accepted upon appeal. The attorney said that when he and plaintiff continued the order to show cause to January 17, 1955, "affiant fully advised defendant of the nature of what had been done and that it referred only to the attorneys fees, alimony, etc, and had nothing to do with the trial, but that nothing would be done about setting the case for trial until after January 17, 1955"; also, "[t]hat at no time did affiant tell defendant or lead him to believe that upon failure of a reconciliation by January 17, 1955, that a property settlement agreement would be worked out before a trial or that defendant would be given any additional time to make a defense; that the only property settlement agreement which defendant mentioned following the service of the Summons and Complaint upon him was that of his letting plaintiff have all of the property." The plaintiff averred: "That defendant requested affiant not to proceed with that hearing on that date as he wanted to convince her that he had really reformed and would treat her right, and that if she would give him just sixty days he would either convince her or he would give her all the property, as he knew he was in the wrong; that affiant referred him to her attorney, Claude L. Welch;" that plaintiff did consent to wait 60 days and instructed her attorney to do so; that the hearing was continued to January 17, 1955; "that repeatedly thereafter defendant reiterated the same determination; that he stated that unless he could win her back that he did not want to even contest the divorce action." Again, "[t]hat it is not true that affiant represented to defendant that if no reconciliation could be effected by January 17, 1955, that no further proceedings would be had until a property settlement agreement had been worked out or, failing such, that defendant would be given an opportunity to protect any of his rights." The fact that defendant had no attorney is no substitute for the necessary statutory showing. Couser v. Couser, 125 Cal.App.2d 475, 477, 270 P.2d 496.

[3] Upon this record it must be presumed that the trial judge resolved all the issues against appellant. That left him without any substantial showing of that mistake, inadvertence or excusable neglect which is essential to a successful motion under § 473, Code of Civil Procedure. There was no abuse of discretion here.

Order affirmed.

MOORE, P. J., and FOX, J., concur.

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140 Cal.App.2d 874

Al SCHUMM and Lillian Powers, Plaintiffs and Appellants,

v.

The BOARD OF SUPERVISORS OF SAN JOAQUIN COUNTY, R. E. Graham, Clerk of San Joaquin County and Ex-Officio Clerk of the Board of Supervisors of San Joaquin County, The San Joaquin County Planning Commission, and Amblers Club, a corporation, Defendants and Respondents.

Civ. 8825.

District Court of Appeal, Third District, California.

April 18, 1956.

The county planning commission granted use permit for construction of clubhouse and swimming pool in area classified as R–A Residence District Suburban Farming, and neighboring landowners appealed. The county board of supervisors affirmed action, and neighboring landowners petitioned for writ of review. The Superior Court, San Joaquin County, M. G. Woodward, J., discharged writ of review and affirmed proceedings of commission and board, and neighboring landowners appealed. The District Court of Appeal, Schottky, J., held that granting of the use permit was in accordance with ordinance provision allowing granting of use permits for public stables, riding academies, miniature golf courses and ranges, or similar semi-commercial-recreational uses.

Judgment affirmed.

1. Counties ⚷21½

Granting of use permit to corporation, which desired to construct a clubhouse and swimming pool and whose activities were to be private and noncommercial and which proposed to landscape the property and provide ample parking, was in accordance with county zoning ordinance provision allowing granting of use permits for public stables, riding academies, miniature golf courses and ranges, or similar semi-commercial-recreational uses.

2. Counties ⚷21½

Under county zoning ordinance provision that the county planning commission should have power to grant adjustments and use permits as provided in ordinance, commission's determination in doing so will not be set aside by a court until commission has acted beyond powers or has abused its discretion.

3. Counties ⚷58

On application for writ of mandate or writ of review to review an order of a local quasi-judicial body such as the county board of supervisors, superior court has no right to judge the intrinsic value of the evidence nor to weigh it but is limited to determine whether there was substantial evidence before the body to support its decision.

4. Municipal Corporations ⚷63(1)

Question whether granting of permit was wise as matter of policy is something which is beyond court's power to determine unless ordinance under which such action was taken is unconstitutional or void, and all questions of policy and wisdom concerning matters of municipal affairs are for determination of the legislative governing body of the municipality, not for the court.

5. Constitutional Law ⚷81

In exercise of the policy power, a large discretion is vested in the legislative branch of the government.

6. Municipal Corporations ⚷63(1)

Function of the courts is to determine whether municipal bodies act within limits of their power and discretion, and courts are not authorized to entertain a hearing de novo and then make such order as, in their opinion, the municipal authorities should have made.

7. Counties ⚷21½

Where fact that use to which property was to be put would not be detrimental to health, safety, morals, comfort, or welfare of persons residing or working in neighborhood of such use or to property or improvements in the neighborhood and would not be contrary to general public welfare was statutory condition of granting use permit under county zoning ordinance, it would be assumed that county planning commission acted lawfully within the premises and otherwise performed its duty, and, therefore, it was not necessary that, before announcing result of its study, commission make a written finding that such statutory condition existed.

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Jeffry & Jeffry, Blewett, Blewett, Macey & Garretson, Stockton, for appellants.

Forslund & Wilson, Stockton, for respondent Amblers Club.

Frederick L. Felton, Richard W. Dickenson, Stockton, for other respondents.

SCHOTTKY, Justice.

This is an appeal upon a clerk's transcript from a judgment discharging writ of review and affirming proceedings of the San Joaquin County Planning Commission and the Board of Supervisors of San Joaquin County. Plaintiffs and appellants are the owners of a portion of Lots 6 and 7 of a subdivision in the suburban area northwest of the City of Stockton. The immediate area in question in this appeal has been classified as an R–A Residence District Suburban Farming. Amblers Club, a corporation, was made a party respondent in the proceedings before the Superior Court following the granting of its petition by way of intervention.

The Amblers Club purchased a portion of Lot 6. It desired to construct a clubhouse and swimming pool and it filed an application for a use permit on June 1, 1953 with the San Joaquin County Planning Commission. The petition stated in part: "Our activities will be private and non-commercial. We propose to landscape the property and provide ample parking." It also stated: "We, the undersigned owners of property within 400 feet of the property described in this application hereby certify that we have read the foregoing application and agree that the facts relative thereto are stated correctly and completely, and we agree that the application should be granted." Following this are the signatures of a Mr. and Mrs. Prato and a Mr. and Mrs. Green.

At the hearing before the Planning Commission on June 4, 1953 the Commission unanimously granted the permit. On June 15, 1953, appellant Schumm filed a notice of appeal and a public hearing was set for July 1, 1953 before the Board of Supervisors. On June 23, 1953, the zoning committee of the Planning Commission directed a report to the Board of Supervisors, a portion of which stated: "It is now apparent that the large majority of abutting owners are opposing the Amblers Club project (as of this date), and it has been noted that the consent signatures on the original application are those of owners not adjacent but removed by almost 200 feet. The Planning Commission was not informed that certain abutting owners, as stated in their letters, had been requested to sign their consent but had refused. * * * [I]n view of the now expressed opposition of most of the abutting owners, the action of the Planning Commission is perhaps somewhat questionable and might not have been taken had they been fully informed of the facts that have come to light since the meeting of June 4th." Nevertheless, at the conclusion of the hearing on July 1, 1953, the Board of Supervisors found that sufficient facts did not exist to justify the revocation or modification of the use permit, and ordered that the appeal be denied and the action of the County Planning Commission be affirmed.

On July 2, 1953, the use permit was reissued, said permit stating, among other things, "That the proposed activities of the Amblers Club will not, on the basis of the facts submitted, be detrimental to the properties or dwellers in the vicinity, nor to the general public welfare."

On July 15, 1953, appellants filed their petition for a writ of review. Following the issuance of the writ, the filing of the return thereto, and argument thereon, the matter was submitted to the Superior Court, and on October 20, 1954, judgment was entered discharging the writ and affirming the proceedings of the County Planning Commission and of the Board of Supervisors.

The first question raised on appeal by appellants is that the Planning Commission and the Board of Supervisors were each without legal authority to grant the Amblers Club a use permit in an R–A Residence District Suburban Farming Area.

In granting the use permit on July 2, 1953 the Planning Commission made the finding: "That the use is permitted, subject to securing a Use Permit, as a recreational enterprise in an R–A Residence Agricultural District, as provided in Section 12(a) 6 of said Ordinance." Appellants contend that since Section 12(a) 6 provides that the Planning Commission may grant a use permit for the following uses: "Public stables, riding academies, miniature golf courses and ranges, or similar semi-commercial-recreational uses subject to the securing of a use permit in each case," and since the Amblers Club is none of these, there was no basis upon which the Planning Commission or the Board of Supervisors could grant a use permit, and thus acted without any authority. Appellants argue further that where a private club such as the Amblers Club may be permitted *expressly* in an *R–4 Residence District* but such use is *not* mentioned in an *R–A Residence District*, the basic principles of statutory construction and interpretation would rule out a private club in the area where it is not expressly included.

Respondents, in reply, contend that the use proposed by the Amblers Club is a "semi-commercial-recreational use", as provided in Section 12(a) 6. Those uses enumerated in that section are merely other types of semi-commercial-recreational uses and are not exclusive. Respondents argue that having a clubhouse and swimming pool is certainly a recreational use. Respondents assert that since the Planning Commission is given the power to interpret the provisions of the ordinance, and since the Commission has previously issued a similar use permit to the Pacific Women's Club directly across the street, and a country club with an eighteen-hole golf course has existed in the neighborhood for many years the issuance of the present use permit was proper.

[1, 2] We are unable to agree with appellant's contention that the granting of the permit was not in accordance with the provisions of Section 12(a) 6. We are convinced that the respondent Planning Commission was fully justified in deciding that the use proposed by the Amblers Club was within the terms of said section. Certainly a clubhouse and swimming pool is a recreational use and the Amblers Club can also be classified as semi-commercial. The ordinance provides that the Commission "shall have the power to grant adjustments and use permits as hereinafter provided", and its determination in doing so should not be set aside by a court until it has acted beyond its powers or has abused its discretion.

Appellants next contend that the evidence before the Board of Supervisors and the Planning Commission was without any sufficiency whatsoever to enable those bodies to act upon the application of the Amblers Club, and that the court has the power to reach its independent judgment as to "jurisdictional facts".

Appellants assert that "jurisdictional facts" are those facts, the existence or nonexistence of which are essential to the determination of whether or not the inferior tribunal had jurisdiction. Appellants argue that the court can inquire into the existence of jurisdiction and while the commission and board had the power over the subject matter, they failed to comply with the conditions precedent to the exercise of the power. Appellants urge that there has not been a compliance with Section 24, subdivision (c) of the Basic Zoning Ordinance, which provides: "In recommending the approval of any use permit the Planning Commission shall find that the establishment, maintenance and/or conducting of said use will not, under the circumstances of the particular case, be detrimental to the *health, safety, morals, comfort or welfare* of persons residing or working in the neighborhood of said use or to property or improvements in said neighborhood or will not be contrary to the general public welfare." Appellants contend that there must be substantial evidence in support of the findings of the existence of the "jurisdictional facts" in order for the findings to be supported, and the reviewing court has and should use its power to make its own independent judgment as to the facts of jurisdiction.

In summing up this evidence appellants contend that the only evidence favorable to the position of respondents showed that the appearance of the proposed clubhouse and other improvements would not be objectionable. Appellants do not seek to attack this. It is the contention of appellants that the proposed use in the location proposed is not consistent with an orderly and planned community. Under no circumstances could any of the uses testified to be considered to be not detrimental to the comfort and welfare of the persons residing in the neighborhood. The noise, dust, and particularly the increased traffic make the neighborhood very undesirable and uncomfortable for the persons residing nearby and unreasonably dangerous to the children residing near said use.

[3] Respondents in reply correctly take the position that the superior court on an application for a writ of mandate or a writ of review to review an order of a local quasi-judicial body such as the board has no right to judge the intrinsic value of the evidence nor to weigh it but is limited to determine whether there was substantial evidence before the body to support its decision. Respondents argue that in the instant case the decision of the board, having been made after a full hearing before it, and after all the requirements of the zoning ordinance had been met should be sus-

tained by the court. They state that appellants have attempted to retry in the courts all the facts produced at the hearing before the Commission and the board, and that the alleged "jurisdictional facts" are not "jurisdictional facts" at all, especially since the ordinance specifically grants jurisdiction to the Planning Commission to issue use permits and likewise provides for an appeal to the board whose decision under the ordinance is made final and conclusive. Respondents argue further that if such facts, for the purpose of argument, be considered "jurisdictional facts", still appellants have no cause for complaint in that the evidence is more than sufficient to establish the existence of said facts. This evidence is to the effect that the area is relatively uninhabited, that similar uses had already been granted, that the clubhouse, swimming pool and landscaping will be a beneficial improvement, and that the proposed recreational activities, including the use by the character-building Boy Scouts, would be beneficial to the public welfare. Respondents conclude that there is substantial evidence to uphold a finding that such use would not be detrimental to persons or properties in said area.

[4–6] We believe that the argument of appellants is chiefly an argument upon the weight of the evidence and the wisdom of the Planning Commission in granting the permit. But as stated in Wheeler v. Gregg, 90 Cal.App.2d 348, at page 361, 203 P.2d 37, at page 46:

> "* * * Whether or not the granting of the permit herein was wise as a matter of policy is something which is beyond the courts to determine unless the ordinance under which such action is taken is unconstitutional or void. The rule is indelibly written into our law that all questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts. In the exercise of the policy power a large discretion is vested in the legislative branch of the government. The function of the courts is to determine whether or not the municipal bodies acted within the limits of their power and discretion. Courts are not authorized to entertain a hearing de novo and then make such order as in their opinion the municipal authorities should have made. Were the rule otherwise, courts would be usurping the functions of the municipal governing body. Lockard v. City of Los Angeles, 33 Cal. 2d 453, 461, 202 P.2d 38 [7 A.L.R.2d 990].
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> "The determination of what harmonizes with the elements and objectives of the Master Zoning Plan having been committed to the discretion of the local governing bodies, the burden of proving that the City Council acted without substantial evidence and in excess of jurisdiction, rested upon appellants. And this requirement is not satisfied by a mere showing that there was a conflict in the evidence, or that the City Council on the basis of the record before it, might have been justified in deciding differently, or that the record before the Council might have supported a conclusion contrary to that which was arrived at. Hogan v. Retirement Board, 13 Cal.App.2d 676, 677, 57 P.2d 520."

[7] Appellants make the further contention that the respondent Commission failed to make findings as required by Section 24, Subdivision (c), of the Basic Zoning Ordinance, hereinbefore quoted. In ruling contrary to this contention the trial court stated in its memorandum opinion:

> "* * * I do not believe it necessary that before announcing the result of its study the Commission was duty-bound to make a written finding that the use to which the property was to be put would not be 'detrimental to the health, safety, morals, comfort or welfare of persons residing or working in the neighborhood of said use or to property or improvements in said neighborhood or will not be contrary to the general public welfare.' Since this was a statutory condition of the granting of such permit, it may be assumed that the Planning Commission

acted lawfully within the premises and otherwise performed its duty.

"Pursuant to the ordinance plaintiffs appealed from the decision and thereupon the Board of Supervisors, after giving the requisite notice, held a public hearing at which time both proponents and opponents were sworn and examined. The Board of Supervisors, after a full consideration of the matter, approved the action of the Planning Commission and made its order accordingly. The Commission thereupon reissued the permit and made the written finding above referred to."

We agree with this statement.

We conclude that the record shows that appellants had a full and fair hearing before the Planning Commission and the Board of Supervisors, that said bodies have jurisdiction in the matter and that there was ample evidence to support the granting of the permit.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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140 Cal.App.2d 902

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wayne W. HILLMAN, Defendant and Appellant.

Cr. 5461.

District Court of Appeal, Second District, Division 1, California.

April 19, 1956.

Rehearing Denied April 30, 1956.

Hearing Denied May 15, 1956.

Defendant was convicted of first degree murder. The Superior Court, San Luis Obispo County, Anthony Brazil, J., entered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence established case of murder in second degree, but did not sustain verdict of guilt of first degree murder.

Judgment modified and cause remanded.

1. Homicide 🔑22(2)

To justify verdict of first degree murder, evidence must be legally sufficient to show a wilful, deliberate and premeditated killing. West's Ann.Pen.Code, § 189.

2. Homicide 🔑22(2)

Deliberation and premeditation, as elements of first degree murder, not only negative idea of hurried thoughtless action in face of an unexpected situation, but reasonably imply some opportunity for careful thought and for weighing of various considerations as well as the presence of some plan or design. West's Ann.Pen.Code, § 189.

3. Homicide 🔑254

In prosecution for murder of defendant's wife, evidence established case of murder of second degree, but did not sustain verdict of guilt of first degree murder. West's Ann.Pen.Code, § 189.

4. Homicide 🔑169(1)

In prosecution for murder of defendant's wife, defendant's evidence that defendant and wife had effected a reconciliation prior to homicide, and that defendant had been solicitous of wife's welfare after her attempted suicide was properly excluded.

5. Homicide 🔑345

Where record on appeal established case of second degree murder, but did not support verdict of guilt of first degree murder, reviewing court remanded cause with directions to enter judgment of guilt of second degree murder.

◆

Gallagher, Madden & Hart, Paso Robles, Ward Sullivan, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Defendant was charged with murder. Following a jury trial he was found guilty of murder in the first degree. The verdict provided for life imprisonment. Defendant appeals from the verdict, the sentence and judgment, and also from the order denying defendant's motion for a new trial.

It is contended by appellant that, "The court erred in excluding evidence: (a) That following his wife's attempt at suicide in 1952, appellant was solicitous of her welfare and he personally cared for her and administered to her, thereby saving her life. (b) That appellant and his wife effected a reconciliation several days prior to the homicide."

"That the court erred in excluding evidence: (a) Of the medical records of the Paso Robles Hospital showing that decedent was suffering from alcoholism, psychoneurosis and had been treated for barbiturate poisoning. (b) That on November 9, 1954, decedent's physician examined her and found her extremely depressed and agitated over both her mental and physical condition and because her husband (appellant) had not returned."

"The evidence is legally insufficient to support the verdict. The verdict is contrary to the law and the evidence."

As recited in respondent's brief, "In 1946 Wayne Hillman and Marie Hillman were married. About four months after the marriage date difficulties arose between them and from then on their marital history was punctuated by quarrels and misunderstandings. The quarrels were frequent, often violent. When Marie Hillman was given certain duties in connection with the Hillman ranch which the appellant owned near San Luis Obispo, difficulties arose over the performance of these duties.

* * *

"On January 31, 1955, at the Hillman ranch the appellant and his wife began a particularly violent quarrel. According to the appellant his wife's drinking habits were of concern to him, and he chided her about them. During the argument the appellant pushed his wife, and she fell down. Thereafter his wife left the room and Hillman finished his dinner. He went into the living room. His wife was in the bedroom lying down. The quarrel between the parties resumed, and the appellant went into the bedroom and proceeded to undress conversing with his wife all the time. During the course of the evening with the argument resuming and shutting off alternately, appellant stated that he warned his wife to 'lay off Wayne Martin.' His wife taunted him by stating, 'You'd better look out for Johnny.' This is according to the testimony of appellant. The appellant gave his version of what then occurred and he testified that he was under the belief that his wife was reaching for a gun in the drawer of her nightstand. According to his testimony in order to beat her to the draw, so to speak, he reached into his own nightstand drawer, grabbed his own gun and shot his wife three times, killing her. Thereafter, his son, DeWayne Hillman, came in and the appellant stated, 'I just shot your mother.' Officers were called and came immediately to the Hillman ranch.

"The admissions made by appellant when arrested by the police officers were, to Deputy Sheriff Lewis Tate: 'She gave me nothing but trouble.' 'She wouldn't retract the statement and I shot her.' To Deputy Sheriff Roy Ottoson: 'I did it, and you know it has been building up for a long time, and a man can only take so much.' To Richard C. Stacey, Criminal Investigator of the District Attorney's Office: 'The pressure was building up for ten or twelve years. I couldn't stand it any longer.'"

That the deceased was a heavy drinker over the years the record establishes beyond question. It would serve no useful purpose to detail this most unusual situation.

It is sufficient to note, as recited in appellant's brief, that, "The history of their marital life was one of great discord and conflict almost from the beginning, interspersed, however, with periods of affectionate reconciliation. They quarreled violently about many things. The management of the Rolling Keys Ranch, a cattle and wheat ranch of some 6,400 acres which appellant had owned prior to his marriage to Marie, was often a cause of dissension. Appellant accused his wife of spending too much money, of forging his name to checks, of excessive drinking of intoxicants, of relations with other men. Both Marie and appellant were heavy drinkers, and this added fuel to the fires. On a number of occasions, appellant had struck her and she had struck him. In the course of these arguments vile and obscene language was freely used by both of the parties.

"Marie's intimate friend, Josephine Shaeffer, a witness for the People, admitted that Marie was a heavy drinker and that on the several occasions when she had overheard her arguing with her husband, both had been drinking. Other evidence, established that when Marie had been drinking heavily, she was very combative and belligerent."

From a review of the record it is quite evident that the evidence fails to show a wilful, deliberate and premeditated killing. Section 189 of the Penal Code provides that, "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, * * * is murder of the first degree; and all other kinds of murders are of the second degree."

[1] To justify a verdict of first degree murder the evidence must be legally sufficient to show a wilful, deliberate and premeditated killing.

In People v. Thomas, 25 Cal.2d 880, 898, 899, 156 P.2d 7, 17, these terms are defined as follows: " 'deliberate' (as an adjective) means 'formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as, a *deliberate* judgment or plan; carried on coolly and steadily, esp. according to a preconceived design; * * * Given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a step; * * * Slow in action; unhurried; * * * Characterized by reflection; dispassionate; not rash.' (Id.) The verb 'deliberate' means 'to weigh in the mind; to consider the reasons for and against; to consider maturely; reflect upon; ponder; as to *deliberate* a question * * * to weigh the arguments for and against a proposed course of action.' (Id.) It has been judicially declared that 'Deliberation means careful consideration and examination of the reasons for and against a choice or measure.' (People v. Richards, 1905, 1 Cal.App. 566, 571, 82 P. 691, 693)"; the verb "premeditated" means "To think on, and revolve in the mind beforehand; to contrive and design previously".

[2] As was said in People v. Nichols, 88 Cal.App.2d 221, 228, 198 P.2d 538, 542, "The elements of 'deliberate' and 'premeditated' not only negative the idea of hurried thoughtless action in the face of an unexpected situation, but must be said to reasonably imply some opportunity for careful thought and for the weighing of various considerations as well as the presence of some plan or design".

[3] The evidentiary picture framed by the evidence in this case suggests reasons for and the facts of quarreling between decedent and appellant, it also shows that quarrels between appellant and his wife were followed by affectionate reconciliations and that such quarrels and reconciliations became the normal pattern of their married life. These evidentiary features leave only to conjecture and surmise the conclusion that appellant either arrived at or carved out the intention to kill as the result of a concurrence of deliberation and premeditation. And overwhemingly opposed to such conjecture or surmise, and consistently evidenced by every circumstance, is the rationale of a tempestuous quarrel, hot anger and a violent killing. We are, therefore, of the view that the record now before us establishes murder of the second degree. We entertain a grave doubt as to its showing of murder of the first degree.

[4] As to appellant's claim that the court erred in excluding evidence as set forth in his first two contentions above referred to, we have examined the record and the offers of proof made by appellant, and are satisfied that the rulings of the court thereon, under the circumstances present herein, were not erroneous.

[5] The attempted appeal from the verdict and sentence is dismissed. The judgment of the court below of murder of the first degree is modified. The cause is remanded to the trial court with directions to enter a judgment against the defendant finding him guilty of murder of the second degree, and to thereupon pronounce judgment against him as prescribed by law.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; SPENCE, J., dissenting.

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140 Cal.App.2d 791

**PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

Charles G. SILVA, Defendant and Appellant.

Cr. 5450.

District Court of Appeal, Second District,
Division 2, California.

April 16, 1956.

Defendant was prosecuted for the illegal possession of marijuana and charged with a previous conviction. Judgment of conviction in the Superior Court of Los Angeles County, Clement D. Nye, J., who struck the previous conviction and the defendant appealed. The District Court of Appeal, Ashburn, J., held that defendant could complain of an illegal search and seizure though he disclaimed ownership or possession of the marijuana, and that consent to search of the house given by joint occupant was adequate authority for the officers to pursue the search without the necessity of any affimative consent by the defendant.

Judgment affirmed.

1. Searches and Seizures 🔑7(26)

Defendant could complain of an alleged illegal search and seizure of narcotics though he disclaimed ownership, possession or knowledge thereof.

2. Searches and Seizures 🔑7(27)

In prosecution for illegal possession of marijuana, permission given to search the home where the narcotics were found by one of the joint occupants thereof was adequate authority for authorities to make the search without necessity of any affirmative consent of defendant or any other occupant.

3. Searches and Seizures 🔑7(27)

In prosecution for illegal possession of marijuana, where there was a dispute in the evidence upon question of consent of a joint occupant to search the house where the marijuana was found, it was the duty of the trial judge to resolve the conflict and there was no abuse of discretion in rejecting testimony of defendant and members of his immediate family upon the question of consent to the search.

4. Searches and Seizures 🔑7(20)

Evidence did not establish an unreasonable search or seizure of narcotics. West's Ann. Health and Safety Code, § 11500.

5. Criminal Law 🔑1023(10)

An appeal from the "sentence" was dismissed since there can be no appeal from the sentence.

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William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant Charles G. Silva and his brother-in-law Richard O. Heredia, were jointly charged with possession of marijuana, violation of § 11500, Health and Safety Code. Silva was also charged with a previous conviction and service of sentence for violation of the same section. He pleaded not guilty but admitted the previous conviction. Before Silva's trial Heredia had pleaded guilty and been sentenced. By stipulation Silva was tried without a jury and was convicted. The judge of his own motion ordered the admission of the prior conviction set aside and the prior conviction stricken;[1] then sentenced defendant to a term of nine months in the county jail. The propriety of the conviction depends primarily upon the admissibility of certain marijuana which was found by police officers in a search which appellant's counsel claims to have been unreasonable and unlawful. Appropriate objection was made in the trial court to the introduction of this evidence and was overruled. In support of the appeal counsel raises but one point, phrasing it thus: "The only question is whether the contraband recovered by the officers was lawfully obtained."

Defendant Silva, his mistress (known as Maria Silva and also as Mrs. Silva), her father and Richard O. Heredia, her brother, lived together at 7045 Remmet Street in Canoga Park. On March 22, 1955, at about noon, the police arrested Heredia at the recreation center, which was a block or two from his home. He was taken to the Van Nuys police station and there made statements to the effect that he had sold marijuana cigarettes to a minor and had himself swallowed one when he saw the officers approaching. No marijuana was found on his person. According to Officer Wayne Belda, Heredia was asked at the police station whether he had any marijuana in his home. He said "no" and then added: "If you don't believe us, you can go out and look for yourself." Belda, with Officers Barnaby and McTighe, took Heredia in handcuffs to his residence. This was about five hours after his arrest. They had no search warrant and had made no effort to get one. Officer Belda also testified that at the police station he had asked Heredia's permission to go into the house and had been told to go ahead; also that he, Belda, believed he would find marijuana there.

There are two buildings on the premises known as 7045 Remmet Street. The northerly house contains living quarters other than bedrooms, and the southerly house is a converted garage which contains two bedrooms, one occupied by defendant and Maria and the other by Heredia at times. The family considered the two houses as one home. When the officers approached the north house they were met by Maria and her father; she asked them what they were doing there; they said they had Heredia under arrest and were going to search the premises; she asked if they had a search warrant and they said they did not; there was no further conversation; the officers did not ask her permission but walked past her into the house.

In the bathroom of the north house Belda saw defendant Silva, who testified that when he saw the officers he said "what the hell"; they showed their badges and he sat on the bowl and they searched; the officer testified that Silva did not ask what he was doing there or by what authority, or if he had a warrant, and that there was no conversation about the search. The officers then went to the south house, the bedrooms, and renewed their search. Defendant was there too. Officer McTighe recognized defendant as "Big Charley Silva," there was talk about a previous narcotics situation and McTighe immediately arrested him. The search continued and marijuana in several forms was found in drawers of a chest in the bedroom which Silva said he and Maria occupied; he also said that he used the chest and the clothes in it were his. Again there was no conversation with Silva about the search. At no time did he voice any objection thereto. The foregoing gives the gist of the officers' testimony and includes certain undisputed facts.

Defense witnesses were Heredia, Maria and defendant himself; no one else. Defendant denied ownership, possession or knowledge of the marijuana. Heredia, having pleaded guilty and been sentenced, undertook to shoulder the entire burden, said the marijuana was his and he had placed it where it was found. He denied telling the officers they could search the house. He corroborated the testimony of Maria to the effect that Officer Belda, when asked about a search warrant said he did not need one, that he pushed her away and entered. Maria also said she was heavy with child and was frightened. Belda denied that any officer pushed her. Silva and Heredia claim that defendant asked if the officers had a search warrant, that they were told "no" and that there was no further conversation.

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[1] A questionable procedure. See Health and Safety Code, § 11712.

[1] The Attorney General argues that appellant cannot complain of an illegal search and seizure because he disclaimed ownership, possession or knowledge of the marijuana. Reliance is placed upon certain federal decisions, which are exemplified by Ingram v. United States, 9 Cir., 113 F.2d 966, wherein a search was made pursuant to entry into an apartment rented to one Woods, who became Ingram's co-defendant. In some clothes belonging to Ingram, which were in that apartment, morphine was found. The court said, at page 967: "As noted, Flynn or Woods, the sole lessee of the premises as shown by the evidence, made no complaint or effort to suppress the evidence. The right to complain because of an illegal search and seizure is a privilege personal to the wronged or injured party, and is not available to anyone else. [Citing cases.] Where the defendant disclaimed ownership of the property seized, he cannot complain of the illegality of the search." Our Supreme Court rejected this rule in People v. Martin, 45 Cal.2d 755, 290 P.2d 855. After reviewing the reasons underlying the exclusionary rule of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, the court said, 45 Cal.2d 759, 290 P.2d at page 856: "The Attorney General contends that since defendant disclaimed any interest in the premises searched and the property seized, his constitutional rights could not have been violated and that therefore he has no standing to challenge the legality of the searches and seizures. [Citations.] We cannot agree with this contention." And at page 761 of 45 Cal.2d, at page 857 of 290 P.2d: "'Since all of the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights." In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23, 25, the court found that the entry into the house in question was unlawful, but added, "and it is immaterial whether or not it was defendant's house." See also People v. Gale, 46 Cal.2d 253, 294 P.2d 13.

[2–4] Respondent also relies upon the permission given by Heredia to search the home of which he was one of the joint occupants. So far as appears, his status in that home was equal to that of any other member of the family. His consent to a search, if he gave one, was adequate authority for its pursuit without the necessity of any affirmative consent of defendant or any other occupant. The ruling in People v. Gorg, 45 Cal.2d 776, 291 P.2d 469, supports this conclusion as does People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513. The Gorg case holds that the question of consent to a search is one of fact and when the fact is found the admissibility of the evidence is to be determined as a matter of law, 45 Cal. 2d at page 780, 291 P.2d 471, 472. See also, People v. Michael, 45 Cal.2d 751, 290 P.2d 852. There being a dispute in the evidence at bar bearing upon the question of Heredia's consent, it became the duty of the trial judge to resolve that conflict; this he did in favor of the state; there was no abuse of discretion in his rejecting the testimony of defendant and the members of his immediate family upon this point. It thus appears that express consent was given by Heredia; as a matter of law that was as good as one emanating from defendant in this case. It also follows that what occurred between the police officers and Maria is immaterial, just as the trespass was in People v. Boyles, 45 Cal.2d 652, 290 P.2d 535. There was no unreasonable search or seizure in this case.

[5] Defendant appealed from the "judgment and sentence." As there can be no appeal from the sentence, the attempted appeal therefrom is dismissed, People v. Nelson, 126 Cal.App.2d 453, 272 P.2d 536.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Oscar HAMPTON, Defendant and Appellant.*

Cr. 3176.

District Court of Appeal, First District, Division 2, California.

April 19, 1956.

Hearing Granted May 15, 1956.

Prosecution for sale of marijuana in violation of narcotics act. The Superior Court, Alameda County, Chris B. Fox, J., denied defendant's motion for new trial and entered judgment of conviction, and defendant appealed. The District Court of Appeal, Nourse, J., held that evidence sustained conviction.

Judgment affirmed.

Dooling, J., dissented.

1. Criminal Law ⚷576(5)

Statutory right to a trial within 60 days from filing of an information against a defendant is a privilege to the defendant which may be waived. West's Ann.Pen. Code § 1382.

2. Criminal Law ⚷576(5)

Where defendant, in open court, consented to time of trial without objection, he waived his right to trial within 60 days from date of filing of information. West's Ann.Pen.Code § 1382.

3. Criminal Law ⚷1186(4)

In prosecution for sale of marijuana in violation of narcotics act, reference of district attorney in his closing argument to defendant as a "supplier" and a "big man" in the narcotics trade did not constitute prejudicial error, especially in view of fact that defendant had previously been convicted on two charges of narcotics traffic. Const. art. 6, § 4½.

4. Criminal Law ⚷1186(4)

In prosecution for sale of marijuana in violation of narcotics act, statement of District Attorney in closing argument to the effect that all the evidence, in his opinion showed that defendant was guilty, did not constitute prejudicial error. Const. art. 6, § 4½.

5. Criminal Law ⚷720½

A prosecutor in his final argument, has the right to state his views, his beliefs and his convictions as to what the evidence establishes, and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant.

6. Poisons ⚷9

Evidence sustained conviction for sale of marijuana in violation of narcotics act.

Robert L. Bostick, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The appellant and one Johnson were jointy charged with violation of the narcotics act—sale of marijuana. Appellant was also charged with two prior convictions for violation of the same act (possession of marijuana). Defendant Johnson pleaded guilty and was the only witness called by appellant. The two priors were admitted by appellant.

During the trial appellant was represented by private counsel. His appeal is presented here by counsel assigned by this court for that purpose.

Three grounds are assigned in the attack upon the judgment: (1) that appellant was not brought to trial within the statutory limit; (2) that the district attorney's remarks to the jury were prejudicial misconduct; (3) that the evidence is insufficient to support the verdict. The answers to all three points are simple.

(1) The record discloses that the appellant went to trial under stipulation by his counsel and without any objection to the delay—if any delay existed, which does not appear in the record.

[1, 2] It is the settled rule of decision that the statutory right to a speedy trial—within 60 days from the filing of the information—is a privilege to the defendant which may be waived. People v. Workman, 121 Cal.App.2d 533, 536, 263 P.2d 458; see for numerous citations to the

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* Opinion vacated 302 P.2d 300.

same effect West's Annotated Penal Code, § 1382, vol. 50, pp. 788–789. The right was waived here when the defendant, in open court, consented to the time of trial without objection as to the time of trial.

[3] (2) The assigned misconduct of the district attorney should not be taken seriously. It is argued that he was guilty of misconduct in referring to appellant as a "supplier" and a "big man" in the narcotics trade. No objection was made to these remarks and we are unable to perceive any misconduct. The appellant had theretofore been convicted on two charges of narcotics traffic. He had served two terms on those convictions. How many more would it take to make him a "big man" in the trade? Succinctly, what is the basis upon which we could label a dealer in the illicit trade of narcotics as a "big man" in the trade?

[4, 5] Appellant complains of the statement of the deputy district attorney in oral argument to the effect that all the evidence, in his opinion, showed that the defendant was guilty. He relies on People v. Kirkes, 39 Cal.2d 719, 723, 249 P.2d 1, which is an extreme case, and not in point, as in that case the district attorney intimated that he had private knowledge of facts showing defendant's guilt. The rule applicable here is found in People v. Acuff, 94 Cal. App.2d 551, 558, 211 P.2d 17, 21, where this court, speaking through Justice Goodell, gave the correct and sensible rule as follows: "A prosecutor 'has the right to state his views, his beliefs and his convictions as to what the evidence establishes, and to urge that the evidence convinces his mind or is conclusive of the guilt of the defendant'" (citing numerous authorities).

[6] (3) The evidence is sufficient. A federal narcotic agent testified in detail to the purchase and delivery of a quantity of marijuana in his presence. The appellant did not testify. His codefendant, who had pleaded guilty, gave a rambling story of the transaction which the jury manifestly disbelieved. The minor discrepancies between the testimony of this witness and that of the federal officer did not weaken the positive testimony of the officer. In any event the jury believed the testimony of the federal officer and disbelieved that of the codefendant. That disposes of the issue.

The appeal from the order denying a new trial must of course be dismissed.

Judgment affirmed.

KAUFMAN, Justice.

I concur in the affirmance of the judgment of conviction. On a review of the entire record I am of the opinion that appellant had a fair trial. The remarks of the district attorney while intemperate did not constitute prejudicial error. Article VI, section 4½ of the State Constitution applies here.

DOOLING, Justice.

I dissent. In my opinion the statements of the prosecutor concerning his belief in appellant's guilt fall into the class condemned in People v. Kirkes, 39 Cal.2d 719, 249 P.2d 1, and People v. Edgar, 34 Cal. App. 459, 167 P. 891, and were not a mere statement of what the prosecutor believed the evidence established within the rule of People v. Acuff, 94 Cal.App.2d 551, 211 P.2d 17. I quote the prosecutor's exact language:

> "It is my duty as a Deputy District Attorney to only prosecute the people that I believe are guilty. In this case I sincerely believe Mr. Hampton is guilty. * * * If I were to prosecute this man knowing he wasn't guilty, it would be a grievous breach of duty, and I am the first one to agree with that. But I don't believe the man is not guilty. I wouldn't be here standing in front of you."

The prosecutor thus threw the weight of his personal integrity and his own judgment of appellant's guilt into the scales, without any reference to the evidence. The language of People v. Edgar, supra, quoted with approval by the Supreme Court in People v. Kirkes, supra, 39 Cal.2d at pages 723–724, 249 P.2d at page 4, clearly applies to the prosecutor's statements above quoted:

> "'When the district attorney declared that he would not prosecute any

man he did not believe to be guilty, he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion, formed from deductions made from the evidence adduced at the trial that the defendant was guilty of the crime charged (citation); but his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear, and which perhaps could not have been shown, in evidence.' "

140 Cal.App.2d 756

John SCOTT, a minor, by Lillian E. Scott, his Guardian ad litem, Plaintiff and Appellant,

v.

DEL MONTE PROPERTIES, Inc., a California Corporation, et al., Defendants and Respondents.

Civ. 16667.

District Court of Appeal, First District, Division 2, California.

April 16, 1956.

Action to recover for injuries sustained by plaintiff when he fell from defendant's pier allegedly because the railing gave way. The Superior Court, County of Monterey, Anthony Brazil, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that court committed prejudicial error in refusing to allow plaintiff to cross-examine as adverse witness his witness who had been employee of defendant at time plaintiff fell, but who was not employee at time of trial.

Judgment reversed.

1. Witnesses 🔑276

For purposes of statute permitting examination of "employee" of adverse party as an adverse witness, "employee" includes persons not presently employees but who were such at time transaction occurred out of which lawsuit arose. West's Ann.Code Civ.Proc. § 2055.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee".

2. Statutes 🔑190

When statute is so clear that reasonable minds cannot differ as to meaning of words used, there is no choice but to enforce it as written.

3. Statutes 🔑223.5(4)

It is cardinal principle of statutory construction that where legislation is framed in language of earlier enactment on same or analogous subject which has been judicially construed, there is very strong presumption of intent to adopt construction as well as language of prior enactment.

4. Appeal and Error 🔑1048(6)
Witnesses 🔑276

In action for injuries sustained when plaintiff fell from defendant's pier, allegedly because railing gave way, error of trial court in refusing to allow plaintiff to cross-examine as adverse witness, his witness who had been employee of defendant at time plaintiff fell, but who was not such an employee at time of trial, was prejudicial entitling plaintiff to new trial, and such error was compounded by court's allowing adversary to cross-examine such former employee.

5. Appeal and Error 🔑1048(1)
Evidence 🔑507

In action for injuries sustained when plaintiff fell from defendant's pier, allegedly when railing gave way, issue of whether railing was secure in an upright position when certain pins allegedly securing it were removed was one of fact which jury could easily determine from own experience if given sufficient facts, and court committed no prejudicial error in sustaining defendant's objections to questions asking witness whether railing would have been secure if pins were not in it.

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Irving Sugarman, Bernheim, Sugarman & Gilbert, Richmond, for appellant.

Hoge, Fenton & Jones, Monterey, for respondents.

KAUFMAN, Justice.

Plaintiff appeals from a judgment after jury verdict for defendant Del Monte Properties, Inc., in an action for personal injuries alleged to have been sustained by John Scott, a minor. Motion for new trial was made and denied.

John Scott, who was fifteen years of age at the time of trial, was a member of Sea Scout Ship 128 of Carmel, California. On September 6, 1953, together with other members of his sea scout ship, he went onto Del Monte Properties to assist with shore boat duty for the Stillwater Cove Yacht Club whose members were engaging in the Labor Day regatta. The Stillwater Cove Yacht Club used the pier and other facilities of respondent's Beach Club each year during this regatta. Mr. Geisen, Commodore of the Stillwater Club, testified that this was an independent club which on race days was permitted to use the Del Monte facilities. Stillwater Cove is adjacent to the 17 Mile Drive which is on respondent's property, and admission is charged for the use of this roadway, but appellant did not pay the fee.

Respondent maintains a publicity department in connection with Del Monte Lodge, which gives out releases to local and more distant newspapers concerning events of interest occurring on respondent's premises. The Labor Day regatta was so publicized.

The Stillwater Yacht Club as the sponsoring body of Ship 128 of the Sea Scouts permitted arrangements to be made by officers of that scout group for appellant and other scouts to be present at the regatta. There was no evidence of any contact between any officer or agent or respondent and appellant, nor of any contact between the Stillwater Club and respondent. The practice of using Del Monte's pier during these races evidently had gone on over a period of years.

An employee of respondent, Itoshi Kono, was present at Stillwater Cove on the day of the accident. He was described as a "kind of man Friday for the Yacht Club." He took people out to the boats, ran errands and was a general handyman. On race days the Yacht Club men tipped him for his assistance. He was a regular summertime employee of respondent from whom he received his salary. He stated that he was asked by the Yacht Club to assist. An officer of respondent testified that employees were permitted to use free time to assist the Yacht Club during the regatta.

The pier from which John Scott fell was between 300 and 500 feet long, and about 10 to 20 feet above low water. There were removable sections of railing at the end, permitting the pier to be used for lowering or raising small boats into or out of the water. There was a metal spike between 3 and 7 inches in length which was inserted in a bracket at the base of this rail when it was in place.

At some time prior to the accident Kono had removed this rail and laid the spike on the pier. During the regatta it had been replaced by the sea scouts, appellant being one of those who assisted. Kono noticed that the rail was in place about one-half hour prior to the accident. He said that from his position, ten to thirty feet from the end of the pier, it would have been possible to notice if the spike had been missing, but his attention had not been focused on that area.

Shortly after lunching at 12:30 p. m. John Scott went to the end of the pier and stood with his hands against the railing looking down at a United States Coast Guard cutter which was moored to the end of the pier. Appellant testified that he intended to go down the vertical ladder at the end of the pier and board the cutter, but the railing gave way and he fell some 15 feet to the deck of the cutter. The railing fell on top of him.

Two of respondent's witnesses testified that the railing could only be dislodged if it was pulled up and back. One of these witnesses, the engineer who had been in charge of its construction, assumed that the railing had been properly set in the groove. The other witness was a boy who observed the rail three days after the accident.

Appellant suffered a fracture of his left sinus and antrum, a fractured wrist, a laceration of his back and injury to soft tissue in his left side.

Appellant contends that prejudicial error was committed by the trial court in denying him the right to cross-examine Itoshi Kono under section 2055, Code of Civil Procedure. Kono had been an employee of respondent on the day of the accident. He was a student at San Jose State College, who had worked for respondent during the summer vacation of 1952, 1953, the summer when the accident occurred, and 1954. His deposition had been taken on August 29, 1954. At the time of trial, October, 1954, he was in his final year of college. He had last worked for respondent on September 20, 1954. No arrangement had been made for him to return the following summer to respondent's employ. Appellant had to call Kono as his own witness because the court refused to permit him to be called as an adverse witness because he was not then employed by respondent.

[1] Section 2055, Code of Civil Procedure, permits an employee of a party to be examined as an adverse witness. Respondent maintains that the court was correct in interpreting the statute to mean that the witness must have employee status at the time of trial, whereas appellant argues that the statute includes those who are not presently employees but who were such at the time the transaction occurred out of which the lawsuit arose. We agree with appellant's contention.

A case in point is Wells v. Lloyd, 35 Cal. App.2d 6, 94 P.2d 373, 377. In that case the trial court refused to allow examination of a witness by appellant under section 2055, sustaining an objection on the ground that the witness at the time of trial was no longer an employee of the defendant bank. The District Court of Appeal held that the witness, who as an officer of the bank had written an important letter involved in the transaction, could be examined under section 2055, Code of Civil Procedure, and that appellant was entitled to invoke said section against the defendant "by cross-examining defendant's officer and agent, even though the latter prior to the trial terminated his official connection with such corporation." The court reasoned that if the statute were not so interpreted the benefits of the statute could be nullified by a party by simply terminating the relationship existing between it and the witness prior to trial, and said that the section "was undoubtedly intended to provide for cross-examination of any officer whose official position with the corporation put him in possession of any matters material to the cause on trial." The statute was amended subsequent to the time this case was decided to include agents and employees. The cited case was reversed on another ground, but the court deemed it necessary to decide this point for the guidance of the trial court upon retrial. A petition for hearing in the Supreme Court was denied. The same reasoning was used in Golden State Co. v. Superior Court, 25 Cal. App.2d 176, 76 P.2d 728, 729, a case in which a writ of mandamus was granted commanding the Superior Court to order a witness to give his deposition. The witness had been a managing officer of the corporation of whose estate the plaintiff was trustee in bankruptcy. It was alleged that the facts out of which the case arose occurred while he was such officer. The court noted that while the statute (sec. 2021, subd. 1, Code of Civ. Proc.) was in the present tense, "it was undoubtedly the intention of the Legislature to afford the parties to the litigation means of obtaining in advance of the trial information concerning the issues so that they might properly prepare for trial" and that the purposes of the statute would be defeated if a corporation could remove officers or employees pending litigation. It is true that the parties had stipulated in the cited case that the deposition might be taken, and the concurring opinion which disagreed with the interpretation given to the statute by the majority, based its concurrence in the issuance of the writ on that ground.

[2, 3] Although it is true as respondent argues, that when a statute is so clear that reasonable minds cannot differ as to the meaning of the words used, there is no choice but to enforce the statute as it is written, In re Estate of Sahlender, 89 Cal. App.2d 329, 201 P.2d 69, still it is a "cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analagous subject, which has been judicially construed, there is a very strong presumption of intent to adopt the construction as well as the language of the prior enactment." Union Oil Associates v. Johnson, 2 Cal.2d 727, 734, 43 P.2d 291, 295, 98 A.L.R. 1499; see, Associated Boat Industries v. Marshall, 104 Cal.App.2d 21, 23, 230 P.2d 379.

[4] In view of the above decisions, it appears that appellant had the right to examine Kono as an adverse witness under section 2055, Code of Civil Procedure. Although the ruling was erroneous, was it prejudicial? Appellant maintains that it was, setting forth certain instances at the trial where the testimony of Kono was evasive and non-responsive, and where, he contends, had he been able to cross-examine him, he might have elicited more pertinent evidence.

Counsel for appellant asked the witness, "Does the Stillwater Cove Yacht Club use the Beach Club (the club in which respondent had an interest) for a club house? Kono answered "I can't say." Counsel for respondent said, "Well, if he knows", but the court cut further inquiry off by saying "He has answered." It is to be remembered that Kono worked three summer vacations on these premises and each year assisted the yachtsmen at the regatta. Appellant argues that this question was directed toward determining the relationship between the Stillwater Club and Beach Club, and had a bearing on whether or not appellant was an invitee of the respondent. This was an important issue in the case. In fact, the jury requested further instructions on the distinction between invitees and licensees.

Again Kono was asked if any of the sea scouts operated any of the shore boats on September 5, 1953. He answered, "I suppose they did, but I couldn't say for sure." Appellant claimed surprise but the court, having compared this answer with Kono's deposition, decided it was not surprise nor a matter of impeachment. Kono was allowed to refresh his recollection by reading his deposition and then answered, "I can't recall." When he was later asked if he had removed the railing at the end of the pier on September 5th or 6th he said he believed he did, but answered, "I can't say" as to whether it was the 5th or the 6th. He then said it could have been on the 4th, 5th or 6th. When asked if he had ever replaced that railing, after having removed it on one of those days, he answered, "Can't remember". To the question of how long before the accident he had observed the railing in place, he responded, "Can't say", but finally admitted it was at least a half hour.

Later counsel for appellant examined Kono as follows:

> "Q. Now had you had anything to do with putting up the fence, let us say, at any time from the morning of September 6 up until the time the accident happened? A. I'll say partly.
>
> "Q. What had you done toward putting up the fence that morning? A. Not too much, I suppose.
>
> "Q. The Court: Just tell us what you had done. You answered another question 'partly'.
>
> "The Witness: Well, I saw to it that, more or less, that it was in place.
>
> "By Mr. Sugarman: Q. Did you— A. (interrupting) By—when you ask me that question—did you see it before—and I said half an hour, well, I saw that it was in place, so—
>
> "The Court: (interrupting) You saw it was in place? A. Yes.
>
> "By Mr. Sugarman: Q. All right. Now tell me, did you physically touch it that morning? A. Perhaps.
>
> "Q. Can you tell us what your best recollection is as to whether or not you had touched that fence on the

morning of the accident? A. I cannot recall."

Appellant maintains that having been foreclosed from cross-examination or impeachment on the crucial point of the witness' relation to the railing shortly before the accident, he was prejudiced by not being able to ask leading questions of the witness, through which he might have been able to bring out negligent acts, knowledge and responsibility which could have been imputed to respondent.

The vice-president of respondent testified that no one was employed to assist the Yacht Club. Kono was asked if he was hired for shore boat service in 1953 and replied that, "when they asked me to I helped them out" meaning, apparently, the yacht club. When he was asked the question again, he answered, "No." Appellant claimed surprise and showed that in his deposition he had stated that he was hired mainly for shore boat service. Appellant because he had to use Kono as his own witness instead of as an adverse witness could not by cross-examination develop the theory that respondent was sufficiently interested in the yachting activity to employ a person for this express purpose. Furthermore, the deposition of this witness gave appellant ground for believing that such evidence could be elicited if he could have indulged in an exploratory cross-examination.

In Lawless v. Calaway, 24 Cal.2d 81, 147 P.2d 604, 609, the judgment granting a nonsuit was reversed solely because the court below was held to have committed prejudicial error in limiting the scope of the examination of defendant who was called as an adverse witness under the provisions of section 2055 of the Code of Civil Procedure. It was held in that case, a malpractice action, that appellant should have been allowed to examine defendant doctor as an expert in regard to the standard of skill and care exercised by doctors in that community. The court stated that an offer of proof was unnecessary where the court had declared an entire class of evidence inadmissible, and noted further that "examination of a party under section 2055 is often exploratory and it would be unreasonable to require an offer of proof under such circumstances." The court disapproved certain cases suggesting a different rule.

Respondent maintains that the scope and extent of examination of witnesses rests largely in the sound discretion of the court, and notes that several of the authorities cited by appellant were cases where reversals resulted because the scope of examination was unduly limited under section 2055, Lawless v. Calaway, supra; In re Estate of Carson, 184 Cal. 437, 194 P. 5, 17 A.L.R. 239, or dealt with the right to impeach such a witness or the effect of evidence so obtained on a motion for directed verdict. Figari v. Olcese, 184 Cal. 775, 195 P. 425, 15 A.L.R. 192; Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529. However, if it has been considered prejudicial error to unduly limit the scope of examination under the above section, it is certainly prejudicial error to forbid such examination altogether in cases where a party has a right under the statute to cross-examine an adverse witness. See, Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624.

In MacGregor v. Kawaoka, 132 Cal.App.2d 407, 282 P.2d 130, judgment was reversed solely because appellant was denied the right to examine an accommodation maker of a promissory note in an action against him and the maker of said note. The court held that no offer of proof was necessary, that the statute was remedial in character and should be liberally construed in order to accomplish its purpose, that it conferred a substantive right which might not be denied to a party.

Counsel for appellant having examined the witness Kono as his own witness then objected to counsel for respondent cross-examining him, asserting that Kono was originally respondent's own witness, and the court said to respondent's counsel: "For all practical purposes, Mr. Hoge, you've got a deposition in your hand which you announce you took and on—I would suggest that you refrain from leading questions in cross-examination." Counsel protested that "No matter how close the relationship may be to the client or employee, another party places him on the stand, I'm entitled to cross-examine him. I will ask for that leave to do so." The court granted that he had such a right, and he proceeded to ask leading questions of the witness emphasizing the purely voluntary nature of Kono's services to the Yacht Club, for example, "if some member of the Yacht Club would ask you to give them a lift you would volunteer your services, wouldn't you? A. Yes."

Of course, had the trial court been correct in ruling that appellant had no right to examine the witness under section 2055, this latter ruling would have been correct, but in view of the error in the first ruling, the prejudice resulting was compounded.

[5] Appellant contends that prejudicial error was committed in sustaining objections to questions asked by him of his witness Kurt Springer, commanding officer of the Monterey lifeboat station, who examined the end of the pier and the railing a few hours after the accident. He was asked if the railing would have been secure if the pin or pins were not in it. And again he was asked if he could determine from his examination if it would hold its position if the pins were removed. Appellant made no showing that this witness had ever examined the railing when the pins had been removed. One of the witnesses who testified for respondent had tested the railing when the pins were removed, and the other witness was the engineer under whose supervision the railing was built.

The ultimate fact to be determined in regard to the railing was whether or not it was secure when in an upright position, a fact which the jury could in such a case easily determine from their own experience if given sufficient facts. Appellant cites People v. Manoogian, 141 Cal. 592, 75 P. 177, to the effect that certain questions are of such a nature that it is impossible for a witness to convey to the jury an adequate conception of the ultimate fact except by giving the result of his observation. That was not true here, for if the witness were prepared to testify as to what happened when a person leaned against the railing with the pins removed, the jury could easily deduce whether or not it was safe or secure. In Mace v. Watanabe, 31 Cal.App.2d 321, 87 P.2d 893, the witness simply testified to a tire mark, describing it as one made by a free running wheel, a matter of common knowledge and observation. (And, see Murphy v. County of Lake, 106 Cal. App.2d 61, 65, 234 P.2d 712). Clearly appellant was not prejudiced by the rulings on these questions.

In view of the error in denying appellant the right to examine the witness Kono under section 2055, Code of Civil Procedure, the judgment must be reversed.

Judgment reversed.

DOOLING, J., concur.

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140 Cal.App.2d 899

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harold F. McCLAIN, Defendant and Appellant.

Cr. 3205.

District Court of Appeal, First District, Division 2, California.

April 19, 1956.

Prosecution for grand theft. The Superior Court, County of Alameda, Charles Wade Snook, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Nourse, P. J., held that any error in instruction advising jury that defendant's custom of withdrawing company funds for his own use with intention of eventually restoring them did not make his acts noncriminal was cured by instruction that intent necessary to embezzle is intent to fraudulently appropriate property to use and purpose other than that for which it was entrusted.

Affirmed.

Criminal Law ⚷823(4)

In prosecution for grand theft, any error in instruction advising jury that defendant's custom of withdrawing company funds for his own use with intention of eventually restoring them did not make his acts noncriminal was cured by instruction that intent necessary to embezzlement is intent to fraudulently appropriate property to use and purpose other than that for which it was entrusted. West's Ann.Pen. Code, §§ 512, 513.

◆

Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried to a jury on an information framed on four separate counts—two charging grand theft, and two charging the issuance of fictitious checks. The jury found him guilty on the first count, and not guilty on the other three. His motion for a new trial was denied, and he was admitted to probation with directions to restore the embezzled money.

There is no material dispute in the evidence. The verdict rests largely on the admission and confession of the defendant. The only ground urged for a reversal is a claim of error in the instructions to the jury.

The defendant was local manager of a branch store of the Owl Drug Company. He was permitted to take from company funds $1,000 a day which he was required to distribute to the several cash registers for the purpose of making change for the customers. Prior to the trial he gave a statement in writing to this effect:

> "My name is Harold Frank McClain and I live at 701 Walker Ave., Oakland, California. About 4 weeks ago I started preparing *fictitious* checks and estimate at this writing that the total amount to between Seven Hundred and Fifty and Eight Hundred Dollars. I fully realize this was wrong and making this statement of my own free will, with no threat or promise having been made to me."

This statement was supplemented by the defendant's testimony that he had taken the moneys from the working fund for his own personal use. He expressed the intention to return the money to the owner.

Under these facts appellant is left to his attack upon the instruction advising the jury that defendant's custom of withdrawing company funds for his own use with the intention of eventually restoring them did not make his acts noncriminal. Whatever error or uncertainty there may be in this instruction was fully cured by the instruction reading:

> "The intent essential to embezzlement is the intent to fraudulently appropriate the property to a use and purpose other than that for which it was entrusted, in other words, the intent to deprive the owner of his property, but, the other element of the offense being committed, the crime is committed, even though it was intended to deprive the owner of his property only temporarily and to eventually return it."

The statutory law is found in sections 512 and 513 of the Penal Code. Section 512 reads:

> "The fact that the accused intended to restore the property embezzled, is no ground of defense or mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, or an indictment found by a grand jury, charging the commission of the offense."

The rule of decision fully following the statute is found in People v. Talbot, 220 Cal. 3, 16, 28 P.2d 1057; People v. Colton, 92 Cal.App.2d 704, 710, 207 P.2d 890.

Judgment affirmed.

DOOLING, Justice.

I concur. However, because I believe that the opinion of the presiding justice does not touch the real question presented by the appellant, I feel obliged to elaborate the reasons for my concurrence. The embezzlement statute requires the *fraudulent intent* to appropriate the money or property of another with which the defendant is entrusted. Pen.Code, § 506. The appellant herein attempted to prove that he lacked such fraudulent intent by his evidence that it was a recognized custom in the business for the manager to pay to employees including himself money from the revolving fund as an advance against salary earned but not yet payable. He complains of the following instruction, that it took from the jury this question of the necessary fraudulent intent:

> "The fact, if it be a fact, that the defendant in this case had been accustomed to drawing and using the funds of the corporation for his personal needs, having such withdrawals charged to his personal account, and eventually paying the money back by credits due him or by payments made by him, does not relieve the acts from the stain of criminality; and even if all of the Directors of the Corporation knew of such custom, the wrong was not made right, as each was charged with a trust to use the funds of the corporation for its needs."

The instructions, however, must be read as a whole and the jury was properly instructed:

> "The intent essential to embezzlement is the intent to fraudulently appropriate the property to a use and purpose other than that for which it was entrusted, in other words, the intent to deprive the owner of his property, but, the other element of the offense being committed, the crime is committed, even though it was intended to deprive the owner of his property only temporarily and to eventually return it.
>
> "Before you can find the defendant guilty of the crime of embezzlement, you must find from the evidence, beyond a reasonable doubt, that the defendant had such fraudulent intent."

In view of this express and clear instruction the jury could not have understood from the instruction complained of that they could find the defendant guilty if he lacked the required fraudulent intent.

KAUFMAN, J., concurs for the reasons expressed by Mr. Justice DOOLING.

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140 Cal.App.2d 944

In the Matter of the ESTATE of Ermina BULLOCK, Deceased.

Bela SMITH, Mamie Newman and Elsie Burge, Contestants and Respondents,

v.

Nellie B. SMITH, as Legatee under the Will of said Decedent, and as Petitioner for the Probate of the Will of said Decedent and for Letters of Administration with the Will Annexed, Proponent and Appellant.

Civ. 8747.

District Court of Appeal, Third District, California.

April 20, 1956.

Rehearing Denied May 18, 1956.

Hearing Denied June 7, 1956.

Proceeding to probate will. The Superior Court, Sacramento County, James H. Oakley, J., denied probate, and beneficiary appealed. The District Court of Appeal, Van Dyke, P. J., held that where witnesses for contestants were not asked whether testatrix was capable of recalling the nature and extent of her estate or natural objects of her bounty, and of understanding nature of act she was doing, evidence was insufficient to support finding of testamentary incapacity.

Judgment reversed.

1. Wills 🔑55(9)

Evidence in proceeding to probate will, wherein witnesses for contestants were not asked whether testatrix was capable of recalling the nature and extent of her estate, and natural objects of her bounty and of understanding nature of act she was doing, was insufficient to support finding of testamentary incapacity

2. Wills 🔑52(1)

In absence of evidence that testatrix was not capable of recalling nature and extent of her estate and natural objects of her bounty or of understanding nature of act she was doing, it was presumed that she was so capable.

3. Wills 🔑55(9)

In proceeding to probate will, doctor's testimony that testatrix was incompetent to make a will was insufficient to establish legal incompetency, where doctor was not asked whether testatrix was capable of recalling nature and extent of estate and natural objects of her bounty or of understanding nature of act she was doing.

4. Wills ⚷166(1)

Evidence in proceeding to probate will was insufficient to support finding that will had been procured by undue influence.

5. Wills ⚷166(7)

Fact that beneficiaries might have had opportunity and ability unduly to influence testatrix would not, of itself, support finding that they had exercised such undue influence.

◆

Busick & Busick, Sacramento, for appellant.

Bradford, Cross, Dahl & Hefner, Sacramento, for contestants.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment denying probate of the last will and testament of Ermina Bullock, deceased, whom the jury by its verdicts found was of unsound mind and under the undue influence of "another person" at the time of its execution. Appellant maintains that the evidence is insufficient to support the verdicts and the judgment entered thereon.

The testatrix died on June 24, 1953 as the result of a cerebral hemorrhage. She was then approximately 83 years of age and had been a widow for ten or fifteen years. Her heirs at law were her brother and two sisters, the respondents herein, all of whom lived in Iowa and whom, apparently, she had not seen for many years. The testatrix' holographic will, the probate of which was contested by respondents, was executed on December 31, 1952. By it she left her entire estate to the appellant who was her closest friend and whom she had known for approximately 40 years. The testatrix' home, in which she lived alone, was two or three blocks from that of appellant and her husband. They saw her on the average of three or four times a week and were very kind to her. She depended upon them to take her to the meetings of the Rebekah Lodge in which lodge she and appellant had been very active in past years. The lodge appears to have been the testatrix' main interest in later life. She liked to recall the lodge conventions which she and appellant had attended together and past and present affairs of the local branch were the main topic of her conversations with members who visited her during her last illness which was of more than a year's duration.

On May 27, 1952 the testatrix telephoned appellant's husband and said that she did not feel well enough to attend a lecture to which he and appellant had planned to take her that evening. Appellant's husband went to see if there was anything he could do for the testatrix but she assured him that she was not ill and would be all right. However, later in the day, a neighbor became alarmed and had the testatrix taken by ambulance to the county hospital where she remained until June 6th. On May 29th the testatrix asked appellant's husband to have Mr. Busick, a local attorney, come to the hospital to draw her will. Mr. Busick had known the testatrix for over 40 years and had been her husband's lawyer. On June 6th appellant's husband brought Mr. Busick to the hospital to see the testatrix. She informed him that she wished to make a will leaving everything to appellant and her husband. Mr. Busick testified that he asked appellant's husband to leave the room so that he might talk to her privately. He asked her if she did not wish to leave something to the Odd Fellows or to the Odd Fellows Home for which her husband had been a trustee for many years. She replied that she did not and repeated that she wished to leave everything to appellant and her husband. Mr. Busick then wrote out a will which so provided and read it to her. A social worker at the hospital was called in and she and Mr. Busick witnessed the will which the testatrix signed with an "X", presumably because she was too weak to write her name. It should be here observed that although this will was not offered for probate, much of the evidence upon which the respondents rely to support the jury's findings of mental incapacity and undue influence relate to the time of its execution rather than to December 31, 1952, the date of the testatrix' later holographic will, which is the subject of the present controversy.

On June 7th, at the testatrix' request, appellant's husband contacted Dr. Lee, who had formerly acted as her physician, and had him arrange for the testatrix to be transferred to Mercy Hospital where she remained until June 11th, when, at Dr. Lee's suggestion, she was moved to a nursing home where she remained until her death more than one year later. The proprietress of the nursing home testified that the testatrix was in a semi-conscious condition on the day of her admittance to the home but that, considering her age, she showed great physical improvement and "cleared up quite rapidly to where she responded and talked, and swallowed." However, this witness testified that she considered the testatrix incompetent at all times because she was repetitious and childish, never seemed to ask any questions about current events, only remembered things pertaining to the past, and would not discuss what she was reading but would merely shrug and remark: "Well, it passes the time". The witness stated that the testatrix recognized people and conversed with her visitors about members and meetings of the lodge and appeared to remember some of it; further that she had no difficulty in making the testatrix understand things if she got her full attention.

Dr. Lee testified that on June 7, 1952, when the testatrix was transferred to Mercy Hospital, she was very ill, incoherent, confused, and incompetent to make a will; she was very frail, weighing at the most 73 pounds, and suffered from arteriosclerosis with cerebral encephalopathy (softening or damaging of the brain), high blood pressure, lack of bladder control, partial deafness, and malnutrition; that due to the nature of her illness, which causes progressive brain degeneration, a condition which can neither be cured nor improved, he was firmly convinced the testatrix was incompetent to make a will at all times between June 7, 1952, when he first saw her and June 24, 1953, when she died. However, he also said that the only calls for which he charged her during that period were made on June 11th, 16th, 18th, 25th and August 4, 1952 and on February 9th and June 18, 1953. He had no record of having seen her on or near December 31, 1952, the date of her holographic will. Dr. Lee explained that he did not see testatrix more frequently as her condition was such that he could do little for her. On the average of once a month he would stop at her door and pass the time of day when he was at the nursing home to see other patients. He said the testatrix recognized him and would wave when she saw him walking down the hall and on one occasion inquired about his father-in-law whom she had known. Dr. Lee discounted this by drawing an analogy to a dog who would recognize him but who was not competent to make a will. He testified that he believed the testatrix was mentally incompetent because she was repetitious, appeared childish and confused, could not explain why she moaned in her sleep, and had no appetite, all of which he stated were symptoms of advanced senility.

[1-3] On the authority of decided cases this record is insufficient to support a finding of testamentary incapacity. In re Estate of Doty, 89 Cal.App.2d 747, 751-752, 201 P.2d 823; In re Estate of Powers, 81 Cal.App.2d 480, 482-483, 184 P.2d 319; In re Estate of Wellauer, 107 Cal.App.2d 268, 236 P.2d 906; In re Estate of Sexton, 199 Cal. 759, 769-770, 251 P. 778; In re Estate of Shay, 196 Cal. 355, 237 P. 1079. Neither the nursing home proprietress nor Dr. Lee was asked whether or not the testatrix was capable of recalling the nature and extent of her estate, the natural objects of her bounty, and of understanding the nature of the act she was doing. In the absence of evidence to the contrary, it must be presumed that she did. In re Estate of Shay, supra, 196 Cal. at pages 359-361, 237 P. 1079. Dr. Lee's conclusion that the testatrix was incompetent to make a will amounted to no more than his belief that she was of unsound mind in the medical sense. In re Estate of Arnold, 16 Cal.2d 573, 587, 107 P.2d 25. His testimony in no way establishes that the testatrix was so incompetent in the legal sense as to be incapable of making a valid, testamentary

disposition of her property. In what we have said as to the insufficiency of the evidence to support a verdict of incompetency we are not unmindful of the rule so well stated in In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384. But it is obvious that no witness gave facts of her condition when she wrote her own will which as of that time would give support to the jury's verdict of testamentary incapacity. That insufficiency is well disclosed by the discussion in In re Estate of Powers, supra.

On the other hand, there is more than ample evidence that the testatrix had the mental capacity to execute a valid will. "[T]he will itself bears mute evidence of testator's competency." In re Estate of Jamison, 41 Cal.2d 1, 13, 256 P.2d 984, 990. A few weeks after the testatrix was placed in the nursing home, she was served with a copy of a petition for appointment of her second cousin as her guardian. Upon her own initiative the testatrix sent for the attorney of her choice, Mr. Busick. She lucidly related what had transpired and told Mr. Busick she did not wish her cousin to act as her guardian as they were not friends. Mr. Busick testified that the testatrix was in good condition except for being bedridden and that she told him in detail about the service of the papers upon her and what she wanted done. However, the cousin was appointed guardian despite the testatrix's objections. Some time thereafter the testatrix again sent for Mr. Busick and asked him to have her taken elsewhere as she did not like the treatment which she was receiving at the nursing home. Mr. Busick explained this could not be done without the consent of her guardian. She again sent for him about the middle of January, 1953, and made the same request. During that visit she handed Mr. Busick her holographic will, which bore the date of December 31, 1952, and asked him to keep it, which he did. Such voluntary entrustment of possession of her will to her personal attorney for whom she had sent is cogent evidence that the testatrix was of sound mind and not acting under undue influence of any person.

It is true that the testatrix was practically bedridden from May 27, 1952 until the time of her death on June 24, 1953. However, she was able to sit up in a chair for short periods, read, and have visitors, one of the most frequent of whom was appellant who saw her three or four times a week while she was in the nursing home. A number of members of the Rebekah Lodge whom the testatrix had known for many years called on her regularly. They found her mentally alert and testified that she displayed a remarkable memory. Two of the nurses who attended the testatrix attested as to her mental competency. She conversed with her visitors and at Christmas time showed them the cards which she had received. Appellant visited her on the day before, the day of, and the day after December 31st, the date which her holographic will bore, and she testified that the testatrix was then of sound and disposing mind. Other friends who visited her during the holiday season were of like opinion. There is no evidence that the testatrix was irrational or mentally deranged at the exact time of the execution of her will.

[4, 5] There is no evidence that the execution of testatrix's will was induced by the undue influence of any one. Appellant testified that she did not know of its existence until Mr. Busick telephoned her after the testatrix' death and there is no evidence to the contrary. There is no evidence that either appellant or her husband was present when the testatrix wrote her will nor when she gave it to her own attorney for safekeeping. There is no evidence that appellant or her husband was active in procuring its execution. In re Estate of Lingenfelter, 38 Cal.2d 571, 585–586, 241 P.2d 990; In re Estate of Welch, 43 Cal.2d 173, 178, 272 P.2d 512; In re Estate of Wellauer, supra, 107 Cal.App.2d at page 273, 236 P.2d 906. The mere fact that they may have had the opportunity and ability to unduly influence the testatrix will not, standing alone, support a finding that they did. And, of course, there is no evidence that the testatrix was influenced by "another person". It was not unnatural that the testatrix wished to leave her estate to her most intimate friend in preference to her relatives whom she seldom saw. In re Estate of Doty, supra, 89 Cal.App.2d at page 755, 201

P.2d 823; In re Estate of Dunne, 130 Cal. App.2d 216, 225, 278 P.2d 733; In re Estate of Agnew, 65 Cal.App.2d 553, 565, 151 P.2d 126.

The judgment is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied: CARTER, TRAYNOR and McCOMB, JJ., dissenting. For dissenting opinion of CARTER, J., see 297 P.2d 633.

140 Cal.App.2d 638

Lena GALLIN, Plaintiff and Appellant,

v.

Jeanne POULOU, Defendant and Respondent.

Civ. 16602.

District Court of Appeal, First District, Division 1, California.

April 10, 1956.

Hearing Denied June 6, 1956.

Action by the tenant of an apartment in defendant's building for injuries sustained when a piece of plaster fell on plaintiff from the ceiling in her bathroom as alleged result of building vibrations caused by construction of garages in basement of building by a contractor employed by defendant. From a judgment of nonsuit by the Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., plaintiff appealed. The District Court of Appeal, Peters, P. J., held that defendant, as matter of law, was not liable for injuries, as no extrahazardous activity was involved and there was no evidence of negligence or defendant's knowledge before accident of cracked condition of plaster in bathroom or vibrations of building.

Judgment affirmed.

1. Trespass 🔑10

Trespasses may be committed by consequential and indirect injuries, as well as by direct and forcible injuries, to property, and vibrations, under certain circumstances, can constitute a trespass.

2. Trespass 🔑1, 2

There is no liability for trespass, unless it is intentional or result of recklessness, negligence, or extrahazardous activity.

3. Trespass 🔑1

An "extrahazardous activity," rendering person engaged therein liable for resulting trespass, is activity which necessarily involves risk of serious harm to persons, land or chattels of others, cannot be eliminated by exercising utmost care, and is not a matter of common usage.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrahazardous Activity".

4. Master and Servant 🔑319

Construction of garages in apartment building is matter of common usage and hence not an extrahazardous activity rendering building owner liable to tenant, injured as result thereof, for trespass.

5. Master and Servant 🔑319

An apartment building owner, as matter of law, was not liable for injuries to apartment tenant when piece of plaster fell on her from ceiling in her bathroom as alleged result of building vibrations caused by construction of garages in basement of building by contractor employed by owner, in absence of evidence of negligence or owner's knowledge before accident of cracked condition of plaster in such room or of such vibrations, though tenant complained about them and showed cracked plaster to one of contractor's workmen.

Joseph L. Bortin, San Francisco, for appellant.

Boyd & Taylor, San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff is a tenant in an apartment house owned by defendant. Defendant employed a contractor to construct some garages in the basement of the apartment building. Thereafter, some plaster fell from the ceiling in plaintiff's apartment, injuring her. This action was brought on the theory that the construction work caused the building to vibrate, causing the plaster to fall, and that such constituted a trespass for which the landlord is responsible. The trial court granted defendant's motion for a nonsuit. From the judgment based thereon, plaintiff appeals.

In May of 1953 plaintiff, then 68, occupied a first-floor apartment in an apartment house then owned by defendant. She had occupied the apartment for about 12 years. The defendant had purchased the apartment house in 1947. Defendant, who did not live in San Francisco, did not visit the property very often, nor did she employ a manager to supervise it.

For several years prior to 1953 the ceiling in the bathroom of plaintiff's apartment was cracked, and pieces of plaster hung down over the tub. No plaster had ever fallen, however. This condition had existed for several years. Plaintiff never reported this condition to defendant, nor did defendant know about it. There is no evidence that defendant was under any duty to repair this condition.

In March of 1953 the defendant engaged a Mr. Folino, whether as an employee or independent contractor does not clearly appear, to construct four garages in the basement of the apartment house directly below plaintiff's apartment. The plaintiff testified that the construction work caused her apartment to vibrate. Plaintiff complained to one of the workmen who came into the apartment and saw the condition of the plaster. Who this workman was, what was his position, and what was his authority, if any, do not appear. At any rate, plaintiff made no complaint to defendant.

On May 3, 1953, while plaintiff was bending over her bathtub, a piece of plaster, larger than a dinner plate, fell and hit her on the head and shoulders, causing the injuries for which this action was brought. Prior to this date no plaster had fallen in plaintiff's apartment, nor, so far as is known, had plaster fallen any place else in the building. While the garages were being constructed defendant never visited the premises during working hours, nor did she know what equipment the workmen used, nor how they performed their work. She did visit the premises once or twice a week during the construction period, but such visits were always after the workmen had quit for the day. On this evidence the trial court granted a nonsuit, and plaintiff appeals from the judgment based thereon.

The plaintiff expressly renounces any theory of liability based on the violation of any duty owed by a landlord to a tenant, or on negligence. The theory relied upon is disclosed by the allegation of the complaint to the effect that defendant "undertook substantial repairs, alterations, and improvements * * * which * * * in the normal course thereof, were apt to, and did set up severe vibrations," and that as a "direct and proximate result of said dangerous and defective condition, and said vibration, a certain piece of plaster * * * was caused to * * * fall * * * striking plaintiff on her head." In other words, plaintiff contends that the acts complained of constituted a trespass and are actionable regardless of negligence. She places particular reliance on the rule stated in the case of Green v. General Petroleum Corp., 205 Cal. 328, 333, 270 P. 952, 955, 60 A.L.R. 475, where it is stated: "Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done."

[1] The basic question presented is whether or not an absolute liability exists in the case of a constructive trespass, or whether such liability only exists in this state when the defendant engages in an extra-hazardous activity or commits an intentional or negligent trespass. At common law the action of trespass was limited to a direct invasion of property. In such action the defendant was held strictly lia-

ble for all damages regardless of negligence. But where, as here, the invasion was indirect or constructive the form of action was on the case. In such an action proof of negligence and improper intent were essential. Prosser on Torts, 2d ed., pp. 54 to 56. This distinction between direct and indirect invasions is not recognized in this state. In Coley v. Hecker, 206 Cal. 22, 28, 272 P. 1045, 1048, it was said that the "trend of decisions of this court is generally in accord with the doctrine, whenever the question has come before it, that trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries." Vibrations, under certain circumstances, can constitute a trespass. McNeill v. Redington, 67 Cal.App.2d 315, 154 P.2d 428. In McKenna v. Pacific Electric Ry. Co., 104 Cal.App. 538, 286 P. 445, the plaintiff's property was damaged by vibrations caused by the blasting operations of defendant. The court said in 104 Cal.App. at page 543, 286 P. at page 447: "We see no reason for differentiating between responsibility for damage done by physical projectiles or missiles and responsibility for damage done by vibration or concussion." See generally Robinson v. Black Diamond Coal Co., 57 Cal. 412; McGrath v. Basich Brothers Const. Co., 7 Cal.App.2d 573, 46 P.2d 981; Colton v. Onderdonk, 69 Cal. 155, 10 P. 395.

[2] The real question involved is not whether there is a distinction between direct or indirect trespass, in this state, because there is not, but what the rule of liability in such cases is. Does California apply the rule of strict liability as to all trespasses, or has California imposed liability only for intentional trespasses and trespasses caused by reckless, negligent or extra-hazardous activities? The Restatement of Torts has clearly adopted the latter rule. Section 158 provides:

"One who intentionally and without a consensual or other privilege

"(a) enters land in possession of another or any part thereof or causes a thing or third person so to do * * * is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests."

Section 165, and several of the comments to the section, provide:

"One who recklessly or negligently, or as a result of an extra hazardous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor thereof or to a thing or a third person in whose security the possessor has a legally protected interest.

"Comment a. To come within the rule stated in this Section, the conduct of the actor either must involve an unreasonable risk of invading the possessor's interest in his exclusive possession of the land or some other interest connected therewith or must be caused by an extra hazardous activity carried on by the actor which, although carefully carried on, involves a risk of invading such an interest * * *."

"Comment d. The rules which determine whether the actor's conduct is reckless or is negligent as involving an unreasonable risk of an invasion of the other's interest in the exclusive possession of land are the same as those which determine the recklessness or negligence of conduct as threatening bodily harm * * *.

"The rules which determine whether an activity carried on by the actor is so especially hazardous that it must be carried on at the risk of answering for any intrusion on another's land caused by the miscarriage of the activity are the same as determine the ultra hazardous character of an activity, the miscarriage of which is likely to result in bodily harm * * *.

"Comment e. There is this difference between liability for harm caused to the possessor of land by a negligent or reckless intrusion thereon or by an intrusion resulting from the conduct of an extra hazardous undertaking and the liability for harm so caused otherwise than upon land in the other's possession. In the latter case, the actor's conduct is not negligent unless there is an unreasonable risk of causing some such harm as that which the other sustains. In the situation dealt with in this Section, the actor's conduct is sufficient to subject him to liability for any harm which is done to the possessor if such conduct contains an unreasonable risk of resulting in an intrusion upon the possessor's land. If this is the case, the actor is liable for any harm of the sort stated in this Section (see Comment c) of which his intrusion or any act done by him while he is intruding is a legal cause, although there was no antecedent probability that his conduct would so result. The fact that he has wrongfully intruded, even though the wrong is one of negligence rather than intention, makes the actor liable for any such harm done to the possessor of land while the actor is thereon. In short, it is not essential that the harm caused to the possessor of the land was reasonably to be expected by the actor or that it was reasonably to be expected as a result of a trespass on the land. It is sufficient that there is an intrusion on another's land caused either recklessly, negligently, or as a result of an extra hazardous undertaking, and that as a legal consequence of such intrusion, harm of the required sort has come about, however, antecedently improbable * * *."

Section 166 provides: "Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

An examination of the California cases discloses that while no case seems, in so many words, to have adopted the rule of the Restatement, the overwhelming majority of cases where liability has been imposed fit within the rule of the Restatement, or within the rule of Fletcher v. Rylands. The foundation case is Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952. There the defendant was engaged in drilling for oil. He capped the well just before hitting a gas pocket. Without negligence on his part the well "blew off," throwing much debris on plaintiff's property. The Supreme Court imposed absolute liability on the defendant. The court relied on the principle stated in section 3514 of the Civil Code that "'One must so use his own rights as not to infringe upon the rights of another'", and stated "'* * * it is "unreasonable" and unlawful for one owner to physically invade the land of another owner. There can be no *damnum absque injuria* where there is such a trespass.'" 205 Cal. at page 335, 270 P. at page 955. Obviously, the case involved an extra-hazardous activity on the part of the defendant. While the Green case did not so state, most of the cases citing it have so interpreted it. Boyd v. White, 128 Cal. App.2d 641, 654, 276 P.2d 92; Shanander v. Western Loan & Bldg. Co., 103 Cal.App. 2d 507, 510, 229 P.2d 864, 26 A.L.R.2d 1039; Daniels v. McPhail, 93 Cal.App.2d 479, 482, 209 P.2d 19; see discussion in 5 So.Cal.L. Rev. 263.

There are other trespass cases in California where strict liability has been imposed. All of them involved a nuisance, or some extra-hazardous activity, or the bringing of a foreign substance on the land which escaped. Thus, Nola v. Orlando, 119 Cal.App. 518, 6 P.2d 984, and Parker v. Larsen, 86 Cal. 236, 24 P. 989, involved liability for escaping waters. McGrath v. Basich Brothers Const. Co., 7 Cal.App.2d 573, 46 P.2d 981; Colton v. Onderdonk, 69 Cal. 155, 10 P. 395; Munro v. Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 P. 303, and McKenna v. Pacific Electric Ry. Co., 104 Cal.App. 538, 286 P. 445, involved damages caused by blasting operations, which, at least in an urban area, involves an extra-hazardous activity. But see Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 93 P. 82, 14 L.R.A.,N.S., 913, where the court held that in isolated areas the defendant could be liable for damages caused by an explosion only if he were negligent; see for a good discussion of the general subject 19 Cal.L.Rev. 94.

Plaintiff places great reliance on McNeill v. Redington, 67 Cal.App.2d 315, 154 P.2d 428, claiming that that case stands for the rule that a defendant is absolutely liable for damages caused by any trespass, regardless of the nature of the activity. The case stands for no such proposition. There the defendant operated a drop forge 24 hours a day. This caused substantial damage to the nearby home owners. The conduct of the forge was not a nuisance because the zoning law permitted its operation in the area involved. The trial court found that methods used by defendant's operations were "reasonable and necessary," but nevertheless imposed liability for damages on the theory of trespass. While the court does not spell out the precise basis of liability, it is obvious that, under the facts, the case involved either an intentional or negligent trespass, because as a reasonable man defendant knew or should have known that his operations would cause the adjoining properties to be subjected to vibrations. All of the cases cited by the appellate court fall within the rule of the Restatement.

From the foregoing we conclude that the rule of the Restatement is sound, and that in this state there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity.

[3] Now how do these rules apply to the facts of the instant case? Clearly, no negligence is here involved. Plaintiff admits that there is no evidence of negligence. Equally clear it is that no extra-hazardous activity is involved. The Restatement of Torts, section 520, defines such an activity as one where the act

> "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and
>
> "(b) is not a matter of common usage."

California has generally approved that classification. Boyd v. White, 128 Cal.App. 2d 641, 649, 276 P.2d 92.

[4] Obviously, the construction of garages in an apartment house, there being no evidence that the methods employed were unusual, is a "matter of common usage."

[5] The only remaining question is whether, on the evidence of the acts here shown to exist, the case should have gone to the jury on the question of whether the trespass was intentional, or one engaged in knowing that the work would necessarily invade the plaintiff's property rights. The defendant did not know, prior to the accident, that the plaster was weakened in plaintiff's apartment. She had no reason to believe that the construction of basement garages would cause plaster to fall. No plaster fell in any other apartment. No one complained to defendant, not even plaintiff, about the vibrations. Under the evidence the only reason the plaster fell was that it had been in a cracked condition for a long period of time. It was apparently in such a condition that the slightest vibration would cause it to fall. Defendant did not know this. It is true that plaintiff complained to one of the workmen about the vibrations, and showed him the cracked plaster, but there is no evidence of the status of the workman, or of his authority. There is no evidence that he told defendant of the occurrence or that it was his duty to do so. Even if it be inferred that Folino, the contractor, was an employee of defendant,[1] so that his acts would be imputed to defendant, certainly a complaint to one of Folino's workmen cannot be sufficient to impute knowledge to defendant. Without such knowledge, under the admitted facts, there could be, as a matter of law, no liability.

For the foregoing reasons the judgment is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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[1] The evidence is very scant on the point, and probably the only reasonable inference is that Folino was, as a matter of law, an independent contractor. See Johnson v. Helbing, 6 Cal.App. 424, 92 P. 360; Green v. Soule, 145 Cal. 96, 78 P. 337.

140 Cal.App.2d 822

Fred HERRERA, Plaintiff and Appellant,

v.

Howard T. JOHNSTON, an individual doing business under the firm name and style of California Seed & Fertilizer Co., Defendant and Respondent.

Howard T. JOHNSTON, an individual doing business under the firm name and style of California Seed & Fertilizer Co., Cross-Complainant,

v.

Fred HERRERA and F. H. Woodruff & Sons, Inc., a corporation, Cross-Defendants.

Civ. 8722.

District Court of Appeal, Third District, California.

April 16, 1956.

Action to recover damages for breach of warranty in regard to seed. The Superior Court, Sutter County, Arthur Coats, J., allowed recovery in the amount of the purchase price of seed and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to support findings that there was an express warranty and that such warranty was limited to purchase price of seed.

Affirmed.

1. Appeal and Error 🔑1071(1)

Where judgment for buyer was based on limited warranty of seller, apparent inconsistency in findings as to whether there was a warranty was harmless.

2. Sales 🔑441(2)

In action to recover damages for breach of warranty in regard to zucchini seed which was a variety inferior to that ordered, evidence was sufficient to support findings that there was an express warranty and that such warranty was limited to amount of purchase price. West's Ann.Civ. Code, § 1732.

Arthur S. Powell, Marysville, for appellant.

Manwell & Manwell, Marysville, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of the appellant as plaintiff in the trial court, in the amount of $11.25, in an action to recover damages for a breach of warranty.

In the main, the facts out of which this litigation arose are not in dispute. The appellant purchased $11.25 worth of zucchini seed from the respondent which proved to be a variety inferior to that ordered. As a result, the crop which appellant raised for commercial purposes was practically unmarketable and was valueless, whereas if the seed had been true to name, appellant would, as the trial court found, have realized a profit of $6,125. The trial court denied recovery of more than the purchase price of the seed, finding that to be the limit of the seller's warranty. The actual transaction was as follows: Appellant went to the store of respondent Johnston and told him that he wanted to purchase dark green zucchini seed. Respondent replied that he had none on hand at the moment but would attempt to obtain it from the seed houses. Within a few days he told appellant that two seed houses had dark green zucchini seed on hand, that one of the houses was Ferry-Morse, the other Woodruff & Sons. Appellant suggested he buy from Woodruff & Sons. A few days later, when the seed had arrived, respondent called appellant and told him the seed was there. It had been shipped to respondent in a bag which bore the label "dark green zucchini seed". Appellant came to the store of respondent, and respondent sacked in a paper bag five pounds of the seed which appellant proceeded to plant. He then called respondent again, stated that he needed four or five pounds more to finish his planting, and asked respondent to soak the seed overnight. On the next morning he came and got the seed and proceeded to plant it. There was evidence only an expert, which appellant was not, could have ascertained the error until too late to avoid the loss.

For eight years respondent had maintained in his seed store and in a conspicuous spot therein a sign reading as follows: "The California Seed & Fertilizer Company gives no warranty, express or implied, as to the productiveness of any seeds, plants, or bulbs we sell, and we will not be in any way responsible for the crop. Our liability in all instances is limited to the purchase price of the seed or materials purchased." When appellant received the first lot of seeds, respondent made out an invoice tag which appellant then signed. This invoice bore the following printed matter which appellant said he did not read: "We warrant to the extent of the purchase price that seed, bulbs, plants and other materials sold are as described on the container, within recognized tolerances. We give no other or further warranty, express or implied". Though appellant signed the invoice, he did not then keep it. Respondent retained it because he was not able at that time to fill in the price. Later, after the seed had been planted, the completed invoice was mailed to appellant.

The trial court found as follows:

> "That plaintiff did not rely on the representations of defendant that said zucchini seed was dark green zucchini seed and defendant did not warrant to plaintiff that said seed was dark green zucchini seed *except as herein stated.* That on the bills and invoices delivered to plaintiff by defendant for said seed there is contained the statement as follows, to-wit: 'We warrant, to the extent of the Purchase Price, the Seed, Bulbs, Plants and other materials sold are as described on the container, within recognized tolerances. We give no other or further warranty express or implied.' That in defendant's place of business above the sales counter there is posted a large sign which contains substantially the same words and language as is contained upon the invoices and bills. That for many years last past there has existed and now exists a general custom and usage appertaining to the retail sale seed business that the dealer or seller does not warrant seed as to name or description or that the seed is true to name, and that said custom is so well established and universal that it must be presumed to have been known to plaintiff and other people purchasing seed from retail seed dealers. That the extent of the warranty of the defendant in this action is the amount of the purchase price of said seed which is $11.25."

[1] In the light of the judgment rendered, we construe the findings as declaring respondent warranted that the seeds he sold to appellant were dark green zucchini seeds, but that he limited his liability for breach of that warranty to the price paid for the seed. To be sure, some of the findings appear inconsistent; but we think that no material harm is done by such apparent inconsistency. For instance, the finding that the plaintiff did not rely on the representations of the defendant that said zucchini seed was dark green zucchini seed appears to be a foundation finding for a conclusion that there was no warranty whatever. Yet in the same sentence, the court states the conclusion that the defendant did not warrant to plaintiff that said seed was dark green zucchini seed "except as herein stated". In any event, whatever inconsistency may appear in the findings as to the warranty, the judgment is based upon a limited warranty; and on this appeal it must stand or fall according as such judgment is or is not supported by the evidence.

Section 1732 of the Civil Code declares:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. * * *"

[2] The facts we have recited amply justify a finding by the trial court that an express warranty was entered into. Chamberlain Co. v. Allis-Chalmers Manufacturing Co., 51 Cal.App.2d 520, 125 P.2d 113; Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041.

The serious question on the appeal is whether or not the court's finding that the warranty was limited by appropriate disclaimer brought to the attention of the appellant finds support in the record. We have concluded that it does. Notwithstanding, the appellant testified that in all his dealings with respondent, which had extended over a number of years, he had never seen the sign kept in place over the sales counter, and, notwithstanding his testimony that when he signed the invoice he did not read the disclaimer printed thereon, the trial court was not bound to accept this testimony and was entitled, if it thought fit, to hold that he was advised of these warranty limitations. There was also evidence of a general custom prevailing in the vicinity that dealers in seeds did not warrant that they were true to name beyond the amount of the price paid therefor. Upon the whole record it was for the trial court to determine whether or not there had been a limitation of what would otherwise have been a full warranty. It is open to the parties to limit the effect of language which would otherwise be construed as amounting to an express warranty. 1 Williston on Sales, revised edition, section 213. We conclude that the record supports the trial court's findings that there was an express, but limited warranty.

The judgment is affirmed.

SCHOTTKY, J., and McMURRAY, Justice pro tem., concur.

140 Cal.App.2d 697

Kathlyn J. FIELDS, Plaintiff,

v.

Albert Elmo POTTS, also known as A. E. Potts, doing business as "Potts' Back Door", Defendant and Respondent,

James A. Gardner, Petitioner for Intervention and Appellant.

Civ. 5325.

District Court of Appeal, Fourth District, California.

April 11, 1956.

Rehearing Denied May 9, 1956.

Hearing Denied June 6, 1956.

Action for amount due on note, for other money due and for attorney's fees, wherein attorney for plaintiff filed plea of intervention to protect alleged interest in subject matter of suit. The Superior Court, Kern County, Gordon L. Howden, J., denied petition and petitioner for intervention appealed. The District Court of Appeal, Griffin, J., held that under contract which attorney had with client and which merely gave attorney an interest in amount collected on said claims, intervention was not warranted.

Order affirmed.

1. Attorney and Client 🔑75(3)

Contract between attorney and client whereby client agreed to pay attorney 40 per cent of amount collected on note and claims and granted attorney lien on any judgment recovered on note and claims, did not give attorney, before recovery, such a specific present interest in subject matter of action on note and claim by other attorneys employed by client after discharge of such attorney which interest would be jeopardized by discharge of such attorney and consequently such attorney could not intervene as a matter of right in the action.

2. Attorney and Client 🔑190(2)

If attorney does not have a lien for compensation for his services on suit or cause of action, he will not be allowed to proceed with the action for protection of his compensation after parties have in good faith compromised or settled before judgment, but if there is fraud the attorney can intervene and prosecute action, notwithstanding settlement, in order to protect his compensation.

3. Attorney and Client 🔑190(4)

Petition for intervention in suit to collect on note and collect other money allegedly due plaintiff, which petition alleged plaintiff failed to prosecute action with diligence, that petitioner, plaintiff's attorney, had present, existing and vested interest in the claim sued upon and that it appeared that plaintiff and defendant had conspired to deprive petitioner of his interest in said claim by nonprosecution and otherwise, and which petition was predicated mainly on information and belief and conclusions of petitioner, was insufficient to justify intervention on ground of fraud. West's Ann.Pen.Code, § 182.

4. Parties ⟹44

The trial court is authorized to deny petition for intervention when there is no sufficient showing that intervention is warranted, even though there is no objection on the part of any person to such intervention, or the person objecting is not authorized to object. West's Ann.Code Civ. Proc. § 387.

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James A. Gardner, Bakersfield, in pro. per.

Siemon & Siemon, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff Kathlyn J. Fields brought an action against defendant Albert Elmo Potts, doing business as "Potts' Back Door", to recover, in her first cause of action, $300 claimed due on a promissory note which provides for reasonable attorneys' fees in case suit was instituted to collect it. The second, third and fourth causes of action alleged money due from defendant to plaintiff in the sum of $2,904. Defendant answered, claimed the note had been paid, and denied that any money was due plaintiff on the remaining causes of action.

It appears that prior to filing said action petitioner James A. Gardner, as attorney for plaintiff, secured from her an agreement in writing by which Gardner agreed to act as plaintiff's attorney in a contemplated divorce action, and to sue on the promissory note and other causes of action. It recites: "It is mutually agreed that client will pay to attorney, and client hereby assigns to attorney forty (40) per cent of the amount collected on said claims, and attorney is hereby granted a lien on said claims and any judgment recovered therefor and on his papers herein". It was further recited that "this agreement goes through trial in the trial court", and that the parties would not compromise or settle the claims except by mutual consent and neither party should be obligated to advance costs if he or she did not choose to do so.

Before trial petitioner, appearing in propria persona, petitioned the court to allow him to intervene in said action alleging that on October 21, 1954, plaintiff instructed petitioner, as her attorney, to take no further legal action in her case against defendant Potts; that since said date petitioner urged her to allow him to continue to prosecute the action and upon her refusal he demanded 40 per cent of the amount claimed due; that he believes plaintiff is insolvent and that defendant and plaintiff have conspired to deprive petitioner of his interest in plaintiff's claim against defendant. A proposed complaint in intervention was presented with said petition, setting forth the facts above alleged. Upon the hearing only counsel for defendant appeared to oppose the motion. Petitioner appeared in propria persona in support of it. After the petition was denied petitioner appealed and claims in his brief that he was entitled to intervene as a matter of right because he is a necessary party to and has a direct interest in the subject matter of the suit; that the rules pertaining to fraud and collusion allow such procedure and that defendant Potts does not have sufficient standing in court to object to petitioner's intervention, citing such authority as 39 Am.Jur. p. 936, sec. 63; Enos v. Keating, 39 Wyo. 217, 271 P. 6, 275 P. 131, 67 A.L.R. 442; Sec. 387, Code Civ.Proc.; High Point Casket Co. v. Wheeler, 182 N.C. 459, 109 S.E. 378, 19 A.L.R. 391; Kellogg v. Winchell, 1921, 51 App.D.C. 17, 273 F. 745, 16 A.L.R. 1159; Dodd v. Reese, 216 Ind. 449, 24 N.E.2d 995, 128 A.L.R. 581; and cases cited therein.

Defendant has not filed a brief but unfairly stands content to place the burden of research upon this court. He apparently relies upon the case of Kelly v. Smith, 204 Cal. 496, 268 P. 1057, 1059, as controlling. In that action it was held that the cases where an attorney is authorized to intervene in an action instituted by himself in behalf of his client for the purpose of settling a dispute between him and his client as to his attorney's fees for services rendered in the same action should be limited at least to those actions wherein, by virtue of the contract of employment between the attorney and client, the former is given a specific present interest in the subject matter of the action, which interest might be jeopardized by the client's discharge of his original attorney and the employment of other attorneys to prosecute the action, in which class of cases the attorney has a contract coupled with an interest under which the client is powerless to discharge him. It was there said:

> "We think the cases are and should be very rare when an attorney is authorized to intervene in an action instituted by him in behalf of his client for the purpose of settling a dispute between him and his client as to his attorney's fee for services rendered in the same action. They should be limited at least to those actions wherein, by virtue of the contract of employment between the attorney and client, the former is given a specific present interest in the subject-matter of the action, which interest might be jeopardized by the client's discharge of his original attorney and the employment of other attorneys to prosecute the action." (Citing cases.)

[1] The real question then arises whether the agreement pleaded resulted in a "contract coupled with an interest under which the client is powerless to discharge him". The court was justified in interpreting the written agreement to mean that for representing the plaintiff in a divorce proceeding and prosecuting this action on the promissory note and oral contracts or claims for money due, plaintiff would pay her attorney, petitioner herein, by way of assignment of 40 per cent of the "amount collected on said claims". It does not affirmatively appear that plaintiff thereby intended to assign a 40 per cent interest in the promissory note, but only 40 per cent of the amount collected. The same is true as to the claims. It does not thus far appear that petitioner had, before recovery, such an interest therein as may be described as a "specific present interest in the subject matter of the action", which interest might be jeopardized by the discharge of such attorney and the employment of other attorneys to prosecute it.

The remaining portions of the agreement, i. e., that "the attorney is hereby granted a lien on said claims and any judgment recovered therefor" clearly contemplates a lien on the ultimate amount determined to be due by the judgment obtained and upon the amount collected on said claims. This added provision would not bring petitioner within the exception to the general rule.

In O'Connell v. Superior Court, 2 Cal.2d 418, 41 P.2d 334, 336, 97 A.L.R. 918, the cases, in reference to the power coupled with interest, are fully discussed. It was there held that to have a power coupled with an interest, so as to be irrevocable, there must be a specific present and coexisting interest in the subject of the power or agency, the existence of which must be determined from the entire agreement between the parties, and not merely an interest in that which is to be produced by the exercise of the power. It was there said that the interest in the *proceeds* of what may be collected is not, strictly speaking, a beneficial interest in the legacies. The interest is nothing more than the assurance that the attorney-in-fact will be reimbursed and compensated out of the legacies when collected. In that case the agreement under discussion, which appeared to be more of an attempt than this one to assign to the attorney as his compensation an interest in the subject-matter, the court said:

> "The contract of employment involved in the present case, and set forth above, cannot, when construed as a whole, be said to transfer and assign to the attorney a present and coexisting interest in the subject of the agency or power even though a particular paragraph thereof, to be hereinafter referred to, contains some language purporting to accomplish this result."

It was there held that it was clear from the intention of the parties there expressed that the attorney was to have a one-half interest in the "proceeds" derived from the exercise of the power, and that it did not create a present interest in the legacies, and accordingly the agency or power was revocable.

[2] Some exception is made in reference to fraud or collusion on the part of the parties to the action to settle the same for the purpose of depriving petitioner of his compensation and costs. It appears to be the weight of authority, as indicated in 67 A.L.R. 443, that if, under the particular circumstances and statutory provisions, an attorney does not have a lien for compensation for his services on the suit or cause of action, he will not be allowed to proceed with the action for the protection of his compensation or fees, after the parties thereto have in good faith, and without any intent of depriving the attorney of his fees, compromised or settled the cause of action before judgment. However, it is said, at page 462, that where fraud or collusion is properly shown "the weight of authority supports the proposition that * * * such attorney will be allowed to proceed or continue with the action to the extent of his interest; in other words, he will be allowed to intervene and prosecute the action to judgment in his own behalf, notwithstanding the settlement, for the purpose of protecting his compensation."

[3] Here, petitioner avers in his unverified notice of motion for leave to intervene, as grounds for such intervention, that plaintiff failed to prosecute said action with diligence; that he now owns a present, existing, and vested interest in the claim sued upon and that "it appears that plaintiff and defendant have conspired to deprive petitioner of his interest in said claim by nonprosecution and otherwise". In his verified petition presented with said motion he alleges he has been ready, able and willing to represent plaintiff in the prosecution of said claims; that on October 21, 1954, plaintiff instructed him to take no further legal action in the case and maintained said instructions in force since then; that he urged plaintiff on several occasions to allow him to continue with the prosecution; that he demanded the payment of the equivalent of the sum of 40 per cent of the amount alleged to be due; that plaintiff failed and refused to pay petitioner any sum whatsoever. He then alleged *on information and belief* that plaintiff was insolvent and that she and defendant had conspired to deprive petitioner of his interest in plaintiff's claim against defendant and that his interest can only be protected by prosecution of the action by him. As heretofore stated, the court might well have found that petitioner, contrary to his claim, did not have a present existing and vested interest in the claim sued upon. Defendant claimed the note had been paid and denied the allegations that plaintiff had advanced any money to him. There is no showing, other than the conclusions of petitioner, that defendant and plaintiff ever conspired to defraud petitioner of his attorney's fees. Sec. 182, Penal Code. The claimed refusal of plaintiff to further prosecute the action may have been due to reasons other than an attempt to defraud petitioner of his attorney's fees. The evidence pertaining to the alleged fraud or conspiracy is predicated mainly on information and belief and conclusions of the pleader. The court was justified in believing that petitioner did not present sufficient evidence of a conspiracy or fraud between plaintiff and defendant to defraud him of his claimed attorney's fees.

[4] The claim that defendant had no right to object to the petition for intervention appears to be without merit. When there is no sufficient showing the trial court is authorized to deny the petition without objections on the part of any person. The court is not bound to grant a petition for intervention merely because no one objects to it, or the party objecting is not so authorized, otherwise there could be unjustified interlopers in every lawsuit.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 870

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Verna Louise MOORE, Defendant and Appellant.

Cr. 5510.

District Court of Appeal, Second District, Division 2, California.

April 18, 1956.

Prosecution for bookmaking. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Ashburn, J., held that where officers looked through window and saw woman gather up racing form and white slips of paper and run when they identified themselves and demanded entrance to home and officers then forced door and found racing form and white slips of paper in garbage disposal unit and arrested the woman, search and seizure was reasonable and it was of small consequence if search preceded arrest.

Affirmed.

1. Searches and Seizures 🔑7(10)

Where deputy sheriff who was expert in bookmaking activities looked through dining room window and saw woman seated at table with telephone, pads and slips of paper and publication identified to his own satisfaction as racing form, such observation did not constitute an unreasonable search, and officers were entitled to act upon information thus obtained although officer could not positively identify publication.

2. Arrest 🔑71

Where officers saw woman gather up racing form and white slips of paper and run when they identified themselves and demanded entrance to home and officers then forced door and found racing form and white slips of paper in garbage disposal unit and arrested woman, search and seizure was reasonable and it was of small consequence if search preceded arrest. West's Ann.Pen.Code, § 844.

3. Arrest 🔑63(4)

Where officers broke through door and made arrest without a warrant, test of whether reasonable grounds existed for arrest was what officers knew or reasonably believed at time they broke through door. West's Ann.Pen.Code, § 844.

4. Arrest 🔑63(4)

Searches and Seizures 🔑3(1)

Arrest or search cannot be justified by what search reveals. West's Ann.Pen. Code, § 844.

5. Arrest 🔑63(4)

"Probable cause" is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in belief that charge is true. West's Ann.Pen.Code, § 844.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

6. Arrest 🔑63(4)

In prosecution for bookmaking, where there was no conflict in testimony relating to circumstances surrounding arrest without warrant, question of whether reasonable grounds existed for forcing entrance and making arrest was one of law. West's Ann.Pen.Code, § 844.

7. Arrest 🔑63(4), 68

Where deputy sheriff who was expert in bookmaking activities looked through dining room window and saw woman seated at table with telephone, pads and slips of paper and publication identified to his own satisfaction as racing form and where woman picked up papers and ran when officers identified themselves and demanded entrance, officers had reasonable grounds for making arrest and were entitled to force entrance. West's Ann.Pen.Code, § 844.

Block, Toler, Bulloch & Biggerstaff, Compton, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant, having been convicted of bookmaking, appeals from the judgment and an order denying her motion for new trial. Defendant voluntarily and fully confessed the crime to the police after her arrest, and her counsel do not now suggest that she is innocent. The only claims made in support of the appeal is that material evidence was obtained through an unlawful search and seizure and should not have been admitted at the trial.

[1] On January 26, 1955, at about 2:00 p. m., seven sheriff's deputies and one officer of the Compton Police Department went to a residence at 1816 Ezmirlian Street, in Los Angeles County, where deputy Caraway, as he testified, looked through the dining room window and saw defendant seated at the dining table. Making such observations through a window does not constitute an unreasonable search and the officers were entitled to act upon the information thus obtained. People v. Martin, 45 Cal.2d 755, 290 P.2d 855. Though the window had venetian blinds there were apertures through which the officer could observe defendant. She was seated at the table with a telephone beside her, numerous pads and slips of paper in front of her; also a publication that Officer Caraway (who was stipulated to be an expert in bookmaking activities in Los Angeles County) identified to his own satisfaction to be a racing form known as the National Daily Reporter. Although he said on cross-examination that he could not positively identify it as such, he "was pretty sure it was" a form. Of course, he did not have to be positive or possess evidence competent to prove the fact in court; a well-grounded belief was sufficient to lay the basis for a search without a warrant. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36; People v. Rios, 46 Cal.2d 297, 294 P.2d 39. In the present instance there was no warrant and the fact, if it be a fact, that the officers had had plenty of time to obtain one did not prevent their making the search if reasonable ground existed therefor. People v. Winston, 46 Cal.2d 151, 293 P.2d 40.

[2] The officers identified themselves and demanded entrance; Caraway held his badge up to the window and said, "Open the door, Sheriff's Department;" thereupon defendant "gathered up that stuff and ran for the kitchen." Fearing the destruction of evidence four officers entered the front door and four the rear one. They kicked in the front door through which Caraway and three others entered. Caraway ran for the kitchen and on arrival saw that defendant was turning on the water at the sink. The racing form and numerous white slips of paper, which proved to be records of bets on that day's races, were in the garbage disposal unit; Caraway pulled them out with his hand; they were wet; the form was the National Daily Reporter. Caraway then went to the telephone and took bets, ten of them. Two of the slips, records of bets, were preserved and placed in evidence. Some 100 other such slips were found covering races of the same day; also an additional Reporter, several other racing forms and numerous pads of paper; which ensemble the witness characterized as "racing paraphernalia." Defendant was there arrested and the search and seizure apparently preceded the arrest, but that is of small consequence if the search was an incident thereto and the arrest based upon reasonable grounds. People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Boyles, supra, 45 Cal.2d 652, 290 P.2d 535; People v. Martin, supra, 45 Cal.2d 755, 290 P.2d 855.

[3-5] The test is what the officers knew or reasonably believed on the basis of reliable evidence at the time they broke through the door, for the arrest or search cannot be justified by what the search reveals. People v. Brown, 45 Cal.2d 640, 290 P.2d 528. "'Probable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122, 133. In People v. Novell, 54 Cal.App.2d 621, 623, 129 P.2d 453, 454, the concept is thus defined:

> "The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a

state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal.App. 420, 421, 97 P. 77."

[6, 7] Defendant obviously was engaged in some activity involving the telephone; she was using other things which, considered separately, could have legitimate uses but which in combination conveyed to the practiced eye of the expert officer "racing paraphernalia;" there was nothing to indicate that defendant was engaged in any household chore or other innocent activity. In this respect the case is unlike People v. Sanders, 46 Cal.2d 247, 294 P.2d 10, wherein the officers looking through a window in a door saw pads of paper such as those used by bookmakers, with writing on the pads. It was held that as those things were reasonably convenient to the conduct of defendant's legitimate business they were insufficient to give rise to reasonable ground for an arrest. When the officers in the instant case identified themselves and demanded admittance defendant "gathered up that stuff and ran for the kitchen," thus placing a sinister meaning upon the various items and suggesting to the officers the probability of immediate destruction of evidence. Reasonable men in these circumstances would conclude that a crime was then being committed and that there was urgent need of rescuing the evidence. There being no conflict in the testimony the question was one of law, People v. Brite, supra, 9 Cal. 2d 666, 687, 72 P.2d 122, which the trial judge correctly decided. The officers had reasonable ground for making an arrest and were entitled in the circumstances to force an entrance.

The right to break down barriers in order to make an immediate arrest and to save evidence from destruction was recognized in similar circumstances in People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. See, also, People v. Martin, supra, 45 Cal.2d 755, 290 P.2d 855; People v. Martin, 46 Cal.2d 106, 293 P.2d 52.

The same case, People v. Maddox, supra, disposes of appellant's contention at bar that a violation of § 844, Penal Code,[1] makes the arrest unlawful; it holds "that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused, his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." 46 Cal.2d at page 306, 294 P.2d at page 9.

There was a valid arrest in the instant case and a reasonable search and seizure. This conclusion renders unnecessary a discussion of certain contentions advanced by respondent in support of the ruling below.

Judgment and order denying new trial affirmed.

MOORE, P. J., and FOX, J., concur.

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[1] Pen.Code, § 844. "To make an arrest, a private person, if the offense be a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

140 Cal.App.2d 536

Joe PERKINS and Maurice Garnes, minors, by James A. Gardner, guardian ad litem in proper person, Plaintiffs and Appellants,

v.

Isadore C. ROBERTSON, Defendant and Respondent.

Civ. 4995.

District Court of Appeal, Fourth District, California.

April 5, 1956.

Action was brought by minor children against their step-father, who stood in loco parentis, to recover for wrongful death of the mother of the children and for injuries sustained by one of the children. The Superior Court of Kern County, Gordon L. Howden, J., entered judgment adverse to the children, and they appealed. The District Court of Appeal, Conley, J. pro tem., held that a completely emancipated minor has a right to sue a parent for simple negligence, but that an unemancipated minor child or a partially emancipated minor child cannot sue his parent, or one who stands toward him in loco parentis, for a tort based on simple negligence, and that an unemancipated minor child may institute an action for a willful or malicious tort committed by parent, and that unemancipated minors cannot sue a parent, or one in loco parentis, in wrongful death actions based on negligence, but may do so if based on willful misconduct.

Judgment reversed with directions.

1. Parent and Child ⚷11

An unemancipated minor child cannot sue his parent, or one who stands toward him in loco parentis, for a tort based on simple negligence.

2. Constitutional Law ⚷70(3)

Contention that there should be a change in the law that an unemancipated minor child cannot sue his parent, or one who stands toward him in loco parentis, for a tort based on simple negligence, should be addressed to the legislative branch of the government rather than to the judicial.

3. Pleading ⚷362(2)

In action for injuries and for wrongful death, trial court properly required elimination of all references to public liability and property damage insurance in pleadings.

4. Parties ⚷20

In a tort action, an insurance company, which has issued a policy indemnifying defendant against loss or damage, is not a proper party to the litigation.

5. Parent and Child ⚷11

A completely emancipated minor has the right to sue a parent for simple negligence. West's Ann.Civ.Code, § 211.

6. Parent and Child ⚷16

"Emancipation" of a child is the relinquishment by parent of control and authority over child, conferring on child right to his earnings and terminating the parent's legal duty to support the child, and it may be express, as by voluntary agreement of parent and child, or may be implied from such acts and conduct as import consent, and it may be conditional or absolute, or complete or partial. West's Ann.Civ.Code, § 211.

See publication Words and Phrases, for other judicial constructions and definitions of "Emancipation".

7. Parent and Child ⚷16

The emancipation of a minor is not to be presumed but must be proved. West's Ann.Civ.Code, § 211.

8. Parent and Child ⚷16

Fact that a minor is permitted to keep and spend his earnings for odd jobs done after school or in summer vacation does not establish his emancipation. West's Ann.Civ.Code, § 211.

9. Parent and Child ⚷11

Partial emancipation of a minor is not sufficient to permit minor to sue a parent for tort based on simple negligence, and complete emancipation is a prerequisite. West's Ann.Civ.Code, § 211.

10. Parent and Child ⚷11

Unemancipated or partially emancipated minors can sue a parent for a willful or malicious tort committed by the parent. West's Ann.Civ.Code, § 211.

11. Action 🔑15

One cannot be both plaintiff and defendant in a lawsuit.

12. Parties 🔑35

When a necessary party plaintiff is joined as a defendant because of his refusal to sue, he is nevertheless treated as a plaintiff in the litigation for some purposes, such as, for example, on motions for change of venue.

13. Appeal and Error 🔑185(1)

Strict compliance with procedure specified in wrongful death statute is not jurisdictional or mandatory in the sense that reversal of a judgment will necessarily follow a failure to comply with the requirements enumerated by the statute. West's Ann.Code Civ.Proc. § 377.

14. Appeal and Error 🔑187(3)

If defendant does not raise issue of nonjoinder by plea in abatement in wrongful death action, and case goes to judgment with only one heir as a party plaintiff, judgment will not be reversed. West's Ann.Code Civ.Proc. § 377.

15. Death 🔑34

Failure to follow strictly and rigidly the procedure prescribed in wrongful death statute is not jurisdictional or even fatally erroneous in most situations. West's Ann. Code Civ.Proc. § 377.

16. Death 🔑42, 105

When it is said that an action for wrongful death is joint, it is meant that all heirs of deceased should join or be joined in the action and that a single verdict should be rendered for all recoverable damages. West's Ann.Code Civ.Proc. § 377.

17. Death 🔑7

When it is said that action for wrongful death is single, it is meant that only one action for the wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the deceased as statutory trustee for the heirs. West's Ann.Code Civ.Proc. § 377.

18. Death 🔑7

When it is said that a death action is indivisible, it is meant that there cannot be a series of suits by the heirs of the deceased against the tort-feasor for their individual damages. West's Ann.Code Civ.Proc. § 377.

19. Death 🔑105

Though a lump sum verdict is required in an action for wrongful death, the total recovery is the aggregate of the pecuniary loss of each of deceased's heirs entitled to recover by reason of deceased's death and the damages are added to produce the total. West's Ann.Code Civ.Proc. § 377.

20. Death 🔑85

If an heir of a deceased has not suffered pecuniary damage because of deceased's death, the heir cannot recover for the deceased's death. West's Ann. Code Civ.Proc. § 377.

21. Death 🔑24
Negligence 🔑89(1)

If one of deceased's heirs bringing suit for wrongful death of deceased was himself guilty of contributory negligence, no recovery by such heir is permitted, but the remaining heirs may nevertheless recover their own damages in the action. West's Ann.Code Civ.Proc. § 377.

22. Death 🔑91
Negligence 🔑89(1)

Since negligence of one of deceased's heirs proximately contributing to wrongful death of deceased bars that heir alone from maintaining action for wrongful death of deceased, such negligence is not imputable to the other heirs and does not prevent their recovery or mitigate their damages for wrongful death of deceased. West's Ann.Code Civ.Proc. § 377.

23. Parent and Child 🔑11

The rule that unemancipated minors cannot sue a parent, or one in loco parentis, also applies to wrongful death actions based on negligence.

24. Parent and Child 🔑11

If mother of unemancipated minors came to her death by reason of willful misconduct of step-father, who stood in loco parentis to minor children, the minor children would have a right to bring action for wrongful death against step-father. West's Ann.Code Civ.Proc. § 377; West's Ann.Civ.Code, § 3281.

25. Appeal and Error ⚷1172(2)

Where there were eight causes of action and demurrers to each count, and some of the demurrers were correctly sustained without leave to amend, and other demurrers were incorrectly sustained, but there was only one judgment, judgment was required to be reversed.

◆

James A. Gardner, Bakersfield, guardian ad litem in pro. per. for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

CONLEY, Justice pro tem.

This is an appeal by minor plaintiffs, Joe Perkins and Maurice Garnes, from a judgment in favor of their step-father, Isadore C. Robertson, after the sustaining without leave to amend of his demurrer to their third amended complaint. The litigation grew out of an automobile wreck in which Ethel Mae Robertson, wife of the defendant and mother of the plaintiffs, was killed and Maurice Garnes injured. By express stipulation of the parties it is established for all purposes of the appeal that the defendant, whose negligence and wilful misconduct are blamed for the casualty, was *in loco parentis* to both plaintiffs at the time of the accident and also when the action was filed.

This appeal requires answers to the following questions: May an unemancipated or a "partially emancipated" minor sue a parent, or one *in loco parentis,* for personal injuries proximately caused by simple negligence, or by wilful misconduct? (2) May heirs of a decedent, consisting of her children, sue another of her heirs, her husband, for her wrongful death, and if so, may recovery be based on his negligence, or on his wilful misconduct?

In the first cause of action in the third amended complaint, Maurice Garnes sues as an unemancipated minor injured as the proximate result of the negligence of the defendant; in the second cause of action as an unemancipated minor for his wilful misconduct; in the third cause of action as a "partially emancipated" minor injured by his negligence; in the fourth cause of action as a "partially emancipated" minor for his wilful misconduct. The fifth cause of action is brought by the two minor plaintiffs as the children and heirs of Ethel Mae Robertson on the theory that the defendant proximately caused her death by his negligence; the sixth cause of action is based on his wilful misconduct; the seventh cause of action alleges that the plaintiffs were "partially emancipated" minors and that the death of their mother was caused by the negligence of defendant; and the eighth cause of action is brought by them as "partially emancipated" minors on the allegation that defendant was guilty of wilful misconduct.

It should be noted in connection with the demurrer to and motion to strike from the first amended complaint that the court eliminated the allegation that at the time of the accident defendant maintained a valid policy of insurance for public liability and property damage.

[1] The trial court's ruling sustaining the demurrer to the first cause of action without leave to amend was correct. Trudell v. Leatherby, 212 Cal. 678, 300 P. 7, 8, establishes the law in this state that an unemancipated minor child cannot sue his parent, or one who stands toward him *in loco parentis,* for a tort based on simple negligence; in the opinion the reason for the rule is thus stated:

> "'* * * The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interest of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.' 20 R.C.L. 631.
>
> "'Any proceeding tending to bring discord into the family and disorganize its government may well be regarded

> as contrary to the common law, and not to be sanctioned by the courts. Such conflict would arise by recognizing the right of a minor child to bring his personal action against the father to recover damages for torts alleged to have been committed by the father in the course of the family relation and resulting in personal injury to the child.'"

The principle was recognized in Myers v. Tranquility Irrigation District, 26 Cal.App.2d 385, 79 P.2d 419, in Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, and in the recent case of Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218.

[2–4] Appellants' argument that the law ought to be changed should properly be addressed to the legislative branch of our government rather than the judicial; for the rule above stated is firmly established in our State by binding precedents; we shall accordingly not discuss the cases cited from other jurisdictions where an opposite or differing view is maintained. In passing, however, it is proper to say that the trial court ruled soundly in requiring the elimination of all reference to public liability and property damage insurance in the pleadings. For the existence of insurance "'gives no cause of action where one did not exist before'". Emery v. Emery, supra, 45 Cal.2d 421, 289 P.2d 218, 224. In a tort action an insurance company which has issued a policy indemnifying the defendant against loss or damage is not a proper party to the litigation. Chamberlin v. City of Los Angeles, 92 Cal.App.2d 330, 332, 206 P.2d 661; Van DerHoof v. Chambon, 121 Cal.App. 118, 125–132, 8 P.2d 925. And the rule has been repeatedly stressed in this State that gratuitous references during a jury trial to the existence of insurance, either in argument or in the taking of testimony, will warrant the granting of a motion for mistrial or the reversal of a judgment, Squires v. Riffe, 211 Cal. 370, 295 P. 517; Citti v. Bava, 204 Cal. 136, 266 P. 954; Freeman v. Nickerson, 77 Cal.App.2d 40, 54, 174 P.2d 688; Rising v. Veatch, 117 Cal.App. 404, 3 P.2d 1023; Sischo v. City of Los Banos, 26 Cal.App.2d 642, 80 P.2d 116, 1020; Nichols v. Smith, 136 Cal.App. 272, 28 P.2d 693; Schellenberg v. Southern Cal. Music Co., 139 Cal.App. 777, 35 P.2d 156.

But the appellants say that the foregoing rule does not apply to emancipated minors and that as they are "partially emancipated" it should not apply to them.

[5–7] A completely emancipated minor has the right to sue a parent for simple negligence. Martinez v. Southern Pacific Co., 45 Cal.2d 244, 288 P.2d 868; 67 C.J.S., Parent and Child, § 61, pp. 789–790; 165 A.L.R. 723; 19 A.L.R.2d 437. "'Emancipation' of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child. It may be express, as by voluntary agreement of parent and child, or implied from such acts and conduct as import consent; it may be conditional or absolute, complete or partial. The emancipation of a minor is not to be presumed and must be proved * * *" (Schouler, "Marriage, Divorce, Separation and Domestic Relations", Sixth Edition, Vol. 1, p. 897.) (See also 39 Am.Jur. p. 702 et seq.) Section 211 of the Civil Code provides in part: "The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings", and in the early case of Lackman v. Wood, 25 Cal. 147, 151, the power of a father to emancipate his minor child was recognized, the court saying:

> "* * * The child is freed by emancipation from parental control; he can claim his earnings thereafter as against his father, and is in all respects his own man.
>
> "Emancipation is defined as 'An act by which a person, who was once in the power of another, is rendered free,' and the adjudged cases show that the doctrine of emancipation, as actually administered, is not less comprehensive than the definition."

Appellants do not claim complete, but only partial, emancipation, saying as to Joe Perkins that he was seventeen years of age, normal and average in development for that age, allowed to make his own decisions, to manage his own affairs and to enter and leave the parental home at will, employed at various times and allowed to retain his earnings and to spend them as he wished, and as to Maurice Garnes that she was twenty years of age, physically and mentally mature, was allowed freedom to make her own decisions, manage her personal affairs, choose her own friends and enter and leave the family home as she might elect. It is conceded, however, by the appellants, as alleged in the pleading, that Maurice Garnes has always been an invalid, being blind, and that as a consequence she has never received sufficient education to permit her to earn a livelihood, that she is not capable of supporting or taking care of herself, that both minors were dependent on their mother for support, care and maintenance, and that Maurice Garnes was additionally dependent upon her, for nursing and personal care. It is not alleged in the pleading or asserted in their brief by appellants that Maurice Garnes is married or that she was emancipated in that way.

[8] The fact that a minor is permitted to keep and spend his earnings for odd jobs done after school or in summer vacation does not establish his emancipation, Aetna Life Ins. Co. v. Industrial Accident Commission, 175 Cal. 91, 94, 165 P. 15, L.R.A.1918F, 194; Boehm v. C. M. Gridley & Sons, 187 Misc. 113, 63 N.Y.S.2d 587; Tande v. Vernon County, 226 Wis. 602, 276 N.W. 359; and the qualified independence allowed to both minors in this case seems to be about the same as that granted to the older "teen-agers" in the average American home today. Certainly there is nothing in the complaint showing a complete termination of the parental rights with respect to the control of the minors, or indicating that either child "did not occupy a subordinate position in the family unit". Martinez v. Southern Pacific Co., supra, 45 Cal.2d 244, 288 P.2d 868, 873.

[9] "Partial emancipation" is not sufficient to permit a minor to sue a parent for tort based on simple negligence; complete emancipation is a prerequisite. Brumfield v. Brumfield, 194 Va. 577, 74 S.E.2d 170, 173; Cafaro v. Cafaro, 118 N.J.L. 123, 191 A. 472.

[10] Although unemancipated or "partially emancipated" minors cannot sue a parent for ordinary negligence, it has been decided by the Supreme Court since the filing of this appeal that they may institute such an action for a wilful or malicious tort committed by the parent. In the case of Emery v. Emery, supra, 45 Cal.2d 421, 289 P.2d 218, 224, it is said:

> "* * * While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent's wilful or malicious misconduct. A child, like every other individual, has a right to freedom from such injury. Accordingly, we conclude that an unemancipated minor may sue his parent for a wilful or malicious tort, * * *."

[11, 12] Turning to the questions presented by the appeal relative to the wrongful death, as alleged in the fifth to eighth causes of action, we find that respondent contends that because Section 377 of the Code of Civil Procedure by its terms authorizes a suit for wrongful death only by, or on behalf of, all of the heirs of a decedent, the children of decedent cannot sue the husband for his tort; involved in the argument is the elementary principle that one cannot be both plaintiff and defendant in a lawsuit, Byrne v. Byrne, 94 Cal. 576, 29 P. 1115, 30 P. 196; 39 Am. Jur. 857, and the rule of thumb that when a necessary party plaintiff is joined as a defendant because of his refusal to sue, he is nevertheless treated as a plaintiff in the litigation for some purposes, such for example as on motions for change of venue. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730.

It has frequently been held that the cause of action created by Section 377 of the Code of Civil Procedure is "a joint one, a single one and an indivisible one." Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 199, 295 P. 41, 45; Salmon v. Rathjens, 152 Cal. 290, 294, 92 P. 733; Estate of Riccomi, 185 Cal. 458, 197 P. 97, 14 A.L.R. 509; Rabe v. Western Union Tel. Co., 198 Cal. 290, 299, 244 P. 1077, and that "an action by some, but not all, of the heirs is not the action authorized under the statute", Watkins v. Nutting, 17 Cal. 2d 490, 498, 110 P.2d 384, 388.

[13, 14] A general statement of legal principle can seldom contain all the qualifications and exceptions that arise in the factual combinations and permutations of litigation. In the situation here presented it is pertinent to ask whether our courts have held that strict compliance with the procedure specified in the section is jurisdictional or in the last analysis even mandatory in the sense that reversal of a judgment will necessarily follow a failure to comply with the requirements enumerated. The answer is clearly "No". For example, if the defendant does not raise the issue of nonjoinder by plea in abatement and the case goes to judgment with one heir only as a party plaintiff, the judgment will not be reversed, Salmon v. Rathjens, 152 Cal. 290, 294–297, 92 P. 733; Knott v. McGilvray, 124 Cal. 128, 56 P. 789. And in Groom v. Bangs, 153 Cal. 456, 458, 96 P. 503, it was held that a person by merely alleging that he was husband of the decedent, and hence an heir, in the absence of timely application for abatement, could carry a case through to judgment without averring that he was sole heir and without naming the other heirs as parties. See also Brown v. Beck, 63 Cal. App. 686, 695, 220 P. 14.

[15] It is a fair conclusion to draw from the adjudicated cases, that failure to follow strictly and rigidly the procedure prescribed in the section is not jurisdictional or even fatally erroneous in most situations.

[16–20] When it is said that an action for wrongful death is *joint* it is meant that all heirs should join or be joined in the action and that a single verdict should be rendered for all recoverable damages; when it is said that the action is *single* it is meant that only one action for the wrongful death may be brought whether, in fact, it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs; and when it is said that the action is indivisible it is meant that there cannot be a series of suits by heirs against the tort-feasor for their individual damages. But while a "lump sum" verdict is required, the total recovery is the aggregate of the pecuniary loss of each of the heirs entitled to recover by reason of the death of the deceased—the damages of each are added to produce the total. Estate of Riccomi, 185 Cal. 458, 461, 197 P. 97; Robinson v. Western States Gas, etc. Co., 184 Cal. 401, 194 P. 39; Simoneau v. Pacific Electric Ry. Co., 159 Cal. 494, 115 P. 320. And if an heir has not suffered pecuniary damage he cannot recover. Walker v. Etcheverry, 42 Cal.App.2d 472, 476, 109 P.2d 385.

[21] If one of the heirs bringing suit for wrongful death was himself guilty of contributory negligence no recovery by him is permitted, but the remaining heirs may nevertheless recover their own damages in the action. In Bowler v. Roos, 213 Cal. 484, 485, 2 P.2d 817, the Supreme Court quotes with approval the following excerpt from the opinion in Bowen v. Kizirian, 105 Cal.App. 286, 290, 287 P. 570:

> "'It is established that the failure of one of the plaintiffs to prove loss will not defeat recovery by another of the plaintiffs whose pecuniary loss has been proved. And this, notwithstanding the fact that under the statute, as interpreted by our courts, only one action may be brought and only one judgment recovered. So far as the interpretation of this statute is concerned, no reason appears why the rule should be any different where the evidence discloses that one of the parties is not entitled to recover, not on account of a failure to prove pecuniary loss, but because of the intervention of another rule, such as contributory negligence. In Estate of Riccomi (185 Cal. 458, 197 P. 97, 14 A.L.R. 509) * * * it is said that it would be absurd to hold that because two heirs

> must join in one action, the one proving damage must share the proceeds with the one suffering no injury. It would seem equally absurd to hold that an innocent party cannot recover because another party, with whom he is required by law to be joined as plaintiff, is not innocent.'" See also: Flores v. Brown, 39 Cal.2d 622, 631, 248 P.2d 922; Chinnis v. Pomona Pump Co., 36 Cal.App.2d 633, 640, 98 P.2d 560; Southern Pacific Co. v. Day, 9 Cir., 38 F.2d 958, 962.

[22] As the negligence of one of the heirs which proximately contributes to the wrongful death of a decedent bars him alone, is not imputable to the other heirs and does not prevent their recovery or mitigate their damages, it logically follows that the negligence of an heir which solely caused the wrongful death should not defeat the suit of the innocent heirs. In this case he is necessarily a party to the action; he cannot, of course, recover any damages against himself and he would not be entitled to share in the award, if any.

[23] But can the unemancipated minors sue their step-father for simple negligence resulting in the death of their mother? It would seem that the reasons which forbid such a suit for the personal injury of a plaintiff persist in all their vigor to prevent an action for the wrongful death of their mother. Appellants argue that this is not so because Section 377 of the Code of Civil Procedure makes no such exception by its terms. A sufficient answer to this contention is the parallel fact that Section 3281 of the Civil Code providing that: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages" contains no express exception denying unemancipated minors the right to sue their parents. We conclude that the rule that unemancipated minors cannot sue a parent, or one *in loco parentis,* also applies to wrongful death actions based on negligence, Strong by Woodburn v. Strong, 70 Nev. 290, 267 P.2d 240, 269 P.2d 265.

[24] As to the causes of action alleging that the mother of the plaintiffs came to her death by reason of the wilful misconduct of defendant, it seems clear that the minor plaintiffs have the right to sue for the reasons set forth in Emery v. Emery, supra, 45 Cal.2d 421, 289 P.2d 218.

We conclude that the order sustaining the demurrers was correct as to the first, third, fifth and seventh causes of action and erroneous as to the second, fourth, sixth and eighth causes of action. However, as the rights of an unemancipated minor (second and sixth causes of action) and a "partially emancipated" minor (fourth and eighth causes of action) are identical, the second and fourth counts and the sixth and eighth counts have exactly the same legal effect, and the fourth and eighth causes of action are to all intents and purposes simply duplications. In the interest of sound judicial administration, we shall not disturb the trial court's ruling as to the fourth and eighth counts, as the existence of the allegations contained in them relative to partial emancipation, although ineffective surplusage, might lead to prejudicial confusion through the introduction of evidence relating thereto at the trial.

[25] Although there are eight causes of action and demurrers to each count, some of which were correctly sustained without leave to amend, there is only one judgment and it must necessarily be reversed because of the errors pointed out in the foregoing opinion. Bank of America Nat. Trust and Savings Ass'n v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357.

The judgment is reversed, and upon the going down of the remittitur the trial court is directed to overrule the demurrers to the second and sixth causes of action.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 807

Joan NESJE, Borghild Nesje, Ammud Nesje and Fra A. Nesje, Plaintiffs and Appellants,

v.

METROPOLITAN COACH LINES, a corporation, and Louis C. Schull, Defendants and Respondents.

Civ. 21016.

District Court of Appeal, Second District, Division 3, California.

April 16, 1956.

Rehearing Denied May 16, 1956.

Hearing Denied June 6, 1956.

Action by surviving spouse, sister and brothers of decedent for damage resulting from decedent's alleged wrongful death which occurred when decedent attempted to cross a street and was struck by defendant's interurban train. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for train company and its motorman and plaintiffs appealed. The District Court of Appeal, Shinn, P. J., held that where motorman observed that as decedent entered street he was not looking toward train which was then about 100 feet from intersecting crosswalk, and motorman vigorously sounded his bell and proceeded at about 15 miles per hour until he was about 20 feet from crosswalk and at that point decedent ran in front of train and motorman applied emergency brakes, but decedent was struck by train, doctrine of last clear chance did not apply, and motorman was not guilty of any negligence.

Judgment affirmed.

1. Street Railroads ⚷93(4)

Street railroads are not required to stop their trains upon observing pedestrians starting to cross their tracks.

2. Street Railroads ⚷93(3)

A motorman is not required to give way to every pedestrian who may possibly walk or run in front of the single car electric interurban train he is operating in spite of the ringing of a bell in such a manner and at such time as to give effective warning of the train's approach.

3. Street Railroads ⚷93(3)

Operators of street railway trains are not bound to anticipate that warnings given to pedestrians will either not be heard or will be ignored.

4. Negligence ⚷83.8

A mere possible opportunity to avoid an accident is not a last clear chance to avoid it.

5. Street Railroads ⚷93(3), 103(2)

Where motorman observed that as decedent entered street, he was not looking toward single car electric interurban train which was then about 100 feet from intersecting crosswalk, and motorman vigorously sounded his bell and proceeded at about 15 miles per hour until he was about 20 feet from crosswalk and at that point decedent ran in front of train and motorman applied emergency brakes, but decedent was struck by train, doctrine of last clear chance did not apply, and motorman was not guilty of any negligence.

6. Evidence ⚷150

A label on a bottle of blood allegedly taken from decedent's body was not an official record of the coroner or evidence of any of the facts noted thereon, and in absence of testimony of the person who took such sample that it was the blood of the decedent that was in the bottle, and in absence of testimony directly establishing that blood of the decedent was analyzed, it was error to admit testimony as to the alcoholic content of such blood. West's Ann.Code Civ. Proc. § 1953f.

◆

Albert D. White and Eric A. Rose, Long Beach, for appellants.

John R. Allport and John T. LaFollette, Los Angeles, for respondents.

SHINN, Presiding Justice.

Plaintiffs in this action are the surviving spouse, adult sister and two adult brothers of Crist Nesje, deceased, who sue for damages resulting from the wrongful death of decedent which occurred while he was crossing a street in Long Beach and came into contact with a single car electric interurban train of Metropolitan Coach Lines operated by its motorman, Louis C. Schull, who also was named as a defendant. Verdict and judgment were in favor of the defendants and plaintiffs appeal.

Ocean Boulevard extends easterly and westerly and Chestnut Street northerly and southerly in the city of Long Beach. Metropolitan, to be referred to as defendant, maintains double railway tracks on Ocean Avenue. Decedent was crossing in a crosswalk from the southeasterly to the northeasterly corner of the intersection of the two streets; defendant's train was approaching from the east on the northerly track. Schull observed decedent as he entered the street. The train was then about 100 feet from the intersection. He also noticed that as decedent approached the tracks he was not looking toward the train. Schull sounded his bell vigorously and proceeded at 15 miles per hour until he was about 20 feet from the intersection when decedent was at the south rail of the southerly track. At that time decedent ran in front of the train; Schull immediately applied the emergency brakes but decedent failed to get past the train and was struck by the right front step, receiving injuries from which he died. The train came to rest in the west crosswalk, having traveled about 80 feet from the point where brakes were applied.

The first point to be considered is that the court refused plaintiffs' requested instruction on the doctrine of last clear chance. We think there was no error in this ruling.

The uncontradicted evidence was that at a speed of 15 miles per hour the train could be stopped with use of the emergency brakes in from 75 to 100 feet. We think the only reasonable conclusion from the facts in evidence was that Schull gave ample warning by ringing the bell and that he applied the brakes as soon as he realized, or should have realized, that decedent was in a position of danger from which, due to his inattention, he probably would not escape through his own efforts.

[1-5] Decedent was in a position of safety until he started to run, as one of plaintiffs' witnesses described it, with about six foot strides. Schull had had a long experience in the operation of trains. He had the knowledge, common to the general public, that pedestrians, walking toward railway tracks, make use of their senses, look for danger before stepping onto a railway track, hear a warning bell when it is vigorously rung and come to a stop to let the train go by if common sense requires them to do so for their own safety. Although Schull observed that decedent was not looking toward the train he had no duty to anticipate that he would not look before going onto the north track or not hear the ringing of the bell while he was still in the place of safety, nor did he have a duty to anticipate that when decedent did hear the bell he would run in front of the train instead of coming to a stop. There was no evidence that decedent, when first seen, was hurrying across the street; he had ample opportunity to stop in a safe place. Schull, in order to stop his train before it came to the crosswalk, would have had to apply the brakes almost immediately when he first saw decedent starting to cross the street. It is not required that trains be operated in that manner. They do not have to give way to every pedestrian who may possibly walk or run in front of them in spite of the ringing of a bell in such manner and at such time as to give effective warning of the train's approach. Operators of trains are not bound to anticipate that such warnings will either not be heard or will be ignored. It may be that if Schull had immediately applied his brakes when he first observed decedent he could have stopped the train before it reached the crosswalk, but this is not to say that he had a duty to do so. He was only required to use ordinary care to avoid an accident, and in deciding what course to pursue he had no duty to anticipate that decedent would disregard the warning and would impulsively run in front of the train. A mere possible opportunity to avoid an accident is not a last clear chance to avoid it. The only chance Schull had was through the exercise of the highest degree of care and the taking of extraordinary precautions. When the train was a sufficient distance away to be stopped before it reached the crosswalk decedent was in no danger, nor did he ap-

pear to be in danger. The instant it appeared he was not going to stop Schull did all that could be done to avoid an accident, but it was too late. Upon the undisputed facts of the case it would have been error to give an instruction on the doctrine of last clear chance. See Doran v. City and County of San Francisco, 44 Cal.2d 477, 283 P.2d 1; Rodabaugh v. Tekus, 39 Cal.2d 290, 246 P.2d 663; Behne v. Pacific Electric Ry. Co., 30 Cal.App.2d 437, 86 P.2d 843; Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932; Dalley v. Williams, 73 Cal.App.2d 427, 435, 166 P.2d 595.

[6] The next point which we deem worthy of discussion is that the court erred in receiving the testimony of one Thompson that he analyzed blood which had been brought to him for that purpose and found that it contained .311% by weight of alcohol. The testimony was received notwithstanding the absence of competent evidence that it was the blood of Nesje that was analyzed. Plaintiffs made repeated objections, which were overruled, the ground of the objections being that no foundation had been laid for the testimony of the chemist for the reason that the specimen was not shown to be the blood of Nesje. The objections were well taken. The proof of identity was manifestly insufficient. Thompson testified from a label on a bottle which contained the sample of blood which he analyzed. On the label was a notation that the blood was taken by F. B. McDonald, the place not being specified; also so that the sample was picked up by a Dr. Dickey who gave it to one Phil Atkins and that it was delivered to the laboratory. It was further noted "Body identified by personal papers." Thompson testified that McDonald was an embalmer at Loper Funeral Service in Los Angeles County. This was the extent of the foundation laid for the testimony. There was no testimony as to who wrote the label, whether one person or several, or how the writer or writers came by the information which was entered on the label. Although it was stated "Body identified by personal papers" there was nothing to show who made the identification and nothing to show under what circumstances the sample of blood was taken. All the entries on the label were pure hearsay. It was not shown that McDonald who purportedly took the specimen even wrote an entry to that effect. Defendant says that this was an official record of the coroner's office kept in due course of business and admissible as such. Code Civ.Proc. § 1953f.[1] The evidence in question did not even purport to come within this section. As a memorandum kept in the coroner's office to identify the persons responsible for bringing the sample into the office the label would have served a useful purpose. It would have facilitated the location of witnesses who could testify respecting the notations of facts on the label. But the label on the bottle was not an official record of the coroner nor was it shown to have been made under his authority or in his office. It was not evidence of any of the facts noted thereon. It might have been written in its entirety by someone who had no knowledge of the facts and no reliable source of information. It did not rise to the dignity of evidence that it was the blood of the decedent that was analyzed. The error of admitting the testimony of Thompson would require a reversal if a judgment in favor of plaintiffs could be sustained.

Decedent was guilty of contributory negligence up to the instant of the occurrence of the accident. This is necessarily conceded by plaintiffs in contending that the doctrine of last clear chance applied. We have stated our reasons for holding that it did not apply and it follows that the evidence failed to establish any basis of liability of the defendant.

Plaintiffs also assign error in instructions given at the request of defendant and in refusing an instruction requested by plaintiffs as to the duties of the decedent and the defendant toward each other. It is unnecesary to consider these points for, as we have stated, if the last clear chance doctrine was inapplicable a verdict against defendants would have been unwarranted.

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[1] "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. (Added Stats.1941, c. 482, p. 1788, § 1.)"

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; CARTER, J., dissenting.

140 Cal.App.2d 862

James Henry SMITH, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Civ. 21691.

District Court of Appeal, Second District, Division 1, California.

April 18, 1956.

Hearing Denied June 6, 1956.

Proceeding upon prohibition to prevent court from trying petitioner on charge of forcible rape of 80 year old woman, on grounds of insufficiency of evidence to show that offense had been committed, or to establish sufficient cause to believe defendant guilty of crime. The District Court of Appeal, Nourse, J. pro tem., held, in part, that though woman denied and admitted occurrence and was entirely disoriented on voir dire examination, and did not remember automobile ride during which incident supposedly occurred, such evidence, together with testimony of physician that blood on her legs and clothing came from vagina, was sufficient, at preliminary hearing, to prove penetration by sexual intercourse.

Writ denied.

1. Criminal Law 🔑238

In proceeding upon prohibition to prevent court from trying petitioner on charge of forcible rape of 80 year old woman, on ground of insufficiency of evidence at preliminary hearing, admissions of petitioner and his co-defendant were ample to establish sufficient cause to believe petitioner guilty of crime charged. West's Ann.Pen. Code, § 261, subd. 3.

2. Rape 🔑1

The elements of the crime of forcible rape are an act of sexual intercourse with female other than wife of defendant, in which female resists and her resistance is overcome by force. West's Ann.Pen.Code, § 261, subd. 3.

3. Rape 🔑7

To establish element of sexual intercourse, at preliminary hearing upon charge of forcible rape, there must be proof of penetration. West's Ann.Pen.Code, § 261, subd. 3.

4. Rape 🔑51(1)

Where alleged victim of forcible rape committed by defendant and another was woman approximately 80 years old, disparity of ages between defendant and victim was sufficient to justify inference by trial court, at preliminary hearing, that victim was not wife of defendant, within rule that one of requisite elements of offense is intercourse with woman other than wife of defendant. West's Ann.Pen.Code, § 261, subd. 3.

5. Criminal Law 🔑238

Where 80 year old woman bore bruises upon face, nose and arms, and blood was present upon inner aspect of her thighs and upon her clothing, such facts were sufficient proof of element of force and resistance, upon preliminary hearing of defendant charged with forcible rape. West's Ann.Pen.Code, § 261, subd. 3.

6. Criminal Law 🔑238

In proceeding upon prohibition to prevent court from trying petitioner on charge of forcible rape of 80 year old woman, on ground of insufficiency of evidence at preliminary hearing to show that offense had been committed, though woman denied and admitted occurrence and was entirely disoriented on voir dire examination, and did not remember automobile ride during which incident supposedly occurred, such evidence, together with testimony of physician that blood on her legs and clothing came from vagina, was sufficient, at preliminary hearing, to prove penetration by sexual intercourse. West's Ann.Pen.Code, §§ 261, subd. 3, 995.

7. Criminal Law ⚷238

In proceeding upon prohibition to prevent court from trying petitioner on charge of forcible rape of 80 year old, entirely disoriented woman, evidence was sufficient to show that offense had been committed, and to establish sufficient cause to believe defendant guilty of crime. West's Ann. Pen.Code, §§ 261, subd. 3, 995.

Wadsworth & Fraser, Charles E. McClung, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., of Los Angeles County, Jere J. Sullivan, Lewis Watnick, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner's motion made pursuant to the provisions of section 995 of the Penal Code to set aside an information charging him with the violation of subdivision 3 of section 261 of that code (forcible rape) having been denied, the petitioner here seeks a writ of prohibition to prevent the Superior Court from proceeding to try him upon that information. He asserts that the evidence produced at the preliminary hearing was insufficient to show that the offense charged had been committed, or to establish sufficient cause to believe him guilty of the crime charged.

[1] Inasmuch as the admissions of the defendant and his co-defendant are ample to establish sufficient cause to believe that the defendant is guilty of the offense charged, the only question that it is necessary for us to decide is whether or not the evidence, other than admissions of the defendant and his co-defendant, was sufficient to establish the corpus delicti.

[2, 3] The elements of the crime charged by the information here, forcible rape, are: an act of sexual intercourse with a female other than the wife of the defendant, in which the female resists and her resistance is overcome by force. In order to establish the first element, that of sexual intercourse, there must be proof of penetration.

We have come to the conclusion that there was evidence sufficient to establish, for the purposes of holding the defendant to answer, each of the elements of the offense.

The evidence shows that the victim, a Mrs. Stevens, was a woman approximately 80 years old; that at the time of the arrest of the defendants she was in the back seat of an automobile driven by petitioner's co-defendant, and petitioner was riding in the right-hand front seat; that she had bruises on her face, nose and arms, and that there was a moderate amount of vaginal bleeding.

[4, 5] From the disparity in the ages of the petitioner and the victim the trial court could draw the inference that the victim was not the wife of the defendant. The bruises upon her face, nose and arms, and the presence of blood upon the inner aspect of her thighs and upon her clothing was sufficient proof of the element of force and resistance.

The evidence as to there having been an act of sexual intercourse with penetration is weak but, we believe, sufficient. The testimony of Mrs. Stevens was taken in a rest home where she was confined, and was not taken until nearly six weeks after the alleged occurrence. On voir dire examination it was shown that: she was entirely disoriented; did not know she was in a rest home; did not know how long she had been in that place; thought her age was sixty; could not remember her birthday; couldn't remember how long she had lived in Los Angeles; did not know whether or not she had a guardian; could not remember being in the County Hospital. After being sworn, she testified in substance that she did not remember being in an automobile with a couple of young fellows who did something to her; did not remember going for a ride in an automobile; said she might have seen the two defendants before but didn't know; could not remember being in an automobile with either of them; that she did not have sexual intercourse with either, but she did remember someone putting their hand over her mouth in an automobile. When asked to tell what happened in the automobile she said it wasn't her fault; that it was an awful hard thing to do; that an assault took place, that she didn't like to say what kind; that she was on business in an automobile, but the strange part of it was the man's father and mother were in the same car; that when she said an assault took place she did not know how to explain it. When asked whether anyone put their private part into hers, she said, "Well now, I won't—I can't go that far. I just can't stand it, I can't." She then reiterated that the man's mother and father were sitting in the car. After repeated attempts the district attorney was unable to get further facts from her than we have related. The district attorney then asked, "Mrs. Stevens, did somebody rape you?" Her answer was, "Yes, just exactly, you got it right now, just like it is, and his father and mother was there, too, in the car with them." Defendant did not object to the question, nor did he move to strike the answer.

[6, 7] We believe that the evidence just recited, together with the evidence of the physician that there was blood upon her legs and clothing which in his opinion came from the vagina, was sufficient to prove that an act of sexual intercourse had taken place. There was, therefore, sufficient evidence to justify the magistrate in believing that the offense of rape had been committed, and as there was ample evidence to show the defendant's connection with the offense, the trial court properly denied the motion to dismiss the information.

A peremptory writ is denied, and the alternative writ heretofore issued is discharged.

WHITE, P. J., and FOURT, J., concur.

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141 Cal.App.2d 33

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harold DOUGLAS and Norma Graybeal, a/k/a Norma Biederman, Defendants.

Norma Graybeal, a/k/a Norma Biederman, Appellant.

Cr. 5532.

District Court of Appeal, Second District, Division 1, California.

April 23, 1956.

Defendant was prosecuted for the unlawful possession of marihuana. From a judgment of the Superior Court of Los Angeles County, H. Burton Noble, J., and from the sentence, and order denying a motion for new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that the evidence sustained conviction.

Attempted appeal from sentence dismissed. Judgment and order denying defendant's motion for new trial affirmed.

1. Criminal Law 🔑1023(10)

An appeal from a sentence is not authorized by law and must be dismissed.

2. Criminal Law 🔑1159(2)

Before the appellate court is authorized to set aside a judgment of conviction on the ground of insufficiency of the evidence, it must be made clearly to appear, that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in the court below.

3. Criminal Law 🔑1159(2)

Appellate courts are not authorized to review evidence except where on its face it may justly be held, that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law.

4. Poisons 🔑9

In prosecution for the unlawful possession of marihuana, evidence that defendant admitted a purse was her property and that at the police station she took from her purse two brown wrapped cigarettes which were identified as marihuana sustained conviction. West's Ann.Health & Safety Code, § 11500.

◆

David Silverton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Patrick T. McCormick, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, appellant and one Harold Douglas were charged with a violation of Section 11500 of the Health and Safety Code of this state. Defendant Douglas pleaded guilty to the charge while appellant entered a plea of not guilty. When the cause was called for trial as to the latter, an amended information was filed charging a prior conviction, that of violation of the aforesaid Health and Safety Code section, a misdemeanor. Appellant stated her true name to be Norma Graybeal in place of Norma Biederman. To the amended information appellant pleaded not guilty and denied the prior conviction. Trial by jury was waived and pursuant to stipulation the People's case was submitted on the transcript of the preliminary hearing, the exhibits admitted at the preliminary hearing were admitted, and both sides reserved the right to put on additional evidence. Evidence was offered by defendant and the People presented testimony in rebuttal. Appellant was adjudged guilty. Application for probation was filed and upon the hearing thereof, the prior conviction alleged in the information was stricken, probation was denied, and appellant was sentenced to imprisonment in the County Jail for the term of one year. From the judgment, the order denying her motion for a new trial, and from the sentence, appellant prosecutes this appeal.

[1] An appeal from the sentence is not authorized by law and must be dismissed, People v. Willey, 128 Cal.App.2d 148, 152, 275 P.2d 522.

We regard the following as a fair epitome of the factual background surrounding this prosecution. Officer George L. Moeller, a Los Angeles policeman, arrested defendant and others on April 19, 1955 at 1249 East 28th Street. Officer Moeller had gone to the rear of this address and at the time his fellow officer attempted to enter the front door thereof he observed one of the room's occupants, not this defendant, come out the back door. He observed this person drop a box containing numerous items. Officer Moeller identified People's Exhibit 1a as the items dropped by this person. He handcuffed the latter and then went into the room where the arrests were made. Material found within the room, including People's Exhibit 1a, were introduced as exhibits and identified as marihuana.

Within the room there was an open purse which was on a dresser. The defendant admitted the purse in question was her property. Officer Moeller glanced in the purse to ascertain if it contained a weapon. He also handed the defendant a cigarette from a package in the purse. The officer, however, indicated he did not make a thorough search of the purse.

In her testimony the defendant contended that a search of the purse was made at the time of arrest. Harold Douglas, a witness for the defense, denied seeing the officers search the purse.

Officer Moeller gave the purse to Officer Mecklenburg to take to the police station. This was done because of the danger of a purse being used as a weapon by one in custody. The purse was closed at all times while in Officer Mecklenburg's custody.

At the police station the defendant asked for a cigarette from her purse. Officer Moeller handed the purse to the defendant.

She reached into the purse and from it took two brown wrapped cigarettes which she threw on the desk in front of the officers. These cigarettes were identified as marihuana. The defendant made no statement regarding the presence of the marihuana at the time she took the cigarettes from her purse.

Appellant testified that at the time of her arrest she was seated in a room listening to the radio and consuming a drink. That her purse was open and lying on the dresser, and that the officers "looked through" the purse and stated at the time that they found no marihuana cigarettes therein. That enroute to the police station the purse was in the possession of an officer in an automobile other than the one in which appellant was riding. She further testified that after arrival at the police station she wanted a cigarette and asked an officer to get her purse. That he handed it to her and "when I opened the purse up there were two marihuana cigarettes lying on top of the thing". In answer to the question, "Did you tell the officers that you didn't know—did they ask you if they were yours?", appellant answered, "I thought they had put them there". Appellant denied that she had any marihuana cigarettes in her possession in the room in question or that she had ever put any in her purse or had knowledge of their presence therein.

Appellant's sole contention on this appeal is that the evidence is insufficient to support the adjudication of guilt. The case at bar is controlled by People v. Gory, 28 Cal.2d 450, at page 455, 170 P.2d 433, at page 436, wherein our Supreme Court exhaustively reviewed the questions of possession and knowledge, and thereupon said: "The distinction which must be drawn, from a reading of the foregoing authorities, is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute. It is 'knowledge' in the first sense which is mentioned in the authorities as being immaterial but 'knowledge' in the second sense is the essence of the offense."

[2] Before we would be authorized to set aside the judgment and order in this case on the ground of insufficiency of the evidence, " 'it must be made clearly to appear that upon no hypothesis whatever is their sufficient substantial evidence to support the conclusion reached in the court below. * * * ' " People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780; that appellant had knowledge of the presence of the marihuana as embraced within the concept of " 'physical control with the intent to exercise such control' ", People v. Gory, supra, 28 Cal.2d at page 455, 170 P.2d at page 436, which is the very essence of the offense charged against her.

That the contraband was in appellant's purse is demonstrated by her own testimony that she took the marihuana cigarettes therefrom. While appellant's knowledge of the presence of marihuana in her purse must be shown, the fact that it was admittedly found in the purse among her other personal effects justified an inference that she had knowledge of its presence there. In other words, the court chose to believe the testimony of the police officers that at no time, after they took the purse from the room in which appellant was present until she opened it at the police station, did they put any marihuana cigarettes into the purse.

[3] As was said by this court in People v. Falk, 113 Cal.App.2d 857, 860, 249 P.2d 60, 62, "* * * appellate courts are not authorized to review evidence except where on its face it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. Furthermore, the legislature has ordained that the jury is the exclusive judge of the credibility of witnesses, Code Civil Procedure, § 1847, and is the judge of the effect and the value of evidence addressed to it, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc., § 2061. And, as a necessary corollary of the rules above noted, the jury in this case was authorized, if it conscientiously felt warranted in so doing after full and fair consideration thereof, to reject the testimony of appellant which was contradictory to that given by the officers. The testimony of the officers if believed by the jury, as presumptively it was, sufficiently established that the appellant had knowledge of the nature of the cigarette, as well as of its presence in her apartment. (Citing cases.)"

[4] It is not within our province on an appeal to decide the case on the basis of what view we might have taken of the evidence were we sitting as triers of fact. We are limited to a determination of whether there is in the record any substantial evidence, contradicted or uncontradicted, to support the conclusion reached in the court below.

For the foregoing reasons, the attempted appeal from the sentence is dismissed. The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.

140 Cal.App.2d 940

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Anthony THYMIAKAS, Defendant and Respondent.

Cr. 5554.

District Court of Appeal, Second District, Division 2, California.

April 20, 1956.

Proceeding upon motion of defendant to set aside information charging possession of heroin, upon ground that arrest had been unlawful and that evidence obtained by incidental search and seizure was inadmissible. The Superior Court of Los Angeles County, David Coleman, J., entered order granting motion, and the people appealed. The District Court of Appeal, Fox, J., held that where officers knew nothing of anonymous informant who told them that defendant was heavy user of heroin and that he kept user's supply in his apartment, and source, character and circumstances under which one of officers had heard defendant mentioned as user and peddler was not revealed, officers' reliance on such information and recollection in forcibly entering defendant's apartment, without warrant, was not reasonable, and heroin discovered in incidental search would be inadmissible in evidence in trial for unlawful possession of heroin.

Order affirmed.

1. Arrest 🔑63(4)

"Reasonable cause" to justify an arrest may consist of information obtained from others, and is not limited to evidence that would be admissible at trial on issue of guilt. West's Ann.Pen.Code, § 836, subds. 3, 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

2. Arrest 🔑63(4)

Though information provided by an anonymous informer is relevant on issue of reasonable cause, in absence of some pressing emergency, an arrest may not be based solely on such information. West's Ann. Pen.Code, § 836, subds. 3, 5.

3. Arrest 🔑63(4)

To justify arrest based on information provided by anonymous informer, evidence must be presented to court that would justify conclusion that reliance on such information was reasonable. West's Ann.Pen. Code, § 836, subds. 3, 5.

4. Arrest 🔑63(4)

Arrest based upon information supplied by informer may be justified in some cases by proof relating to identity of, or past experience with, the informer, and, in other cases, by proof supplied by similar information from other sources or by personal observations of the police. West's Ann.Pen.Code, § 836, subds. 3, 5.

5. Arrest 🔑63(4), 71

Where source, character and circumstances under which officer had heard defendant mentioned as user and peddler of narcotics was not revealed, court could not evaluate this report, upon consideration of question whether arrest, and accompanying search, based partly on such recollection was reasonable. West's Ann.Pen.Code, § 836, subds. 3, 5.

6. Criminal Law 🔑395

Searches and Seizures 🔑7(20)

Where officers knew nothing of anonymous informant who told them that defendant was heavy user of heroin and that he kept user's supply in his apartment, and source, character and circumstances under which one of officers had heard defendant mentioned as user and peddler was not revealed, officers' reliance on such information and recollection in forcibly entering defendant's apartment, without warrant, was not reasonable, and heroin discovered in incidental search would be inadmissible in evidence in subsequent trial. West's Ann.Pen.Code, §§ 836, subds. 3, 5, 995.

7. Criminal Law 🔑395

Searches and Seizures 🔑7(20)

Where action of officers in breaking into defendant's apartment was unlawful, because not based on reasonable cause to believe that he had committed, or was committing a felony, defendant's constitutional rights were thereby violated, and heroin obtained as result of consequent, unlawful search and seizure would be inadmissible in evidence in trial for offense of unlawful possession of heroin. West's Ann. Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 836, subds. 3, 5, 995.

8. Searches and Seizures ⚿3(1)

A search cannot be justified by what it produces. West's Ann.Pen.Code, § 836, subds. 3, 5.

◆

Edmund G. Brown, Atty. Gen., William E. James Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Lewis Watnick, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for appellant.

Gladys Towles Root, Los Angeles, for respondent.

FOX, Justice.

By information, defendant was charged in one count with the possession of heroin, in violation of section 11500, Health and Safety Code. His motion to set aside the information on the ground that there was no reasonable or probable cause to believe he committed the offense charged was granted. See Penal Code, sec. 995. The People appeal. We have concluded the decision of the trial court is correct.

At the preliminary hearing, Officer Rock, who was one of the arresting officers, testified that he and his partner were given information "around 11:00 P. M." on February 17, 1955, that "defendant was a heavy user of heroin" and that "he kept a user's supply in the amount of approximately one gram * * * at his bedside in his apartment." Defendant was identified as "Tony" or "Tony the Greek." This information was given the officers by a person "on West 5th Street" in Los Angeles, just off of Hill Street, about three or four miles from where defendant resided. It does not appear that the officers had had previous dealings with the person who furnished the information, or that they were acquainted with him, knew his name or address, or anything about him. One of the officers who had been attached to the Narcotics Division for a little more than two years testified he had heard "Tony" or "Tony the Greek" mentioned as being a user and a peddler of narcotics.

With this background, the officers proceeded immediately to the address where defendant lived. They went to the manager of the hotel and procured a key to defendant's room. Upon turning the key in the lock the door opened several inches and caught on a night-chain. When the chain stopped the door from opening, the officers banged on the door, stating they were police officers and demanding that defendant open the door. He responded "Wait just a minute." Officer Rock testified he heard "footsteps approaching the door," then they "seemed to be going away from the door," at which time defendant called out again, "Wait just a minute," in response to another demand from the officers that he open up. The officer then stated he would have to open the door or they were going to break it down. The door not being opened, the officers forced their way in. It was only a matter of a few seconds from the time the officers unlocked the door until they actually broke into defendant's room. Neither of the officers had a search warrant or a warrant for defendant's arrest.

When the officers entered defendant's room he was standing in the bathroom area. They recovered a number of capsules from the commode and found another under a small table in the living room. Those capsules contained heroin. They also found equipment used in making injections of such a narcotic. Based on this testimony, so acquired, defendant was held to answer.

The People contend there was reasonable and probable cause for the arrest of defendant and that the resulting search was reasonable under the circumstances.

Defendant's position is that before his arrest and the search the officers had no reasonable cause to believe he had committed, or was committing, a felony, Pen. Code, sec. 836, subds. 3 and 5; that his arrest was therefore illegal and the resulting search and seizure unlawful, hence his commitment was based entirely on incompetent evidence and was therefore without legal sanction.

[1–4] In People v. Boyles, 45 Cal.2d 652, 290 P.2d 535, 537, it was held that "reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." In Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, the court stated that "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information [citations]"; that "evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable." It was pointed out that "In some cases the identity of, or past experience with, the informer may provide such evidence [citation], and in others it may be supplied by similar information from other sources or by personal observations of the police." 46 Cal. 2d at page 294, 294 P.2d at page 38.

The question here presented is whether the information given by the unidentified man to the officers, coupled with the recollection of one of the officers that defendant had been mentioned as a user and peddler of narcotics, was sufficient to constitute reasonable cause to believe that defendant was guilty of a felony.

[5–7] It does not appear that the police officers had had previous experience with this unidentified person, that they knew his name, address, business, reputation or any other fact which would assist in evaluating his reliability. So far as appears, this person was simply an anonymous informer. In the absence of an emergency, and there was none here, "an arrest may not be based solely on such information." Willson v. Superior Court, supra, 46 Cal.2d 294, 294 P.2d 38. The source, character and circumstances under which the officer had heard the defendant mentioned as a user and peddler of narcotics are not revealed. It is therefore impossible to evaluate this report. Willson v. Superior Court, supra, 46 Cal.2d at page 291, 294 P.2d 36. Thus the People failed to present evidence to the court "that would justify the conclusion that reliance on the information was reasonable." Willson v. Superior Court, supra, 46 Cal.2d at page 294, 294 P.2d 38; People v. Sanders, 46 Cal.2d 247, 294 P.2d 10; and People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17. It therefore follows that defendant's constitutional rights were violated when the officers broke into his room and that the contraband they obtained as a result of their unlawful search and seizure was inadmissible in evidence. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905; People v. Sanders supra; People v. Kitchens, supra.

[8] It is now settled that a search cannot be justified by what it produces. People v. Brown, 45 Cal.2d 640, 290 P.2d 528.

This case is readily distinguishable from the recent decision of this court in People v. Sayles, 140 Cal.App.2d 657, 295 P.2d 579. In the latter case one of the arresting officers had knowledge of defendant's narcotic addiction as a result of an interview with him in the course of an earlier investigation. Prior to defendant's arrest an operator working with the police advised the officers that defendant was not only selling narcotics but then had some in his possession. Officer Hill gave the operator $5 and told him to make a purchase. About an hour later the operator reported to Hill that he had bought a capsule from defendant at his home and that defendant had an additional supply on his person. Officer Hill identified the substance in the capsule as heroin or a derivative thereof. The officers thereupon forcibly entered defendant's home without a search warrant. Defendant was arrested and considerable contraband discovered. The trial court found that the information the officers had received gave them reasonable ground to believe that defendant was then committing the crime of possessing narcotics; that the arrest and search were proper and the evidence thus obtained was admissible. We sustained the trial court's view.

The order is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

140 Cal.App.2d 881

Mike CUCUK, Plaintiff and Appellant,
v.
Bill Dean PAYNE and William A. Payne, Defendants and Respondents.
Civ. 4994.

District Court of Appeal, Fourth District, California.
April 18, 1956.

Action by pedestrian against motorist and automobile operator for injuries received when struck by automobile while crossing street. The Superior Court, Fresno County, Strother P. Walton, J., entered judgment upon verdict for defendants, and pedestrian appealed. The District Court of Appeal, Conley, J. pro tem., held that, evidence, which revealed that pedestrian was not in pedestrian lane at time of accident, was sufficient to sustain verdict for defendants.

Judgment affirmed.

1. Evidence 🔑597

Inherently improbable testimony is not "substantial evidence."

See publication Words and Phrases, for other judicial constructions and definitions of "Substantial Evidence".

2. Appeal and Error 🔑994(2), 1002, 1003

It is neither duty nor right of a reviewing court to resolve conflicts in evidence, pass on credibility of witnesses, or determine where preponderance of the evidence lies as to any issue, but all these matters are to be decided by trier of facts in court below.

3. Appeal and Error 🔑930(1), 989

Reviewing court's power begins and ends with determination as to whether there is any substantial evidence, contradicated or not, which will support conclusion of trier of facts, and all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

4. Appeal and Error 🔑996

Where two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial judge or jury.

5. Automobiles 🔑245(2, 67)

In personal injury action arising from automobile accident, jury, which heard and saw the witnesses, had function of determining questions of fact relative to negligence and contributory negligence.

6. Appeal and Error 🔑1005(1)

The District Court of Appeal could not interfere with factual findings contained in jury's verdict, which was approved by trial court, unless evidence supporting verdict was inherently improbable.

7. Witnesses 🔑316

Mere inaccuracies in witnesses' estimates of distance do not make such evidence inherently improbable.

8. Automobiles 🔑244(50)

In action by pedestrian against motorist and automobile owner for injuries received while crossing street, evidence, which revealed that pedestrian was not in pedestrian lane at time of accident, was sufficient to sustain verdict for defendants.

9. Appeal and Error 🔑1033(6)
Trial 🔑260(8)

In action by pedestrian against motorist and automobile owner for injuries sustained when struck by automobile while crossing street, refusal to give all of pedestrian's requested instruction pertaining to negligence and contributory negligence was not error, in view of other instructions given and of fact that inclusion of omitted portion would have been more beneficial to defendants than to pedestrian. West's Ann.Code Civ.Proc. § 1963, subd. 33.

10. Appeal and Error 🔑1068(4)

Where, in personal injury action, jury found against plaintiff as to liability, plaintiff would not be heard to claim prejudice from any error in instructions on damages.

11. Appeal and Error 🔑1068(3)

Prejudicial error cannot be predicated on instruction relative to an issue which played no part in decision of the case.

12. Trial ⚷261

Court was not required to correct form of an offered instruction, and, therefore, jumbled wording of first sentence of offered instruction would itself authorize refusal to give such instruction.

13. Trial ⚷261

If offered instruction is erroneous as submitted, it may be rejected.

14. Trial ⚷260(8)

In personal injury action, refusal to give offered instruction on contributory negligence was not error in view of other instructions given.

15. Negligence ⚷1

"Negligence" is the doing of some act which a reasonably prudent person would not do or failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs, and "negligence" is failure to use ordinary care in management of one's property or persons.

See publication Words and Phrases, for other judicial constructions and definitions of "Negligence".

16. Negligence ⚷4

"Ordinary care" is that care which persons of ordinary prudence exercise in management of their own affairs in order to avoid injury to themselves or others.

See publication Words and Phrases, for other judicial constructions and definitions of "Ordinary Care".

17. Trial ⚷260(8)

In action by pedestrian against motorist and automobile owner for injuries received when pedestrian was struck by automobile while crossing street, refusal to give instruction pertaining to right of way of pedestrian in crosswalk over other vehicles attempting to cross the crosswalk was not error in view of other instructions given.

18. Automobiles ⚷242(1), 246(39)

Motorist, who possesses normal faculty of sight, is not presumed to have seen that which was within range of his sight, but, general human experience, justifies inference that, when one looks in direction of an object clearly visible, he sees it, and it is proper to so instruct a jury and, in addition, to tell them that, if there is evidence that one did look and did not see that which was in plain sight, it follows either some part of such evidence is untrue or that person in question was negligently inattentive.

19. Trial ⚷260(1)

Refusal to give proposed instruction was not error in view of fact that given instruction incorporated the same principles as proposed instruction but expressed such principles in a better form and with a proper qualification.

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Lawrence W. Young and James C. Janjigian, Fresno, for appellant.

Hansen, McCormick, Barstow & Sheppard, Fresno, for respondents.

CONLEY, Justice pro tem.

Plaintiff was severely injured while crossing Tulare Street at "R" Street in the City of Fresno, when he was struck by an automobile driven by Bill Dean Payne and owned by William A. Payne. The jury brought in a verdict for the defendants and plaintiff appeals.

Appellant first claims that the verdict was based on incredible testimony which was "contrary to the laws of nature"; secondly, that certain instructions given by the court were erroneous; and thirdly, that the court erred in refusing some of plaintiff's proposed instructions.

[1-4] On the first point, our inquiry must be limited to a determination as to whether the jury's verdict is supported by substantial evidence. Needless to say, inherently improbable testimony is not substantial evidence. It is neither the duty nor the right of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses or determine as to any issue where a preponderance of the evidence lies. These are all matters to be decided by the trier of facts in the court below. Pfingsten v. Westenhaver, 39 Cal.2d 12, 19, 244 P.2d 395; Chan v. Title Ins. & Trust Co., 39 Cal.2d 253, 258, 246 P.2d 632; Rose v.

Melody Lane, 39 Cal.2d 481, 487, 247 P.2d 335. As is said in Estate of Trefren, 86 Cal. App.2d 139, 142, 194 P.2d 574, 575:

> "* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.
>
> "As was said in In re Estate of Teel, supra, at page 527, of 25 Cal.2d, at page 388 of 154 P.2d: 'All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.'" (Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 780, 117 P.2d 850; Tupman v. Haberkorn, 208 Cal. 256, 280 P. 970; Estate of Weber, 113 Cal.App.2d 160, 165, 247 P.2d 939.

[5–8] The accident happened at about 7:20 p. m. on February 25, 1954, in the darkness of early evening, the lights of business houses in the vicinity and automobile headlights being on. The plaintiff, 71 years of age, was crossing Tulare Street near its intersection with "R" Street in the city of Fresno. It was a signal-controlled intersection and he had waited for the green light to permit him to walk in a southerly direction across Tulare Street. The latter thoroughfare, running east and west, had four lined traffic lanes, divided by a double line in the center, and there was a 16 foot pedestrian lane at the corner for southbound foot passengers. The defendant had been driving north on "R" Street, but with the green light signal he made a left-hand turn to go west on Tulare. His headlights were on and he was traveling at about 10 or 15 miles per hour when he made his turn. The testimony of the defendant driver and another eyewitness and of the police officer who investigated the accident establishes that the plaintiff was not in the pedestrian lane, as he claimed, at the time he was struck, but some material distance to the west of it. The plaintiff was dressed in a dark suit. His eyes were fixed on the green signal light, and he did not see the automobile until almost the instant of the impact. The jury saw and heard the witnesses; it was its function to determine the questions of fact relative to negligence and contributory negligence; and the trial court by denying plaintiff's motion for a new trial approved the jury's verdict. We cannot interfere with these factual findings unless, as plaintiff claims, the evidence supporting the jury's verdict is inherently improbable. Sandvold v. Perrot, 74 Cal.App.2d 344, 346, 347, 168 P.2d 995; Hines v. Milosivich, 68 Cal.App.2d 520, 522, 157 P.2d 45; Wright v. Sniffin, 80 Cal.App.2d 358, 362, 181 P.2d 675; Biondini v. Amship Corp., 81 Cal. App.2d 751, 766, 185 P.2d 94; Ferrell v. Matranga, 92 Cal.App.2d 620, 622, 207 P.2d 654. What counsel actually argue in attacking the verdict is that some of respondent's testimony is inaccurate in this, that the driver, Payne, and his witness Pedersen, estimated that plaintiff was 20 to 30 feet west of the westerly line of the crosswalk when he was struck, while the police officer, Oldfield, testified that by using a steel tape he ascertained that plaintiff was only 14 feet west of that line when he lay in the street after the accident. Counsel argue that the force of the collision would itself carry the plaintiff westerly, but the defendant driver testified that the plaintiff, when struck, "just fell over" at the side of the car and that he was not carried farther to the west—except he "could have moved about a half a foot or something like that, or maybe a foot back from where it was." Mere inaccuracies in the estimates of distance made by witnesses do not make such evidence inherently improbable. It cannot be said that the testimony considered as a whole "is inherently so improbable and impossible of belief as to, in effect, constitute no evidence at all." DeArellanes v. Arellanes, 151 Cal. 443, 448, 90 P. 1059, 1061. The basic fact favoring the defense that the plaintiff was outside the pedestrian lane at the time he was hit is still established by substantial evidence even if the distance was not accurately estimated by two defense witnesses. Being satisfied that the verdict is supported by substantial evidence, we cannot disturb it.

Appellant claims error in the modification of instructions offered, and in the instructions given on contributory negligence, presumption of due care, and damages.

This court pointed out in Bramble v. McEwan, 40 Cal.App.2d 400, 411, 104 P.2d 1054, 1060, that a trial "* * * court is not required to give every instruction requested by a litigant and is not required to instruct the jury upon any particular phase of the law more than once, nor to say the same thing in as many different ways as the ingenuity of counsel may suggest."

It appears that, taken as a whole, the instructions on contributory negligence, while concise and laconic, were complete. Plaintiff requested the following instruction which was modified by the court by striking out everything but the opening sentence:

> "One of the defenses set up by the defendants in this case, is the plea of contributory negligence. *In this defense the burden is upon the defendants to prove two things:*
>
> *"First, that the plaintiff against whom the defense is asserted, was negligent.*
>
> *"Second, that such negligence, if any, proximately contributed to cause the injuries complained of. If the defendants fail to prove either of these two propositions, this entire defense of contributory negligence fails."* (Omitted portion of proposed instruction in italics.)

But the court afterwards gave the following instruction, which covers the same ground:

> "To establish the defense of contributory negligence the burden is upon the defendants to prove by a preponderance of the evidence that plaintiff was negligent, and that such negligence, if any, contributed in some degree as a proximate cause to the damages, if any, to plaintiff."

Appellant complains because the last sentence of the following instruction was omitted:

> "You are instructed that conduct which is in violation of any of the provisions of the California Vehicle Code I have given you in these instructions constitutes negligence per se. This means that if the evidence supports the finding, and you find, that person did so conduct himself, it requires a presumption that he was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. *In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induced him, without moral fault, to do otherwise."* (Omitted portion of proposed instruction in italics.)

The proposed instruction is practically identical with instruction 149 of California Jury Instructions, Civil (BAJI), which, as a whole and without separate comment as to the form of the last sentence contained in it, has been approved by the Supreme Court. Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 610, 177 P.2d 293; Ornales v. Wigger, 35 Cal.2d 474, 478, 218 P.2d 531. It does not necessarily follow, however, that in the instant case, the omission of the deleted portion was error.

[9] All preceding references to sections of the Motor Vehicle Code contained in the court's charge, with the sole exception of one on the right-of-way of pedestrians at crosswalks, covered duties imposed by law on the defendant. With respect to the right-of-way, the plaintiff stoutly maintained that he was at all times in the crosswalk for pedestrians. It would necessarily fol-

low that the defendant rather than the plaintiff would benefit by the inclusion of the omitted sentence, and that the plaintiff cannot reasonably maintain that he was materially prejudiced by the deletion. It should be observed further that the omitted sentence is somewhat ambiguous. This is forcefully illustrated by the fact that appellant states in his brief that it refers to "what an ordinary prudent pedestrian is entitled to expect of an ordinary prudent driver;" on the contrary, the deleted portion of the instruction refers to an assumption that the jury is told it may make with reference to the intentions of an ordinarily prudent man relative to violations of law. The last part of the omitted sentence "(u)nless causes, not of his own intended making, induced him, without moral fault, to do otherwise.", introduces rather vague and shadowy concepts which lack the precision of good legal definition. Furthermore, the sentence seems to return the subject to the test of what an ordinarily prudent person would do in the circumstances, as advocated in the dissenting opinion of Mr. Justice Carter in the leading case of Satterlee v. Orange Glenn School District, 29 Cal.2d 581, 601, 177 P.2d 279, rather than what the statute provides by way of a standard as is required by the majority opinion in that case. The omitted sentence is based upon the presumption "That the law has been obeyed", Code Civ.Proc., Sec. 1963(33), and thus impinges upon a subject which is usually treated separately in instructions and which has a complex history and diverse ramifications of its own. (See California Jury Instructions, Civil (BAJI), Fourth Edition, Vol. 1, pp. 312–322.) These observations induce a legitimate doubt as to the advisibility of giving the omitted portion of the instruction. We find that it was not error, in the circumstances, to leave it out.

[10, 11] From appellant's general instruction on damages the court excised the sentence *"In estimating the amount of such damages, you may consider the physical and mental pain suffered, if any, the extent, nature and character of the suffering, mental and physical, if any, and its duration."* While this deleted portion is only an expansion of the instruction as given, and the essential meaning of the charge was not changed by its omission, the sentence could well have been included. But appellant cannot very well claim that any error in the instructions on damages was prejudicial, for the jury found against him as to liability and consequently, the question of damages never came before them. Boots v. Potter, 122 Cal.App.2d 927, 940, 266 P.2d 176, 39 A.L.R.2d 1; 4 Cal.Jur.2d, Appeal and Error, Sec. 620. Prejudicial error cannot be predicated on an instruction relative to an issue that played no part in the decision of the case.

The final sections of appellant's briefs are devoted to a claim that the court erroneously refused four instructions on contributory negligence, the right of way of pedestrians in signal-controlled pedestrian lanes, a "presumption" relative to seeing that which is in plain sight, and permissible assumptions as to obedience of the law by others. As to contributory negligence, the court refused the following proposed charge:

> "You are instructed that contributory negligence is defined as such an act or omission on the part of the plaintiff amounting to a want of ordinary care, as, concurring or cooperating with the negligent act, if any, of the defendants and contributes to the proximate cause of the injuries complained of. However, if you find that the plaintiff was negligent but that his negligence, if any, did not contribute directly or proximately to his damage, if any, you are instructed that the plaintiff was not guilty of contributory negligence."

[12–14] The jumbled wording of the first sentence would itself authorize the refusal, as a court is not required to correct the form of an offered instruction. If it is erroneous as submitted, it may be rejected. A further complete answer to the contention is that the jury was fully instructed on the subject by the giving of the two following statements of the law:

> "Contributory negligence is negligence on the part of a person injured which, cooperating in some degree

with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

> "One who is guilty of contributory negligence may not recover from another for the injury suffered."

> "To establish the defense of contributory negligence the burden is upon the defendants to prove by a preponderance of the evidence that plaintiff was negligent, and that such negligence, if any, contributed in some degree as a proximate cause to the damages, if any, to plaintiff."

[15, 16] The standard definition of negligence and of ordinary care as given by the court high lights the meaning of the contributory negligence instructions as given:

> "Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person."
>
> "Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others."

[17] Appellant's argument that the instruction as given is erroneous is based on an excerpt from the case of Robinson v. Western P. R. R. Co., 1874, 48 Cal. 409, 423, in which it is pointed out that "ordinary negligence" rather than "slight negligence" must proximately contribute to a casualty before contributory negligence results and bars recovery. The holding is referred to in Strong v. Sacramento & Placerville Railroad Co., 1882, 61 Cal. 326 and in later cases with approval. But, as we have seen, in the instant case the instructions as given were tied in with the definitions of "ordinary negligence" and "ordinary care" and the charge as a whole is entirely consistent with the rule enunciated in the Strong case, supra.

The following instruction offered by plaintiff was refused:

> "A pedestrian crossing an intersection in a marked crosswalk in obedience to the traffic signals possesses the right-of-way over vehicles attempting to cross said crosswalk.",

but the court told the jury:

> "You are instructed that Section 560 of the California Vehicle Code provides as follows: The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection."

Upon analysis, in the light of the factual situation developed in the case, the refused instruction actually would have added nothing material to the total charge as given by the court. The essential point in both is that the pedestrian in the crosswalk has the right-of-way. Therefore, appellant's argument that judicial recognition of the existence of the green light signal might have given additional rights to the pedestrian such as a possible reduction of the quantum of care in keeping a continuing lookout for vehicular traffic. Taylor v. Sims, 72 Cal.App.2d 60, 63–64, 164 P.2d 17; Francis v. City and County of San Francisco, 44 Cal.2d 335, 341, 282 P.2d 496, is a false quantity here, for the proposed instruction did not incorporate any such additional matters. Both the proposed and the given instruction told the jury that if the plaintiff was in the outlined crosswalk, he had the right of way.

[18] Next, appellant argues that the failure to give the following instruction constituted prejudicial error:

> "The law presumes that a person driving an automobile on the highway and possessing normal faculty of sight must have seen that which was within the range of his sight."

There is no such *presumption*. There is, however, an *inference* justified by general human experience that when one looks in the direction of an object clearly visible he sees it, and it is proper so to instruct a jury and to tell them further than when there is evidence that one did look and did not see that which was in plain sight, it follows that either some part of such evidence is untrue or that the person in question was negligently inattentive. Collier v. Los Angeles R. Co., 60 Cal.App.2d 169, 140 P.2d 206; Gilbert v. Pessin Grocery Co., 132 Cal.App.2d 212, 221, 282 P.2d 148; LaBranch v. Scott, 82 Cal.App.2d 1, 185 P.2d 823; Bischell v. State, 68 Cal.App.2d 557, 563, 157 P.2d 41. In the form proposed by appellant, the instruction is argumentative. Beck v. Sirota, 42 Cal.App.2d 551, 564, 109 P.2d 419, and it does not contain the careful qualifications set forth in a correct statement of the rule. See California Jury Instructions, Civil (BAJI), Fourth Edition, Vol. 1, pp. 345, 347. It should be noted also that the jury was instructed that the operator of an automobile must anticipate that he may meet persons at any point in the street and he must keep a proper outlook for them "and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires, he must slow up and stop", and also that because he was operating an automobile the defendant driver owed a duty to exercise a greater quantum of care than the plaintiff.

[19] Lastly, appellant claims error in the refusal of the following proposed statement of the law:

> "I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will exercise ordinary care and caution; and the plaintiff has a right to assume that the defendant, in his operation of his automobile, will obey the traffic laws and regulations."

A complete answer to this contention is that the court gave an instruction incorporating the same principles, but expressed in a better form and with a proper qualification, as follows:

> "A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined do not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty."

It is our final considered opinion that the jury was fairly and adequately instructed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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140 Cal.App.2d 765

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Halford T. FLANDERS, also known as Ralph Flanders, Defendant and Respondent.

Cr. 3158.

District Court of Appeal, First District, Division 2, California.

April 16, 1956.

Prosecution for conspiracy to maintain a gambling house. The Superior Court, City and County of San Francisco, Eustace Cullinan, J., dismissed the indictment on motion and the People appealed. The District Court of Appeal, Kaufman, J., held that evidence was sufficient to compel the denial of the motion.

Order reversed.

1. Indictment and Information 🔑137(4)

On motion to set aside an information or indictment, court may not substitute its judgment as to weight of evidence for that of magistrate conducting preliminary examination, and such information or indictment should be set aside only where there is no evidence that a crime has been committed or no evidence to connect defendant with such crime. West's Ann. Pen.Code, §§ 921, 995.

2. Indictment and Information ⚿140(2)

Even if evidence as to discriminatory enforcement of gambling laws could properly have been received on motion to set aside indictment, court erred in setting aside indictment on ground of discriminatory enforcement in violation of equal protection clause where no evidence as to discriminatory enforcement was introduced. West's Ann.Pen.Code, §§ 182, 995.

3. Indictment and Information ⚿140(2)

On motion to set aside indictment for conspiracy to maintain gambling house, evidence was sufficient to compel denial of motion. West's Ann.Pen.Code, §§ 182, 921, 995.

Joseph C. Haughey, San Francisco, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

KAUFMAN, Justice.

This is an appeal by the People from an order of the Superior Court in and for the City and County of San Francisco, dismissing the indictment against respondent Flanders.

On May 2, 1955, respondent Halford T. Flanders was by indictment of the Grand Jury of the City and County of San Francisco charged with violation of section 182 of the Penal Code, conspiracy to violate section 288 of the Police Code of the aforesaid City and County (maintaining a gambling house.) He was arraigned on May 9, and on May 16, 1955, he moved to set aside the indictment under section 995, Penal Code, alleging that said indictment was not properly endorsed and presented as prescribed by the Penal Code, and that he was indicted without reasonable or probable cause, in that no evidence was presented showing the commission of any offense by respondent or establishing reasonable or probable cause for believing that he committed any offense.

Early in the morning of Saturday, April 23, 1955, the police raided a North Beach social club at 209 Stevenson Street, San Francisco. There were nine round tables in the club covered with green felt. The tables were surrounded by groups of men who had before them on the tables playing cards and chips. Respondent Flanders identified himself to police as the proprietor of the club. He also identified August Watke at the first table as the house man. There were red, white and pink chips on this table as well as cards in front of the players. There was a pot in the center of the table. Officer Nelder testified that from the position of the cards, it appeared to him that the game in progress was draw poker. The dealer in the officer's presence, drew in the chips and paid off the players in amounts varying from $17.40 to $10.35. Watke told the officer that the red chips were worth 25 cents, the white chips, 5 cents, and the pink chips, one dollar. He also said that he charged each player 25 cents for a half hour.

At the third table, a game of panguingui, also a gambling game, was being played for money. George Kondos paid off the players at this table. He was also identified by respondent as one of his dealers. He stated that Watke took care of the front portion of the establishment and Kondos of the southerly portion.

Inspector Cruickshank testified in similar vein, and identified gambling paraphernalia seized in the raid of respondent's establishment.

Respondent refused to testify on the ground that his answers might incriminate him.

It is appellant's contention that a constitutional question cannot be raised under section 995 of the Penal Code, and that the court erred in holding that it was a denial of equal protection of the law to prosecute some while others escaped prosecution for breaking the same laws. The respondent's motion was based on the ground that there was no evidence before the Grand Jury that this respondent conspired with unnamed other persons to violate the anti-gambling ordinance. The trial judge remarked that after reading the transcript he found it difficult to ascertain with whom defendant was supposed to have conspired, and the prosecuting attorney pointed out that the dealers were in some type of contact with the operator or proprietor. After further discussion of the evidence required to constitute a conspiracy the court stated that his reason for dismissing the conspiracy charge was aside from that, stating that he could take judicial notice of the fact that similar offenses were practiced widespread in San Francisco referring to church "bingo" lotteries which were allowed to run without interference and which were even advertised. He cited the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, to the effect that if the law is administered so as to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is within the constitutional prohibition.

The court admitted that the record before the Grand Jury did not show that other forms of gambling were being conducted widespread throughout San Francisco in practically every parish. No proof was offered by respondent either at the hearing or before the Grand Jury that there was discrimination practiced in the enforcement of the gambling laws. This issue was interjected by the court. The court stated that he could take judicial notice of the fact that such offenses were practiced by church organizations and were even advertised.

Respondent cites abundant authority to the effect that it is immaterial that the trial court reached its conclusion through an erroneous process of reasoning if it arrived at a correct judgment, Sears v. Rule, 27 Cal.2d 131, 140, 163 P.2d 443; Kuhn v. Ferry and Hensler, 91 Cal.App.2d 805, 810, 206 P.2d 1; 4 Cal.Jur.2d 390–391, and contends that the record shows discrimination in that if respondent was guilty of a violation of the Municipal Code, the dealers Kondos and Watke were *"particeps criminis"*, but respondent was indicted for a felony while the two dealers were not named in the indictment.

[1] In 1949, section 995, Penal Code was amended to permit an indictment to be set aside if defendant has been indicted without reasonable or probable cause. Prior to that time only an information could be set aside under that section for that reason. Undoubtedly, the cases decided under that section relating to the setting aside of an information for lack of reasonable or probable cause should be followed in principle in regard to cases involving indictments. The test as laid down in People v. Platt, 124 Cal.App.2d 123, 268 P.2d 529, is that an information should be set aside only where there is *no* evidence that a crime has been committed or no evidence to connect defendant with such crime. On a motion to set aside an information, the court may not substitute its judgment as to the weight of the evidence for that of the magistrate conducting the preliminary examination. On such a motion the court will not inquire into the sufficiency of the evidence if there is some evidence in support of the information. And, see, People v. Sears, 124 Cal.App.2d 839, 269 P.2d 683; People v. Nagle, 25 Cal.2d 216, 153 P.2d 344.

In Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713, a case arising prior to the 1949 amendment, in which a writ of prohibition was sought to prevent a trial from proceeding, it was held that if there is some evidence to support the indictment, the court will not inquire into its sufficiency. The lack of any evidence, however, conclusively establishes that the Grand Jury has exceeded its authority.

This court in People v. Hopkins, 101 Cal.App.2d 704, 226 P.2d 74, 77, reversed an order of the trial court setting aside an indictment under section 995, Penal Code. The defendant therein was accused of manslaughter for having assisted a narcotic addict by holding his arm while the addict administered a shot of heroin to himself, from which he subsequently died. The court cited the Greenberg case, supra, and also noted that section 921, Penal Code, requires the grand jury to find an indictment "'when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment warrant a conviction by a trial jury.'" There was clearly evidence herein that defendant had violated the anti-gambling ordinance, there was evidence from which it could be inferred that the dealers were cooperating with him in some form of agreement to violate this ordinance. The evidence was certainly unexplained and uncontradicted, since respondent did not choose to testify.

Even if it be assumed that it is proper to raise the question of discriminatory enforcement of the gambling laws on a motion made under section 995, it appears that the rule of the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 does not stand for the proposition that persons violating the law are to have equal protection from prosecution, but rather for the proposition that equal protection of the law will be extended to all persons in the pursuit of their lawful occupations regardless of their race. In the cited case, the San Francisco ordinance giving the Board of Supervisors authority to grant or withhold licenses to operate laundries within the city, with no criterion set forth in the ordinance on which such permits were to be granted or denied, was held unconstitutional as conferring upon said supervisors arbitrary power. In that case it was proved that licenses were withheld from all Chinese operators, while they were granted with but one exception to all proprietors of laundries who were not members of that race.

In People v. Darcy, 59 Cal.App.2d 342, 139 P.2d 118, 125 the same argument based on the Yick Wo case was raised, as is now urged by respondent herein. The court there stated that if such an argument was accepted it would lead to the rule that "if some guilty persons escape, others who are apprehended should not be prosecuted."

In Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142, a case involving violation of an anti-gambling ordinance in San Francisco, petitioners relied on the Yick Wo case. It was noted by the court in affirming a judgment of the Superior Court discharging a writ of habeas corpus, that appellant was seeking to set aside a criminal law of the state not on the ground that it was unconstitutional on its face, nor discriminatory in tendency and ultimate actual operation as the ordinance was in the Yick Wo case, but that it was made so by the manner of its administration. This, it was held, was a matter of proof which must be made out completely when the power of a Federal Court was invoked to interfere with criminal justice in a state.

In People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437, 446, it was observed that appellant therein argued that "equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons." The court noted that the remedy for unequal enforcement of the law "does not lie in the exoneration of the guilty at the expense of society." It commented on the Yick Wo case, stating that there was an obvious distinction between extending protection to persons of the Chinese race in pursuance of the business of laundering, and extending protection to those engaged in pandering, and that while equal protection will be extended to all in the pursuit of lawful occupations, no one has the right to demand protection in the commission of a crime. The court concluded that the only possible extension of the doctrine of the Yick Wo case to a criminal matter would be an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime.

[2] It was also noted in that case that appellant therein had not attempted to defend on the basis of discriminatory enforcement of the law even if such a defense were available to him. In the instant case respondent based his motion on the argument that there was no evidence of a conspiracy to support the felony charge, and brought in no evidence of discriminatory enforcement.

[3] Since there was some evidence in the record before the Grand Jury of a conspiracy to violate the anti-gambling ordi-

nance, to which respondent was a party, it was error to grant the motion to set aside the indictment. See, People v. Hopkins, supra.

Order reversed.

NOURSE, P. J., and DOOLING, J., concur.

140 Cal.App.2d 835

Fred A. WOOL, Plaintiff and Appellant,

v.

David S. SCOTT, John C. Scott, Bay Head Land Company, a corporation, E. J. Fay, State of California, et al., Defendants and Respondents.

Civ. 16730.

District Court of Appeal, First District, Division 2, California.

April 17, 1956.

Rehearing Denied May 17, 1956.

Hearing Denied June 6, 1956.

Equitable proceeding to obtain a declaration that right to use alleged servient tenement constituted a perpetual easement appurtenant in plaintiff's realty and to have judgment in prior partition proceeding involving servient tenements set aside on ground that it had been obtained by fraud. The Superior Court, Santa Cruz County, James L. Atteridge, J., sustained demurrer without leave to amend amended complaint, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held that where, in equitable proceeding to obtain declaration that right to use alleged servient tenement constituted a perpetual easement appurtenant in plaintiff's realty and to have judgment in partition proceeding involving servient tenement set aside on ground that it had been fraudulently obtained, complaint was sufficient to allege plaintiff's ownership of an easement in the park, but was defective as to allege innocent purchasers for value claiming under partition judgment, trial court's refusal to grant leave to amend constituted an abuse of its discretion.

Judgment reversed.

1. Judgment 🔑443(1)

Failure to serve party who is known by party quieting title to assert an adverse claim in the property involved is extrinsic fraud which will make judgment subject to attack by party kept in ignorance of suit.

2. Judgment 🔑452

Third persons, who are deprived of their interests in property through judgments obtained through extrinsic fraud, such as heirs who are kept from receiving notice of probate proceedings in their ancestors' estates, may seek equitable relief against such judgments.

3. Judgment 🔑452

Generally, fact that there are grounds for equitable relief which could be asserted against a judgment by the grantor will not give grantees right to such relief, though judgment is cloud on his title.

4. Judgment 🔑456(1)

If plaintiff's predecessor was a known defendant in prior partition proceeding, recording of the lis pendens and published summons in the prior action would not be notice as to predecessor who was not served in the action, but, if predecessor was an unknown defendant, publication of summons would be sufficient notice to predecessor, and subsequent proceeding to obtain equitable relief against purported judgment in such 1922 partition proceeding would be barred by statute of limitations.

5. Partition 🔑95

Bona fide purchasers for value who took through judgment in prior partition proceeding would prevail as against plaintiff who sought to have judgment in the partition proceeding set aside on ground that it had been fraudulently obtained, and therefore, to allege meritorious case against such purchasers, plaintiff would have to allege the interest purchasers claimed and that purchasers did not acquire such interest as bona fide purchasers for value.

6. Notice 🔑6

Means of obtaining knowledge is equivalent to knowledge in absence of circumstances preventing investigation.

7. Easements 🔑3(1), 22

If right to use of park could be proved to be an easement appurtenant to plaintiff's land, such right would pass with that land, and plaintiff would not be bound by constructive notice of instruments filed against park and allegedly depriving plaintiff's predecessor of the easement, since such matter would be outside plaintiff's chain of title in absence of showing of common grantor common to plaintiff and those involved in instruments filed against the park.

8. Equity 🔑72(1)

Laches depends not alone on passage of time, but there must also be a showing of resulting prejudice, and delay after ascertaining knowledge of facts must result in damage to the other party.

9. Pleading 🔑193(4)

In equitable proceeding to have previous judgment in partition set aside on ground that it had been fraudulently obtained, in complaint, which did not show that innocent purchasers for value under judgment had succeeded to the property covered by the judgment or show any damage to any of the defendants, laches was not sufficiently apparent from face to be raised by demurrer.

10. Easements 🔑16

Question whether an easement has been conveyed must be determined from all circumstances existing at time of original deed from owner who filed map upon which easement is claimed. West's Ann.Civ.Code, § 806.

11. Easements 🔑15

Law does not favor implication of easements, but effect must be given to and can be shown by all facts and circumstances.

12. Easements 🔑61(8)

Complaint, which alleged that right to use park was an easement appurtenant to plaintiff's land, that original owner of park and plaintiff's land intended to create such an easement, that property in which park use was claimed was designated as park on a map and subsequently used as a park and was still used as such on commencement of action to set aside prior judgment affecting the alleged servient tenement on ground that such judgment had been fraudulently obtained, sufficiently alleged ownership of an easement in the park. West's Ann.Civ. Code, § 806.

13. Counties 🔑217

Control of litigation to which county is a party is in Board of Supervisors, and therefore individual could not sue on behalf of county unless he first showed a demand upon Board of Supervisors to act in the matter, or showed that demand would be useless. West's Ann.Gov.Code, §§ 25550 to 25562.

14. Limitation of Actions 🔑100(4)

Where county had been served with notice in the 1924 partition suit, any cause of action asserted on its behalf on ground that judgment in such partition action had been fraudulently obtained would be barred by statute of limitations. West's Ann.Gov. Code, §§ 25550 to 25562.

15. Easements 🔑61(7)

Person who owns property abutting on street or highway has sufficient property interest to maintain a suit to enforce his right to use of such street or highway.

16. Evidence 🔑43(2)

Judicial notice is limited to proceedings in the same case.

17. Easements 🔑61(8)

Where, in equitable proceeding to obtain declaration that right to use alleged servient tenement constituted a perpetual easement appurtenant in plaintiff's realty and to have judgment in partition proceeding involving servient tenement set aside on ground that it had been fraudulently obtained, complaint was sufficient to allege plaintiff's ownership of an easement in the park, but was defective as to alleged innocent purchasers for value claiming under partition judgment, trial court's refusal to grant leave to amend constituted an abuse of its discretion. West's Ann.Civ.Code, § 806.

Smith, Wool & Perren, by Donald B. Richardson, San Jose, for appellant.

J. Frank Murphy, Eugene J. Adams, Santa Cruz, for respondents David S. Scott and John C. Scott.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of defendants entered after an order sustaining a demurrer without leave to amend to plaintiff's amended complaint.

Plaintiff and appellant, Fred A. Wool, brought this action in equity for equitable relief against a purported judgment, seeking to be declared owner of a perpetual easement appurtenant to his property, and asking that the previous judgment affecting the alleged servient tenement be set aside on the ground that it was fraudulently obtained. Defendants named were David S. Scott, John C. Scott, Bay Head Land Company, a corporation, E. J. Fay, State of California and several Does. A demurrer was sustained with leave to amend. After an amended complaint was filed, a demurrer was sustained without leave to amend.

The amended complaint, filed on October 3, 1950, was in two counts. The first count alleged that plaintiff is now and had been since May 19, 1948, the owner and in possession of a parcel of land located in Santa Cruz County, described as Lot No. 18 in Block "17" of Camp Capitola as numbered and designated on a map marked "Adopted May 1, 1884, F. A. Hihn, and recorded in Book 2 of Maps at page 23 in the office of the County Recorder of the County of Santa Cruz. This land was acquired by plaintiff for a valuable consideration and without knowledge of action No. 8820 referred to below.

It is then alleged that plaintiff owns a perpetual easement for park purposes in a parcel of realty designated by the word "Park" on a map entitled "adopted May 1, 1884, F. A. Hihn", filed on page 23, Book 2 of Maps in the office of the aforementioned County Recorder, by reason of the following facts:

"On and prior to August 14, 1884, F. A. Hihn was the owner of a large tract of land at Capitola, in the County of Santa Cruz which embraced said Park and also the land described in paragraph III hereof. Prior to August 14, 1884, to wit: on or about May 1, 1884, said F. A. Hihn subdivided, mapped and laid out said large tract of land into streets, lots, alleys and parks; the map thereof was dated May 1, 1884, and was filed on May 6, 1884, and was recorded at page 23 of Book 2 of Maps and a copy thereof was subsequently again recorded at page 35 of Book 8 of Maps, all in the office of the County Recorder of Santa Cruz County, State of California. Said Park and the land described in paragraph III of this Complaint were a part of the land so mapped and laid out, and said Park was and still is designated on each of said maps as a 'Park'; and the said F. A. Hihn thereupon and thereby dedicated the said property so designated, for park purposes for the benefit of the purchasers and owners and their successors in interest of all the other parcels of land so mapped and laid out, as an easement appurtenant to said parcels, including the parcel hereinabove in paragraph III particularly described. Said Park was and still is also designated as 'Park' on a Map entitled, 'Capitola, Adopted April 25, 1888, F. A. Hihn' and filed on page 13 of Book 10 of Maps in the office of the County Recorder of Santa Cruz County. Plaintiff succeeded to the title to said parcel of land described in paragraph III hereof through mesne conveyances from the said F. A. Hihn, the original deed in said chain of title from the said F. A. Hihn having been dated August 14, 1884, and recorded in Volume 42 of Deeds at page 105 in the office of the Recorder of Santa Cruz County. Said original deed and each of said mesne conveyances described said parcel as the same is described in paragraph III hereof, to wit: by reference to said original map dated May 1, 1884."

Paragraph V of the amended complaint alleges that defendants claim an interest adverse to plaintiff in said Park, but that they have no right, title or interest in plaintiff's perpetual easement for park purposes; that they claim such interest by virtue of a purported Decree in partition in action number 8820, entitled "Bay Head Land Company, a corporation, Plaintiff vs. E. J. Fay, County of Santa Cruz, and, also all persons unknown who have or claim any interest in or lien upon the real property herein described, Defendants."

Paragraph VI alleges that the Bay Head Land Company as plaintiff commenced said action number 8820 on or about June 15, 1922, filing a complaint in partition. Notice of pendency of action was filed thereafter. The Interlocutory Decree in Partition adjudged that "no persons other than the said plaintiff (Land Company) and the said defendant, E. J. Fay, has or have any interest in said property, as owners, or otherwise." The final decree declared that the Land Company was the owner of said property "in fee simple absolute, and that no other person has any right, title, or interest in or to the same, or any part thereof." Included in the property which was made the subject of action 8820 was the parcel of property hereinbefore referred to as "Park".

The complaint then charges that the interlocutory and final decrees in action 8820 were void and of no effect as to appellant by reason of these facts:

(1) Florence Riehl Vaghts was the owner of the real property described above as Lot No. 18 in Block "M" of Camp Capitola as designated on the recorded map of May 1, 1884, in open and notorious possession thereof occupying a dwelling house thereon, and was likewise the owner of a perpetual easement in said Park, and she throughout said period openly and notoriously used and enjoyed said Park. Her ownership of said easement was apparent to all persons by reason of her recorded deed, by reason of the recorded maps previously referred to, and by reason of her occupancy, use or enjoyment of said property and said easement. Her identity and whereabouts was at all times known to the Land Company. Throughout said period the Park was used and enjoyed as a Park by other persons who then owned and occupied other parcels delineated upon the maps hereinabove referred to, and it was commonly known and reputed to be a Park in and about the community of Capitola.

(2) Florence Riehl Vaghts was not made a party to said action, nor were her successors in interest, no summons or complaint was served upon them, and none of them had or were given actual knowledge of the action, nor did they make any appearance therein.

(3) None of the proceedings in action 8820 was notice to Florence Riehl Vaghts or her successors in interest, because in all proceedings the property embraced was described by metes and bounds without reference to the aforesaid maps and without use of the word "Park" as such property was then commonly known in the community of Capitola. Neither at the time of the commencement of the action, nor thereafter, until the commencement of this action did the plaintiff in action 8820 take possession, use, or cause to be made any visible change in the Park inconsistent with appellant's easement or the easement of his predecessors in interest. No summons was ever posted upon the property of this appellant or upon said Park.

(4) The president of the Bay Head Land Company on behalf of said company, on June 27, 1922, subscribed and swore to an affidavit which stated that "all of the known defendants residing in the State of California have been served herein or have made written appearances herein." This affidavit was made for the purpose of inducing the court to believe that neither plaintiff nor any of its officers or agents had any knowledge of the right and easement of Florence Riehl Vaghts and others in said Park. An order for publication of summons was therefore made addressed to all persons unknown. Said affidavit was false in that said Land Company knew that the Park had been designated such upon each of the maps referred to above, that it had been dedicated as a Park by F. A. Hihn for the benefit of the owners of other lots shown upon said maps, that it was well and commonly known as a Park in the community of Capitola, and that Florence Riehl Vaghts and others owned and claimed an easement for park purposes in said Park.

(5) The Land Company alleged in the complaint in said action 8820 that defend-

ant E. J. Fay claimed some interest therein, that said Fay, who was one of the Land Company's employees, in fact never did have or claim any interest in said Park which was well known to said Land Company; that he filed a pretended answer which was unverified to the verified complaint. This answer was signed by Robert N. Borland, as attorney for Fay. Borland was an associate of and in the same office as Harry E. Monroe, attorney for the Land Company, and both of these attorneys knew that E. J. Fay had no interest nor claimed any interest in the Park. Fay's answer admitted all allegations of the complaint and prayed judgment to be entered as prayed for. A default judgment was then entered against defendants, including "all persons unknown", hence no adversary trial was ever had.

(6) All of these acts were done by the Land Company and its officers and agent to deceive the court, and procure the rendition of a judgment without an adversary proceeding and to conceal said proceeding from Florence Riehl Vaghts and her successors in interest and all other parties claiming an easement for park purposes in said Park, and to prevent them from appearing in said action.

The final paragraph of this count alleges that appellant herein first learned of the fraudulent acts and omissions of the Land Company and its officers and agents on or about October 1, 1949 when R. M. Wright, an attorney, communicated to him the fact of the judgment rendered in action 8820. Appellant promptly commenced an investigation which revealed the facts above recited, which his predecessors in the exercise of reasonable diligence could not and did not discover, because of the fact that ever since the rendition of that judgment and until the commencement of this action the Park was used for park purposes without any visible change in its use and occupancy, that until the commencement of this action there had been no change in use inconsistent with appellant's easement for park purposes.

[1–3] Appellant contends that the acts of the Land Company, its officers and agents, in the partition and quiet title action in failing to serve appellant's predecessor, a known adverse claimant, constituted acts of extrinsic fraud. There can be no doubt that failure to serve a party who is known by the party quieting title to assert an adverse claim in certain property, is extrinsic fraud which will make the judgment subject to attack by the party kept in ignorance of the suit. United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93. That third persons deprived of their interests through judgments so obtained, such as heirs who are kept from receiving notice of probate proceedings in their ancestors' estates, may seek equitable relief against such judgment is well established. Purinton v. Dyson, 8 Cal.2d 322, 65 P.2d 777, 113 A.L.R. 1230; Zaremba v. Woods, 17 Cal.App.2d 309, 61 P.2d 976. The present case differs from those, however, in that appellant herein had no interest in the property at the time the judgment was rendered, but acquired the lot to which he claims the easement appurtenant some years later. The general rule is that the fact that there are grounds for equitable relief which could be asserted against a judgment by the grantor, will not give the grantees the right to such relief though the judgment is a cloud on his title. 31 Am.Jur. 632. The above rule was referred to in Bernhard v. Waring, 213 Cal. 175, 2 P.2d 32, but was interpreted there to mean that an assignment of a bare right to file a bill in equity for fraud committed upon the assignor will be held void as contrary to public policy. In that case title to certain property in San Francisco had been quieted by means of an "all persons" judgment. The owner of the property was known to the party bringing the action, and it was shown that he was not personally served, that notice was not posted on the property as was required in that type of proceeding, and that the description of the property included numerous other parcels in order that the owner would be deceived thereby. (In the present case it is alleged the description published was by metes and bounds including an area larger than and embracing the Park, and that the Park was not described as such, though it was so designated on the maps and so known in the community.) The property thereafter passed to the owner's son, who deeded it to his sister. It was held that she could have it set aside although eleven years had elapsed since the judgment. The court there stated that it could not be presumed that a person who had no notice that judgment had been obtained against him would be satisfied with such inequitable proceeding, and his successors in interest would be in a position to maintain the action. And, see, Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959.

[4] The situation in the above case is somewhat similar to that alleged herein. It is here alleged that appellant's predecessor in title could not in the exercise of reasonable diligence have discovered the acts and omissions of defendants, since there was no visible change in the use or occupation of the Park since the making and entry of the judgment, nor up to the time of the commencement of this action, and that she did not discover these facts. The recording of the lis pendens and the published summons would not be notice as to her when she was not served in the action.

The foregoing is based, of course, on the assumption that appellant's predecessor was a known defendant. If she were an unknown defendant, publication of the summons would be sufficient notice to her, and in such case this action would clearly be barred by the statute of limitations. Although the complaint is subject to numerous objections throughout for ambiguities and uncertainties, it is stated as fact that affiant who made the affidavit for publication of summons knew it to be false for he knew that the Park was so designated on the maps earlier referred to, that he knew it had been dedicated as a Park for the benefit of the owners of other lots shown upon said maps, that he knew that the Park was commonly known as such in the community, and that Florence Riehl Vaghts and others owned and claimed an easement for park purposes. It is also alleged that continuously throughout said period the identity and whereabouts of Florence Riehl Vaghts was known to said Land Company. The statement that the Land Company officers knew that she owned and claimed an easement for park purposes certainly entitled her to service as a known defendant if such statement is true.

[5] It is claimed by respondents that no cause of action is stated as to defendants Scott and their brief states that they are innocent transferees of the property. The complaint discloses nothing as to the status or interest of the defendants Scott other than that they claim an interest by virtue of the purported decree in partition. It is alleged that the Scotts took through the partition judgment. It is not alleged that they had notice of the fraud, or that they did not. If they were bona fide purchasers for value, according to all the authorities, appellant would have no case. It would therefore seem to follow, that in order to meet the requirement of alleging a meritorious case against the Scotts, that appellant should be required to allege what interest the Scotts claim and that they did not acquire this interest as bona fide purchasers for value. In Newport v. Hatton, 195 Cal. 132, 149, 231 P. 987, a complaint was held sufficient to state a cause of action where it was alleged that defendants took with notice of the fraud, and that this precluded the idea of the defendants being innocent purchasers for value. It would accordingly seem to be true in this case that appellant has not sufficiently alleged a meritorious claim against the Scotts, since he has not affirmatively alleged that the interest of the Scotts is not that of bona fide purchasers for value. See also Newport v. Hatton, 207 Cal. 515, 279 P. 134; Marlenee v. Brown, 21 Cal.2d 668, 134 P.2d 770.

[6] Respondents contend that appellant took with knowledge that title in the Park easement had been lost by reason of the partition judgment and therefore suffered no loss by reason of the claimed fraud. Means of obtaining knowledge is held to be equivalent to knowledge in the absence of circumstances preventing investigation. Crabbe v. White, 113 Cal.App.2d 356, 248 P.2d 193; Wheaton v. Nolan, 3 Cal.App.2d 401, 403, 39 P.2d 457; Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268. If due diligence required appellant to search the records on the Park as well as those in

the chain of title on the property he purchased and to which he claimed this easement was appurtenant, then, of course, he would have no claim to equitable relief. It is to be noted that while the complaint states that upon receiving the communication in October 1949, regarding the judgment in partition, he promptly investigated and discovered the falsity of the matters previously set forth, *his predecessors in interest* did not and could not in the exercise of reasonable diligence have discovered these facts. There is no allegation that appellant could not have earlier discovered them. However, the facts alleged show that there was no notice by any change in use of the Park area prior to the time appellant received the actual knowledge of the judgment which would have put him on inquiry.

[7] If the right to use of the Park could be proved to be an easement appurtenant to appellant's land it would pass with that land, and appellant would not be bound by constructive notice of instruments filed against the "Park" as depriving his predecessor of her easement, since that would be outside of appellant's chain of title. There is no showing on the face of the complaint that appellant and defendants had a common grantor. See, Bothin v. California Title Ins. & Trust Co., 153 Cal. 718, 96 P. 500; City of Los Angeles v. Morgan, 105 Cal.App.2d 726, 733, 234 P.2d 319.

[8, 9] It is argued that appellant is guilty of laches because the judgment was rendered in 1924 and this suit was not filed until March 29, 1950. But appellant's predecessor had no means of knowing of the judgment, and the discovery of what had transpired first became apparent in October, 1949. Appellant purchased in 1948. If it could be said that he would be charged with knowledge of these facts from the date of the purchase, the statute of limitations pertaining to fraud would not have run at the time this action was commenced. And laches depends not alone on passage of time, but there must be a showing of resulting prejudice. Allen v. California Mut. Bldg. & Loan Ass'n, 22 Cal.2d 474, 488, 139 P.2d 321; Carlson v. Lindauer, 119 Cal. App.2d 292, 309, 259 P.2d 925. The delay after ascertaining knowledge of the facts must result in damage to the other party. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 735, 146 P.2d 673, 151 A.L.R. 1062. Laches is not sufficiently apparent from the face of the complaint to be raised by demurrer. There are no allegations which show that innocent purchasers for value have succeeded to the Park property. No damage to any defendants appears on the face of the complaint. See, Neet v. Holmes, 25 Cal.2d 447, 460, 154 P.2d 854; Zakaessian v. Zakaessian, 70 Cal.App.2d 721, 725, 161 P.2d 677.

[10–12] Respondent maintains that the complaint does not sufficiently show that an easement appurtenant was created, stating that the mere allegation that the filing of the map by Hihn, the owner, in 1884, created an easement in the area designated "Park" which was appurtenant to all the other lots, and that the word "Park" alone is not sufficient to create an easement, citing Stover v. Steffey, 115 Md. 524, 81 A. 33, 37 L.R.A.,N.S., 856. Respondent says that there are no allegations that Hihn sold any other lots or that he advertised using the "Park" as an inducement to purchasers, or that there was any plan of development other than that the large tract of land was subdivided into streets, lots, alleys and parks, and that these are common requisites of proof of the intention of the owner. Whether such an easement is conveyed must be determined from all the circumstances existing at the time of the original deed from the owner who filed the map. But these, as respondents have said, are items of proof. It has been held that an allegation that plaintiff is owner of a described right of way or other easement over defendant's land and that it is appurtenant to plaintiff's property is sufficient against a general demurrer, and that such allegation is not a conclusion to be ignored on testing the complaint. Roth v. Cottrell, 112 Cal.App.2d 621, 246 P.2d 958. Appellant here has alleged ownership of such an easement, and has alleged the intention of the original owner to create such an easement, and has further shown that the property in which the park use is claimed was not merely designated as "Park" on a map but was subsequently used as a park and was such at the commencement of this action. It is argued that in this state decisions have been confined to establishment of easements appurtenant in rights of way shown on maps where such ways have been necessary or convenient for ingress and egress, Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L.R.A.,N.S., 1024, except where a public dedication has been shown. Archer v. Salinas City, 93 Cal. 43, 28 P. 839, 16 L.R.A. 145. It was said in Fristoe v. Drapeau, 35 Cal.2d 5, 215 P.2d 729, that the purpose of implied easements is to give effect to actual intent of the parties. Section 806, Civil Code, provides that where a grant is implied its terms must be inferred from all the circumstances of the case. Recent cases tend to enforce equitable servitude in favor of parties buying in reliance on a subdivision map where streets and playgrounds are set forth. See, Bradley v. Frazier Park Playgrounds, 110 Cal. App.2d 436, 242 P.2d 958. It is true that the law does not favor implication of easements, but effect must be given to the intent as shown by all the facts and circumstances. The complaint therefore sufficiently alleged ownership of an easement in the Park.

The second count of the complaint alleges that the property described in the first count as "Park" was irrevocably dedicated to the public for park purposes and that the public has a perpetual easement for such purposes.

[13, 14] The county was a named defendant in the partition action, and there is no claim that the county was not served. Since the judgment is regular on its face, and no fraud is alleged in regard to the county, it must be assumed that no dedication of a public park was found to exist. The county has control of parks within its boundaries. Gov't.Code, §§ 25,550 to 25,562. Appellant cannot sue on behalf of the county unless he has shown a demand upon the Board of Supervisors to act in the matter, or has made a showing that a demand would be useless, as control of litigation to which the county is party is in the Board of Supervisors. See Briare v. Matthews, 202 Cal. 1, 258 P. 939. As the county had service of notice in the partition suit in 1924, any cause of action asserted on its behalf would be barred by the statute of limitations. Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422.

[15] Since this count shows that because of the judgment rendered against the county that it had no interest (paragraph VI of count I which is incorporated sets this forth) public dedication is therefore negatived. While it is true as appellant says that a person owning property abutting on streets or highways has sufficient property interest to maintain a suit to enforce his right to the use of such highway, if it be assumed that the court would thus enforce, by injunction, rights established in a park area, there is no showing that such right is threatened to be cut off but rather a continued use as a park is alleged.

[16] Respondent maintains that the regularity of the partition judgment on its face has been established by the judgment in Pieper v. Bay Head Land Company, and its action affirmed in that case by the Supreme Court in Action No. 12390. No opinion was ever rendered in that case, as the affirmance was entered on motion of the parties. It was in effect similar to a stipulation that judgment be affirmed. One of the parties to that action appears to be the same as one of the parties herein, but it is clearly a separate case. Judicial notice is limited to proceedings in the same case. 18 Cal.Jur.2d 472, sec. 53.

[17] It is our view that the complaint is sufficient as against a general demurrer as far as the defendants Bay Head Land Company and E. J. Fay are concerned but is defective as to the defendants Scott. The trial court therefore abused its discretion in not granting leave to amend. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358.

Judgment based on order sustaining demurrer without leave to amend reversed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

140 Cal.App.2d 826

WILLYS OF MARIN COMPANY, Russell Farmer, Josie Farmer, Cecil Norton and Theresa Norton, Plaintiffs and Appellants,

v.

Columbus PIERCE, Angela Pierce et al., Defendants and Respondents.

Columbus L. PIERCE and Angela C. Pierce, Plaintiffs and Respondents,

v.

Russell L. FARMER, Josie M. Farmer, Cecil B. Norton, Theresa Norton et al.,

Defendants and Appellants.

No. 16717.

District Court of Appeal, First District, Division 1, California.

April 17, 1956.

Rehearing Denied May 17, 1956.

Lessors' unlawful detainer action and lessees' declaratory relief action were consolidated for trial. The Superior Court, Marin County, Thomas F. Keating, J., rendered judgment adverse to the lessees, and they appealed. The District Court of Appeal, Agee, J. pro tem., held, inter alia, that Code of Civil Procedure section making statutory remedy exclusive method for enforcement of rights secured by mortgage did not render remedy of unlawful detainer unavailable to lessors alleging that rent was owing for four months subsequent to date when sale was had under deed of trust executed by lessees for purpose of securing performance of lease.

Affirmed.

1. Appeal and Error 🔑**907(2)**

In absence of reporter's transcript, it would have to be assumed that findings were supported by sufficient evidence.

2. Landlord and Tenant 🔑**290(2)**

Code of Civil Procedure section making statutory remedy exclusive method for enforcement of rights secured by mortgage did not render remedy of unlawful detainer unavailable to lessors alleging that rent was owing for four months subsequent to date when sale was had under deed of trust executed by lessees for purpose of securing performance of lease. West's Ann.Code Civ.Proc. § 726.

3. Forcible Entry and Detainer 🔑**6(2)**

Unlawful detainer action is one for possession, and money judgment is mere incident. West's Ann.Code Civ.Proc. § 1161.

4. Landlord and Tenant 🔑**20**

A "lease" is an agreement whereby relation of landlord and tenant is created.

See publication Words and Phrases, for other judicial constructions and definitions of "Lease".

5. Mortgages 🔑**375**

Code of Civil Procedure subsection, prohibiting deficiency judgment upon note secured by deed of trust or mortgage upon real property when real property has been sold under power of sale, does not apply to obligations other than promissory notes. West's Ann.Civ.Code, § 3266; West's Ann. Code Civ.Proc. §§ 580a, 580d.

6. Mortgages 🔑**375**

Unlawful detainer action occasioned by lessees' alleged failure to pay rent during four months following sale under trust deed given to secure performance of a lease was not an action to recover a deficiency, subject to statutory provisions relative to such actions. West's Ann.Code Civ.Proc. §§ 580a, 580d, 1161.

7. Mortgages 🔑**378**

Price obtained for property at public sale under deed of trust was competent, though not conclusive, evidence of its value.

8. Landlord and Tenant 🔑**291(16)**

In unlawful detainer action, brought by lessors contending that four months' unpaid rental had accrued since date of sale under deed of trust given to secure performance of lease, trial court's finding, that lessees had paid no rent whatever for use or possession of any portion of premises during the four month period, was in effect a holding that there had been no money remaining, after satisfaction of past due rents and expenses of deed of trust sale, to be credited against rentals thereafter accruing.

◆

Carl B. Shapiro, Fairfax, for appellants.

Gardiner, Riede & Elliott, San Rafael, for respondents.

AGEE, Justice pro tem.

[1] Appellants appeal from judgments against them in two actions which by stipulation were consolidated for trial. There is no reporter's transcript and the record as disclosed by the clerk's transcript is relied upon herein for the facts. In the absence of such reporter's transcript, it must be assumed that the findings are supported by sufficient evidence. Shuken v. Cohen, 179 Cal. 279, 283, 176 P. 447; In re Estate of Stevens, 27 Cal.2d 108, 116, 162 P.2d 918.

On September 28, 1952, respondents (husband and wife) leased a garage building to appellants for a period of three years, commencing on October 1, 1952. The lease provided for a total rental of $19,800, payable at $450 per month for the first year, $550 per month for the second year, and $650 per month for the third year. The monthly payments were payable in advance on the first day of each month. As partial security, two of the appellants executed a deed of trust on real property they owned which named respondent husband as beneficiary. This deed of trust recited that its purpose was to secure the performance of the lease. It provided that "Upon default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary."

On January 26, 1954, after default in payment of rent, respondents caused the real property to be sold under the power of sale provisions of the deed of trust. The amount of rent then due and the proceeds realized on the sale do not appear in the record. However, the findings in the declaratory relief action, hereinafter mentioned, recite that the sale held on January 26, 1954, "was for the limited and specific purpose of satisfying the installments of rent accrued and due prior to said date, and such sale did not purport to be and was not for the purpose of satisfying any installment of rent accrued or due subsequent to January 26, 1954." In other words, respondents did not exercise their option to declare all of the rentals called for in the lease due and payable.

On March 8, 1954, appellants filed an action against respondents for declaratory relief, alleging that there was a dispute between the parties as to whether the sale under the deed of trust had extinguished any obligation to pay rent after January, 1954.

On May 13, 1954, respondents served appellants with a notice to pay rent or quit. The notice recited that rent had been paid through January, 1954, but that no rentals had been paid since, and that four months' unpaid rental had accrued, amounting to a total of $2,200.

On May 18, 1954, respondents filed an unlawful detainer action against appellants and, as before stated, the two actions were consolidated for trial pursuant to stipulation. In the unlawful detainer action, the judgment gave respondents a writ of possession and rent and damages for the period from February 1, 1954, through August, 1954, in the total sum of $3,850. The judgment held that respondents were not precluded from bringing the unlawful detainer action by reason of the trustee's sale or any of the provisions of sections 726, 580a or 580d of the Code of Civil Procedure. The judgment in the declaratory relief action stated that the trustee's sale on January 26, 1954, did not satisfy or discharge any installment of rent accruing under the lease subsequent to said sale and that appellants were liable for the rent accruing on and after February 1, 1954.

[2] Appellants first argue that the remedy of unlawful detainer was not available to respondents because of section 726 of the Code of Civil Procedure, which provides: "There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter." Respondents reply that at the time of the commencement of the unlawful detainer action there was no longer any mortgage in existence, the same having been extinguished by the trustee's sale on January 26, 1954. In J. I. Case T. M. Co. v. Copren Bros., 32 Cal. App. 194, 197, 162 P. 647, 649, the court said: "So in this case, the property having

been sold by the plaintiff acting under the written authorization of the defendants and having ceased to be security for any part of the balance due, the notes were not secured by a mortgage at the time the suit was brought, and section 726 has no application to the situation." In Merced Security Sav. Bank v. Casaccia, 103 Cal. 641, 644, 37 P. 648, 649, where a collateral security was exhausted before seeking to foreclose the primary mortgage, the court said: "The obvious purpose of the statute [Code Civ. Proc. § 726] is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action."

Respondents also point out that an unlawful detainer action does not come within the purview of section 726 of the Code of Civil Procedure, citing Toplitz v. Standard Co., 25 Cal.App. 575, 143 P. 52, and Ashcroft Estate Co. v. Nelson, 26 Cal.App. 400, 147 P. 101. Both of these cases so hold. In the Toplitz case, supra, 25 Cal. App. at page 576, 143 P. at page 52, the court said: "Unlawful detainer is primarily a possessory action, which cannot be defeated or delayed by the fact that the landlord has taken security for his rent, without destroying the manifest design of the Legislature (Code Civ.Proc., § 1161) to provide a summary remedy for the recovery of the possession of the premises withheld by a tenant in violation of the covenants of a lease or other agreement. Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease, * * * *but in no sense is an action of unlawful detainer one of debt. Consequently it cannot be said that the present action is one for the recovery of a debt or the enforcement of a right secured by the mortgage in controversy.*" (Emphasis added.)

Appellants argue that respondents' primary purpose in the unlawful detainer action was to recover unpaid rents, not possession, and that the reasoning of the Toplitz and Ashcroft cases therefore does not apply. There is nothing in the record to justify this conclusion. It is true that the notice to quit served on appellants by respondents did give the former the alternative of paying such rents or giving up possession. But respondents were required by law, Code Civ.Proc. § 1161(2), to give such alternative when the breach of the lease is based upon failure to pay rent.

[3–5] Appellants state (and respondents agree) that the deed of trust was security for the *whole* obligation under the lease, to wit, payment of rentals totaling $19,800, in monthly installments. Therefore, appellants continue, any action which seeks a recovery for any installments accruing *after* the trustee's sale in January, 1954, is in effect an attempt to recover a deficiency judgment. Section 580a of the Code of Civil Procedure provides in part as follows: "Whenever a money judgment is sought for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security, following the exercise of the power of sale in such deed of trust or mortgage, the plaintiff shall set forth in his complaint the entire amount of the indebtedness which was secured by said deed of trust or mortgage at the time of sale, the amount for which such real property or interest therein was sold and the fair market value thereof at the date of sale and the date of such sale. * * * The court may render judgment for not more than the amount by which the entire amount of the indebtedness due at the time of sale exceeded the fair market value of the real property or interest therein sold at the time of sale * * *. Any such action must be brought within three months of the time of sale under such deed of trust or mortgage." Respondents contend that they do not have to comply with this section. They again point out that an unlawful detainer action is not one for a "money judgment." It is a statutory action for possession and the money judgment is a mere incident. Toplitz v. Standard Co., and Ashcroft Estate Co. v. Nelson, supra. Section 1161 of the Code of Civil Procedure provides for an unlawful detainer action without limiting it to cases where there is no security. Section 1174 of the Code of Civil Procedure provides for judgment *"for the restitution of the premises"* and then goes on to provide incidentally that the court "shall *also* assess the damages occasioned to the plaintiff by any * * * unlawful detainer, * * * and find the amount of any rent due * * *." (Emphasis added.)

Appellants also argue that section 580d of the Code of Civil Procedure precludes the relief obtained by respondents. This section provides: "No judgment shall be rendered for any deficiency upon a *note* secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust." (Emphasis added.) In addition to what has already been said about an unlawful detainer action not being an action to recover a deficiency, respondents point out the difference between a lease and a note. "A lease, as ordinarily understood, is an agreement whereby the relation of landlord and tenant is created." Stone v. City of Los Angeles, 114 Cal.App. 192, 198, 299 P. 838, 840. Section 3266 of the Civil Code defines "note" as meaning a "negotiable promissory note." In 1933, when section 580a was first enacted, the Legislature used the broad term "obligation." As was said in Schwartz v. California Claim Service, 52 Cal.App.2d 47, 54, 125 P.2d 883, 887: "'Obligation' is a word of broad meaning * * *." In 1940, when section 580d was enacted, the limited term "note" was used. It seems obvious that section 580d does not apply to obligations other than promissory notes.

Appellants cite Brown v. Jensen, 41 Cal. 2d 193, 259 P.2d 425, and Freedland v. Greco, 1955, 45 Cal.2d 462, 289 P.2d 463. Both of these decisions involved notes secured by purchase price deeds of trust. In discussing section 580d in the Freedland case, the Supreme Court said, 45 Cal. 2d at page 468, 289 P.2d at page 466: "While other sections of the Code of Civil Procedure which deal with deficiency judgments, Code Civ.Proc. §§ 726, 580a 580b, refer to 'debts,' 'obligations,' or 'contracts' secured by a trust deed may be broader than the word 'note' used in section 580d, the fact remains that *here we have a note* * * *." (Emphasis added.)

[6, 7] Lastly, appellants argue that the deed of trust was in the nature of a deposit to secure the payment of rent; that if there was no breach of the lease, the deposit was to be returned, i. e., the real property was to be reconveyed; that if there was a breach of the lease by failure to pay rent, the question of the value of the deposit becomes important in order to determine to what extent rent, both past and future, had been paid by what appellants term the landlord's "appropriation" (foreclosure) of the "deposit" (deed of trust).

Appellants point out that if the deposit had been a sum of money, the landlord would be entitled to appropriate only so much of it as would be enough to cure the breach and that respondents, having taken no steps to appraise the deposit, should be required to treat the security as equivalent in value to the *total* amount of rent which it secured. This being so, appellants conclude that the foreclosure effected payment of all rent, future as well as past. The record is silent as to the amount of rent due at the time of the trustee's sale and as to the amount bid at such sale. The price obtained for property at a public sale is competent, though not conclusive, evidence of its value. (18 Cal.Jur.2d p. 625.) In the absence of any evidence to the contrary, this would seem to be a proper basis of evaluation. Appellants have never claimed that the sale was not held in accordance with the legal procedure required in foreclosing under a deed of trust. As previously stated, the trial court found that the sale was for the limited and specific purpose of satisfying rents due prior to the sale. If any money remained after satisfying these past due rents and the expenses of sale, appellants (as trustor) would have been entitled to it. And if respondents had not turned over to appellants any such remainder, appellants would certainly have been entitled to a credit to this extent on rentals accruing on and after February 1, 1954. On the contrary, the trial court's finding "that defendants [appellants] have paid no rent whatever for the use or possession of any portion of said premises on or subsequent to February 1, 1954," is in effect a holding that appellants had no such credit or off-set.

We conclude that both judgments should be affirmed, and it is so ordered.

PETERS, P. J., and BRAY, J., concur.

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140 Cal.App.2d 744

Matter of the ESTATE of Joseph F. NUNES, also known as J. F. Nunes, Deceased.

Joe E. NUNES, Appellant,

v.

Joe E. NUNES, Respondent.

Civ. 16682.

District Court of Appeal, First District, Division 1, California.

April 16, 1956.

Rehearing Denied May 16, 1956.

Hearing Denied June 6, 1956.

Proceeding upon petition to determine whether son of testator's half brother or testator's second cousin, who was usually referred to by testator as "my nephew", and who addressed testator as "uncle", was entitled to devise under will which contained latent ambiguity as to identity of the devisee. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment for second cousin, and son of half brother appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence was sufficient to sustain verdict in favor of testator's second cousin who was referred to by testator as "my nephew" and who addressed testator as "uncle" and who conducted his business under name used in will to describe devisee.

Judgment affirmed.

1. Wills 🔑489(2)

If there was latent ambiguity in will as to identity of devisee, extrinsic evidence was admissible to establish the identity.

2. Wills 🔑489(3)

Where there was latent ambiguity in will as to identity of devisee, testator's state of mind, at and prior to execution of will, toward person claiming to be such devisee was pertinent in proceeding to determine who was entitled to the devise.

3. Wills 🔑487(2)

In proceeding to determine who was entitled to devise under will which contained latent ambiguity as to identity of devisee, refusal of proffered evidence showing fraud by person claiming to be such devisee in such person's dealings with testator was proper in view of fact that question was not whether such person had in fact cheated testator but whether testator believed or knew that such person had.

4. Wills 🔑489(2)

Where testator devised interest in realty to named person and described such named person as testator's nephew, but son of testator's half brother and testator's second cousin, who was usually referred to by testator as "my nephew", and who usually addressed testator as "uncle", both had name given in will to the devisee, latent ambiguity as to identity of devisee existed.

5. Wills 🔑703

In proceeding to determine who was entitled to devise under will which had latent ambiguity as to identity of devisee, extrinsic evidence was sufficient to sustain verdict in favor of testator's second cousin who was referred to by testator as "my nephew", who addressed testator as "uncle", and who conducted his business under name used in will to describe devisee.

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Foley & Foley, by James W. Foley, San Jose, Machado & Machado, by John H. Machado, San Jose, for appellants.

Rankin, Oneal, Luckhardt, Center & Hall, by C. E. Luckhardt, Duncan Oneal, San Jose, for respondent.

AGEE, Justice pro tem.

The will of decedent devised "unto Joe E. Nunes, a nephew of mine, a one-quarter interest in my ranch * * *." Both appellant and respondent fitted this description of the devisee. Appellant is the son of a half brother of the decedent. Respondent is a second cousin of the decedent, but was usually referred to by the latter as "my nephew," and respondent addressed decedent as "uncle."

Appellant filed a petition to determine who was entitled to the devise. At the first trial, appellant obtained a directed verdict and judgment in his favor. This judgment was reversed on appeal upon the ground that there was a latent ambiguity in the will as to the identity of the devisee and that extrinsic evidence as to such identity was erroneously excluded. Estate of Nunes, 123 Cal.App.2d 150, 266 P.2d 574; hearing denied by Supreme Court.

[1] Respondent prevailed on the second trial, and this appeal followed. The first question is whether the proof establishes respondent's claim of latent ambiguity as to identity. If it does, extrinsic evidence is admissible. Estate of Nunes, supra. Many witnesses testified that decedent referred to respondent as "my nephew." Among these were a radio announcer, a nurse who cared for decedent, a fruit packer, a fruit canner, neighbors, old friends, a former tenant on decedent's ranch, a building contractor who had dealings with decedent, a woman who was raised from childhood by decedent and his wife, a former laborer who had worked on the ranch, an insurance broker who handled decedent's insurance, a retired police officer, and the lawyer who had handled decedent's legal affairs for many years and who drew the will in question.

Respondent conducted his business under the name "Joe E. Nunes"; he signed checks with that name and many of these checks had been seen by decedent; in fact, some of these checks were payable to decedent; respondent's mail box at the ranch where he lived carried that name; he signed a deed of trust in favor of decedent in that name; he made up tax returns in that name; his automobile registration certificates and other documents so designated him.

It will thus be seen that there is ample evidence to support a finding (implied by the verdict) that decedent identified respondent as "Joe E. Nunes, a nephew of mine."

On the other hand, appellant is a nephew of decedent without any dispute. However, he was best known as Joseph Nunes or Joseph E. Nunes. At the trial he testified that his name was "Joseph E. Nunes" and that he did most of his work under this name. His birth certificate named him as "Joseph." His trucks had "Joseph E. Nunes" printed on them, his mail box carried that name, and his radial trucking permit was issued in that name. His authorized bank signature and his telephone listing were in that name.

The foregoing is by no means an exhaustive summary of the evidence on identity. As was held on the prior appeal, "Joseph" and "Joe" are not necessarily the same name and the word "nephew" does not necessarily describe a legal blood relationship.

Evidence contrary to that favoring respondent is not set out herein because it simply raised a conflict for the trier of facts to determine, which conflict was determined in favor of respondent.

On the previous trial there was an offer of proof made on behalf of respondent herein which included an offer to prove that in Portugal, the native country of decedent, it is the common custom and practice to call a second cousin, nephew or uncle. No evidence of this was produced at the second trial. Appellant says that this court on the prior appeal "gave importance" to this offer and that "Had the Portuguese custom been proved, there may still be some basis to argue that additional explanatory evidence might be admitted." A reading of the prior decision shows that the custom was only a part of the evidence offered to establish the latent ambiguity and that the holding that such evidence could prove such ambiguity was not dependent upon this one part alone.

[2, 3] Appellant next complains of the refusal of proffered evidence showing fraud by respondent in his dealings with decedent. In determining whether respondent was the "Joe" described in the will by

decedent it was, of course, pertinent to determine his state of mind toward respondent at and prior to the execution of the will. Testimony on this issue, both favorable and unfavorable to respondent, was admitted at the trial. Three of appellant's witnesses testified that decedent had stated that respondent would not account to him for the ranch profits and was cheating him. Respondent made no objection to this line of testimony. Appellant then offered to prove that respondent had in fact been cheating decedent and that respondent had not paid over decedent's full share of the ranch operation. This offer of evidence was rejected on the ground that the question was not whether respondent had in fact cheated decedent but whether decedent believed or knew that he had. Appellant properly argues that if decedent had such a belief then it would be unlikely that respondent was the "Joe" he had intended to designate in his will. *But* the correctness of such belief is immaterial, and an inquiry into the accounting and tax records of the ranch's operations would open up a matter highly prejudicial to respondent if he had in fact defrauded the decedent. At the oral argument on this appeal appellant's counsel stated that they could only prove "one thing at a time" and the first thing was to prove the fraud. However, counsel admitted that proof of such fraud was immaterial unless decedent knew of it. Such claim of knowledge was not included in appellant's offer of proof. We think the trial court properly excluded the offer. In Avery v. Wiltsee, 177 Cal. 484, 487, 171 P. 95, 96, the court said: "Where a party seeks to introduce incompetent evidence, relevant, if at all, only because connected with other evidence already in the case, and admissible solely because of such connection, and where, if erroneously admitted, it would be prejudicial to one of the parties, and would have little, if any, proper weight with the jury, the trial court, if in doubt as to the sufficiency of the connection shown, should resolve the doubt in favor of the exclusion of the evidence, for the error in its exclusion, if any, would not be prejudicial to either party, while the error in its reception, if any, would be prejudicial to the party against whom it is offered."

[4, 5] Appellant concludes by arguing that the evidence is insufficient to sustain the verdict. From what has already been said herein, it is clear that (1) a latent ambiguity as to identity was established, (2) extrinsic evidence was therefore admissible to establish identity, and (3) such extrinsic evidence was amply sufficient to sustain the verdict. It would serve no useful purpose to summarize the testimony, covering over seven hundred pages of transcript, or comment on the seventy-four exhibits admitted in evidence.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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140 Cal.App.2d 854

G. A. PAOLI, Individually and as a member of Sugar Refinery Employees' Union, Crockett Local 20037, A. F. of L., a voluntary unincorporated association, and A. W. Newman, Individually and as a member of Sugar Refinery Employees' Union, Crockett Local 20037, A. F. of L., a voluntary unincorporated association, appearing individually and in a representative capacity for and on behalf of said Crockett Local 20037 and all of the members thereof, Plaintiffs and Respondents,

v.

CALIFORNIA AND HAWAIIAN SUGAR REFINING CORPORATION, Limited, a corporation, Defendant and Appellant.

No. 16720.

District Court of Appeal, First District,
Division 1, California.
April 18, 1956.

Action in behalf of union against employer, for damages and injunctive relief for breach of collective bargaining agreement. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., rendered judgment denying damages but granting injunctive relief. Defendant appealed. The District Court of Appeal, Bray, J., held that where action involved contract which had terminated before court entered judgment granting injunctive relief, in view of finding that plaintiff had not suffered damage by breach, judgment would be reversed as based on issues which had become moot.

Judgment appealed from reversed.

1. Appeal and Error ⚷123

Where memorandum order, finding that employer had breached collective bargaining agreement with union, recited that plaintiffs' claim for injunctive relief would be granted and that it would be order of court that plaintiffs have such relief, and order set case for trial on question of damages, order presaged subsequent entry of judgment, and was not itself a final, appealable order, nor sufficient basis for issuance of injunction.

2. Action ⚷6

The same principle applies to actions which become moot before judgment as to appeals which have become moot.

3. Action ⚷6

Though case may originally present existing controversy, if, before decision, it has, through act of parties or other cause occurring after commencement of action, lost that essential character, it becomes a moot case, or question which will not be considered by court.

4. Action ⚷6

Judgment, entered after termination of collective bargaining agreement, declaring that employer had breached contract and award, became moot when court found that union was entitled to no damages for breach, and union failed to appeal therefrom; and whether or not case was one in which class action for damages lay would be immaterial upon question of judgment having become moot.

Brobeck, Phleger & Harrison, San Francisco, for appellant.

Charles P. Scully, San Francisco, for respondents.

BRAY, Justice.

Plaintiff Paoli and others, on behalf of Sugar Refinery Employees' Union, Crockett Local 20037, A. F. of L. (the collective bargaining representative), seeking damages and injunctive relief, sued defendant alleging a breach by defendant of a collective bargaining contract and of an arbitration award rendered thereunder. The trial court rendered judgment denying damages[1] but granting injunctive relief. Defendant appeals.

The relief granted was a declaration that defendant had breached the contract and the award and "That the plaintiffs are hereby entitled to injunctive relief to prevent the defendant, and all agents," etc., "from designating certain employees in the Engineering Department to work a reverse back to back schedule rather than a Monday through Friday schedule." The entire action is based upon a certain contract between the union and the defendant and an arbitrators' award rendered thereunder. The contract expired September 1, 1954.[2] August 13, 1954, a "memorandum order" hereafter discussed was filed. January 10, 1955, findings of fact and conclusions of law and the judgment were filed. The appeal was taken thereafter.

Question Presented.

While the action was primarily to obtain a declaration of the meaning of the arbitration award and damages, the question that is determinative of this appeal is the effect of the termination of the contract before the entry of judgment. While the injunction portion of the judgment does not limit its application to the term of the contract, under the pleadings and facts it could apply only during that term. Plaintiffs concede that "the injunctive relief could not be effective beyond such date"—"the date of termination of the contract * * *."

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[1] Plaintiffs have not appealed from the denial of damages.

[2] The trial court erroneously found September 30th to be the termination date. However, this error is unimportant as either date is prior to the date of the judgment, and, of course, of the taking of the appeal.

[1] Plaintiffs contend that the "memorandum order" was a final order granting injunctive relief, and having been filed before the contract expired was a valid order, and although any appeal therefrom would be moot, the judgment itself is valid. Defendant contends that the "memorandum order" was merely an opinion of the judge, or at most an interlocutory order; that the judgment is the only final order, and being made after the expiration of the contract, is void. An examination of the "memorandum order" discloses that it is not a final order. During the trial it was stipulated that before taking any evidence upon the question of damages the court should first try the issues raised concerning the arbitration award. While plaintiffs contend that in effect it was stipulated that there were to be two judgments, one on the legal questions arising from the award and one on damages, we have examined the transcript and find no such stipulation. The only one made was of the type found frequently in lawsuits,—that before considering the question of damages, the question of liability or lack of liability is first determined, but the judgment, when made, is to cover all issues. The "memorandum order" which was not entered in the minutes but merely filed, shows on its face that it was to be followed by another order. After reciting the court's view of the effect of the award viewed in the light of the contract, the court said: "The plaintiffs' claim for injunctive relief, therefore, must be granted; and *it will be the Order* of this Court that plaintiffs have such relief." (Emphasis added.) The order then stated that "in line with the *contingent* stipulation" (emphasis added) the case could be set down for trial on the question of damages. Obviously such "memorandum order" was not appealable, nor could a writ of injunction have been issued thereon.

While the judgment, in addition to granting injunctive relief, declared that defendant had breached the contract and award, such declaration in view of the finding of the court that none of the plaintiffs including the union had suffered "any monetary loss or damage" by reason of defendant's breach,[3] became moot after the expiration of the contract.[4]

All the issues and the judgment being geared to the life of the contract, and it having expired prior to the entry of judgment, there was no "real or substantial controversy between the parties to the suit * * *." See Bradley v. Voorsanger, 143 Cal. 214, 215, 76 P. 1031, 1032, dealing with an appeal which had become moot. In Consolidated Vultee Aircraft Corp. v. United Automobile, etc., Workers, 27 Cal.2d 859, at pages 862–863, 167 P.2d 725, at page 727, a case dealing with an appeal from a judgment confirming an award of arbitrators under a contract which had been superseded by another contract, the court quoted from Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293: "'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" See also Hidden Harbor v. American Federation of Musicians, 134 Cal.App.2d 399, 285 P.2d 691, which was an appeal from a preliminary injunction based upon a contract which terminated before the appeal could be heard. "When a controversy between parties to an appeal ceases to exist the appeal must be dismissed." 134 Cal.App.2d at page 402, 285 P.2d at page 693. "However convenient or desirable for either party that the questions mooted in the case be authoritatively

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[3] Defendant paid plaintiffs wages in accordance with the union's interpretation of the award, although disagreeing with that interpretation. The action did not purport to be brought for wages.

[4] Paoli sued individually, as a member of the union, and "in a representative capacity for and on behalf of said Crockett Local 20037 and all of the members thereof."

settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have originally presented such a controversy, if before the decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it." Southern Pac. Co. v. Eshelman, D.C., 227 F. 928, 932.

In Bradley v. Voorsanger, supra, 143 Cal. 214, 216, 76 P. 1031, 1032, quoting from Matter of Manning, 139 N.Y. 446, 34 N.E. 931, cited in Foster v. Smith, 115 Cal. 611, 47 P. 591, the court said: "'The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions * * *.'"

[2, 3] While the above cited cases were dealing with appeals which had become moot, the same principle would apply to actions which became moot before judgment. See 1 C.J.S., Actions, § 17(d), p. 1017: "* * * although a case may originally present an existing controversy, if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character it becomes a moot case or question which will not be considered by the court * * *." "It appearing to the court that no concrete matter in dispute between the parties remains for settlement, jurisdiction will not be retained to determine merely an incidental question of costs." State ex rel. Gregory v. Boyd, 1909, 172 Ind. 196, 87 N.E. 140; to the same effect Agee v. Cate, 1913, 180 Ala. 522, 61 So. 900; Postal Telegraph-Cable Co. v. City of Montgomery, 1915, 193 Ala. 234, 69 So. 428.

[4] It should be pointed out that the portion of the judgment declaring that defendant had breached the contract and award became moot when the court found that plaintiffs were entitled to no damages and plaintiffs failed to appeal therefrom. Whether as claimed by plaintiffs this is the type of case in which a class action for damages lies, or as claimed by defendant, does not lie, is immaterial upon the question of the judgment being moot. If a proper class action, the individual members of the union are barred by the judgment of no damages. If not a proper class action, in view of the showing that the defendant paid the employees entitled to the awards, the court would not be justified in determining a controversy that did not exist.

The judgment, except as to the portion denying damages from which no appeal is taken, is therefore moot and is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

140 Cal.App.2d 891

Helen WRIGHT, Plaintiff and Respondent,
v.
Floyd LOWE et al., Defendants,

George M. Dutch, Appellant.
Civ. 16664.

District Court of Appeal, First District,
Division 2, California.
April 19, 1956.

Action wherein the Superior Court, Santa Clara County, M. G. Del Mutolo, J., entered judgment allowing rescission of a contract of sale of real property and cancellation of a deed, and the defendant-purchaser appealed. The District Court of Appeal, Devine, J. pro tem., held that where vendor intended that there be no deduction from agreed price for amount of assessments against property whereas purchaser intended that assessments be deducted from agreed price, and ambiguous written agreement recited that purchaser should "assume" assessments and "pay balance in cash," there was a mutual mistake entitling vendor, who would receive nothing if purchaser's interpretation of agreement were given effect, to rescission.

Affirmed.

1. Vendor and Purchaser 🔑31

Where vendor intended that there be no deduction from agreed price for amount of assessments against property whereas purchaser intended that assessments be deducted from agreed price, and ambiguous written agreement recited that purchaser should "assume" assessments and "pay balance in cash", there was a mutual mistake entitling vendor, who would receive nothing if purchaser's interpretation of agreement were given effect, to rescission.

2. Brokers 🔑8(3)

In vendor's action for rescission of contract of sale of real property and cancellation of deed, evidence sustained finding that broker, who had been aware of vendor's mistake and had made fraudulent representation, had been purchaser's agent.

3. Brokers 🔑7, 94

Vendor's authorization to broker to sell real property for $10,000 would not authorize him to accept purchaser's offer to buy property for $12,200 less assessments (totalling $8,000) and loans (totalling $2,800) secured by deeds of trust on property; nor did such authorization make broker solely vendor's agent for bringing purchaser's new effort back to her.

4. Principal and Agent 🔑24

Agency generally is a question of fact.

5. Principal and Agent 🔑14(2)

An implied agency may arise from words and conduct of parties and circumstances of particular case.

6. Brokers 🔑7

Fact that broker's commission is paid by one party does not necessarily make him exclusive agent of that party.

7. Contracts 🔑100

Whether or not failure to read document is such negligence as will preclude rescission for mistake is ordinarily question of fact, and this is particularly true where failure to read is induced by reliance on misrepresentation of other party or his agent or agent for both parties.

8. Vendor and Purchaser 🔑31

Vendor's impression that assessments against property were not to be deducted from agreed purchase price in fixing sum due to her constituted, if mistaken, a mistake of fact, even though it derived from a written contract.

9. Brokers 🔑102, 105

Where broker was purchaser's agent, purchaser was chargeable with broker's acts and omissions, including broker's awareness of mistake by vendor and fraudulent misrepresentation by broker.

10. Cancellation of Instruments 🔑59

Court may require party to whom rescission is allowed to make any compensation to other which justice may require, imposing of conditions being largely within discretion of trial judge. West's Ann. Civ.Code, § 1689.

11. Vendor and Purchaser 🔑123

Under all circumstances disclosed in vendor's successful suit for rescission of contract of sale of real property, trial court acted well within its discretion in denying any recovery to purchaser, even though he had procured rezoning of property. West's Ann.Civ.Code, § 1689.

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Leon E. Shiells, John D. Jorgenson, Mack, Wilson & Jorgenson, Menlo Park, for appellant, George M. Dutch.

John J. Taheny, Jr., John J. Taheny, San Francisco, for respondent, Helen Wright.

DEVINE, Justice pro tem.

Judgment allowing rescission of a contract of sale of real property and cancellation of a deed having been rendered in favor of plaintiff, the vendor, defendant, the buyer, has appealed.

Plaintiff, Mrs. Wright, was the owner of several lots on which there were dilapidated houses, in Palo Alto. Street and sewer assessments had been levied against the property, and at the time of the sale in question, these amounted to almost $8,000. The assessments were a lien on the property, but they were payable over a term of many years, an instalment being collected annually with the taxes. Mrs. Wright testified she did not know of the assessments. There were deeds of trust on the property of which she was fully cognizant. These, at the time of the sale, secured bank loans of about $2,800.

In 1952, Mrs. Wright decided to sell the property. A broker's salesman named Brown heard of her wish, and obtained authorization to sell, at first at the price of $15,000 and later at $10,000. These authorizations were in writing, but the documents were not offered in evidence. Appellant Dutch, who is an investor in real estate, had been in contact with Brown about acquiring the property. Dutch offered $11,000 originally, but when he received a preliminary title report which disclosed that the bank loans and assessments would exceed that amount, he voluntarily increased his offer to $12,200, which was $700 above the price Brown had quoted to him. There is nothing in the record to show that Dutch personally used deception on plaintiff, nor that Lowe, the broker for whom Brown worked, did so.

The street and sanitary assessments are the crux of the case. Dutch, on his part, intended that the amount of these should be deducted from the purchase price. Mrs. Wright, as she testified and as the court believed, did not know of the assessments and had no idea that the large amount of these would be deducted from the purchase price.

It is necessary to describe the history of the transaction as it relates to the dealings of Mrs. Wright and Brown. She has had an education which did not go beyond the third grade. Brown asked her if she would be willing to accept $1,000 down and $100 a month, and she assented, telling Brown that she wished to make a down payment on a small apartment house. She does not find fault with the $12,200 price as such, but with the deduction of the amount of the assessments, a subject on which, she claims, she was mistaken. Brown testified that he explained to her that she would receive perhaps $500 or $600 less his commission which he reduced to $450. She denies that any such explanation was given to her, and the trial court accepted her testimony as true.

The results of the sale are startling. The total of assessments, bank loans, taxes, commission and closing expenses were such that Mrs. Wright received nothing at all for her property. Several charges which Dutch had agreed to pay were made against Mrs. Wright. She would have had $198 net to her, but a demand from a bank came in just before the closing, and was honored by the title company, so that Mrs. Wright's realization from the sale would have been an algebraic quantity of minus about $130. The deficiency, however, was cancelled by the title company, and Mrs. Wright was informed, when she asked for her check, that there was nothing owing to her.

[1] That there was copious evidence for the court to find that plaintiff made the sale under mistake is not disputed by the appellant. His contention is that the court allowed rescission on the ground of mutual mistake and that there was no mutuality of mistake because he, Dutch, was not mistaken about the terms of the contract.

This reasoning, however, must be based on the premise that the written contract between the parties entitled "deposit receipt", is in itself a clear expression of terms, which coincides with the subjective intent of Dutch. Actually, it is, as the trial court found it to be, an ambiguous instrument. It is not for one party, then, to assert that there was not mutuality of mistake simply because his intent agrees with what he thought the contract said. The written contract, in fact, not only admits of two interpretations, one favorable to the seller and one to the buyer, but it may well be that if the contract alone were before us on a question of construction rather than of rescission, the preferred interpretation would be against the buyer, especially because he dictated the terms. § 1654, Civil Code. In the contract, the buyer agrees to "assume" the assessments, and the property as delivered is to be free of assessment. To "assume" ordinarily means "to pay." 4 Words and Phrases, Assume, p. 585; Klegman v. Moyer, 91 Cal.App. 333, 339, 266 P. 1009. Dutch concedes that he did not intend to pay the assessments at the time, nor to accept any personal liability for them, but simply to let them remain. He concedes that he did not intend that the property should come to him, as the deposit slip says it shall, unencumbered by assessments. All this leads up to the question, what was meant by the word "balance," in the sentence of the contract reading: "Buyer agrees to assume existing loans and assessments and pay balance in cash"? The buyer would have it that this means he agreed to pay something which might have been expressed, but was not, like this: "the balance after deducting from the purchase price of $12,200.00 the sum of existing loans, and street and sanitary assessments." Dutch was mistaken in believing the written contract did so provide; Mrs. Wright was mistaken in having no understanding of the deduction, contemplated by Wright, of the amount of the assessments. The mistake was mutual and related to the same subject matter. The parties did not agree to the same thing in the same sense, and consent was not mutual. § 1580, Civil Code. To avoid an obvious injustice, rescission and cancellation properly were decreed. Moore v. Copp, 119 Cal. 429, 51 P. 630; Security T. & S. Bank v. Southern Railroad Co., 214 Cal. 81, 85, 3 P.2d 1015; Bland v. Kelley, 69 Cal.App.2d 116, 117, 158 P.2d 206.

[2–6] There was another document signed by the seller, namely, instructions to the title company, which we do not regard as curing the defect of the deposit receipt which was the basic instrument. The instructions are described following a consideration of the problem of agency. The question at this point is whose agent Brown was. The trial court found him to be the agent of Dutch for the purpose of presenting to Mrs. Wright his offer to buy. We believe this finding should be sustained.

Mrs. Wright's authorization to Brown was at most that of selling at the sum of $10,000. This would not authorize him to accept Dutch's offer with its deduction provisions, Holbrook v. McCarthy, 61 Cal. 216; Stemler v. Bass, 153 Cal. 791, 795, 96 P. 809, nor did it make Brown solely her agent for bringing Dutch's new effort back to her.

Agency generally is a question of fact. Brokaw v. Black-Foxe Military Institute, 37 Cal.2d 274, 278, 231 P.2d 816. An implied agency may arise from the words and conduct of the parties and the circumstances of the particular case. Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 779, 135 P.2d 569. It was Dutch who dictated the terms of his offer to Brown for communication to Mrs. Wright. None of these terms was at her suggestion. The whole plan by which Dutch intended, as he testified, to acquire the property for a low down payment, by the deductions above described, originated with Dutch. His was not an acceptance, but a new offer, and Brown was his agent in transmitting it.

The fact that a broker's commission is paid by one party does not necessarily make him the exclusive agent of that party. Stephens v. Ahrens, 179 Cal. 743, 746, 178 P. 863; Sands v. Eagle Oil & Refining Co., 83 Cal.App.2d 312, 318, 188 P.2d 782. In any event, it is almost fictitious to say that the seller paid the commission in this case. It was paid from the relatively small amount of $1,627.89 which was deposited by the buyer and of which the seller received nothing. Besides, in the buyer's instructions to the title company, he specifically authorized the use of his money to pay the broker's fee, and this authorization appears among the charges for which he was liable. Nor do we regard the statement signed by the seller, on the deposit receipt, referring to the broker as "employed by me" as controlling. These words are contained in that part of the document relating to the broker's commission, a part separated from that containing the terms of sale between the seller and the buyer.

[7–9] The trial court's finding, justified, as we find it to be, that Brown was Dutch's agent for the purpose of communicating his offer, has two effects. First, it makes more readily excusable Mrs. Wright's failure to understand or even to read, the deposit receipt or instructions to the title company, for Brown being Dutch's rather than her agent for the purpose of transmitting the offer, she is not chargeable, as appellant argues, with the faulty explanation by Brown. Whether or not failure to read a document is such negligence as to preclude relief is ordinarily a question of fact, and this is particularly true where the failure to read is induced by reliance on the misrepresentation of the other party or of his agent. Moore v. Copp, 119 Cal. 429, 51 P. 630; Security-First Nat. Bank v. Earp, 19 Cal.2d 774, 122 P.2d 900; C. I. T. Corporation v. Panac, 25 Cal.2d 547, 560, 154 P.2d 710, 160 A.L.R. 1285; Kantlehner v. Bisceglia, 102 Cal.App.2d 1, 3, 226 P.2d 636. The same rule holds where the agent is the agent for both parties. Feckenscher v. Gamble, 12 Cal.2d 482, 85 P.2d 885.

The second effect of the finding on agency is this: even if the mistake in the case were that of Mrs. Wright alone, as appellant contends it was, rescission would be allowable. That would be so even granting further a proposition of law which appellant contends for, but which we need not decide, that in cases of unilateral mistake, some consciousness of the mistake must exist in the mind of the party against whom the rescission is sought. That the deduction of assessments would be made was a mistake of fact, even though it derived from a written contract. Rued v. Cooper, 119 Cal. 463, 468, 51 P. 704.

There was not only awareness of the mistake by Brown but a fraudulent representation and, he being Dutch's agent at the time of negotiating Dutch's offer into acceptance by Mrs. Wright, Dutch is to be charged with Brown's acts and omissions. The mistake was a basic one, and to allow the contract to stand would be to confirm an injustice.

Under all the circumstances of the case, the judgment of rescission is to be affirmed whether the mistake was mutual or unilateral. § 1689, Civil Code; Moore v. Copp, supra; M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 701, 235 P.2d 7.

[10, 11] Finally, it is the contention of Dutch that if the judgment of rescission is allowed to stand, at least there should be reimbursement allowed him for his efforts in persuading the planning commission to rezone the property which, he claims, enhanced its value. He was allowed $275 for work he did in preparing maps. He was not allowed a share in the asserted increase in value because of the rezoning. The court may require the party to whom rescission is allowed to make any compensation to the other which justice may require. § 3408, Civil Code. No authority has been cited wherein increment in value because of the efforts of the party against whom rescission was had, was allowed; but assuming that it is permissible, the imposing of conditions is largely within the discretion of the trial judge. Utemark v. Samuel, 118 Cal.App.2d 313, 318, 257 P.2d 656. Considering all the circumstances of the case, the trial court acted well within its discretion, in denying compensation for the rezoning, whether such compensation was on the basis of increase in value or on the basis of effort to obtain the rezoning.

The judgment is affirmed.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

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140 Cal.App.2d 865

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Valentine Q. RODRIGUEZ, Defendant and Appellant.

Cr. 5551.

District Court of Appeal, Second District, Division 1, California.

April 18, 1956.

Defendant was convicted of unlawful possession of preparation of heroin. The Superior Court of Los Angeles County, H. Burton Noble, J., entered judgment, and defendant appealed from judgment and from order denying motion for new trial. The District Court of Appeal, White, P.

J., held that where police, while patroling district reputed to be frequented by peddlers and users of narcotics, were attracted to nervous mannerism of defendant, whose eyes were noted as pin pointed and reddish, and police observed piece of newspaper, wrapped to resemble bindle of narcotics, protruding from defendant's pants cuff as he alighted from police vehicle, police had reasonable cause for arrest of defendant; and search as incident to arrest, was reasonable, and justified admission in criminal trial of heroin capsules obtained as result of search.

Affirmed.

1. Arrest ⚿63(4)

Criminal Law ⚿238

To constitute reasonable or probable cause, to justify arrest or prosecution of person on criminal charge, there must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that person is guilty, within California and Federal Constitutional guarantees of freedom from unreasonable searches and seizures. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subd. 3; West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4.

2. Arrest ⚿63(4), 71

Criminal Law ⚿395

Where police, while patrolling district reputed to be frequented by peddlers and users of narcotics, were attracted to nervous mannerism of defendant, whose eyes were noted as pin pointed and reddish, and police observed piece of newspaper, wrapped to resemble bindle of narcotics, protruding from defendant's pants cuff as he alighted from police vehicle, police had reasonable cause for arrest of defendant; and search, as incident to arrest, was reasonable, and justified admission in criminal trial of heroin capsules obtained as result of search. West's Ann.Const. art. 1, § 19; U.S.C.A.Const. Amend. 4; West's Ann.Pen. Code, § 836, subd. 3; West's Ann.Health & Safety Code, § 11500.

Ellery E. Cuff, Public Defender, James L. McCormick, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an amended information filed by the District Attorney of Los Angeles County, defendant was accused of violating section 11500 of the State Health and Safety Code, in that he did unlawfully have in his possession a preparation of heroin. The amended information also charged a prior conviction of violating the aforesaid code section, a misdemeanor. Defendant pleaded not guilty and denied the prior conviction.

Trial by jury was waived and by stipulation, the case of the prosecution was submitted on the transcript of the testimony taken at the preliminary examination, both sides reserving the right to offer additional evidence, and subject to the reservation that defendant could object to the introduction into evidence of any testimony or exhibits contained in or referred to in the transcript of the preliminary hearing. Thereafter, the trial judge indicated for the record that he had read the entire transcript of the preliminary examination. The people then rested their case.

Defendant offered no evidence but interposed an objection to the introduction into evidence of People's Exhibit 1 (a quantity of heroin found on defendant's person). The objection was overruled and the evidence admitted. The court adjudged defendant guilty as charged and found the allegation of the prior conviction to be true. Motion for a new trial was denied and defendant was committed to the California Youth Authority. From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

The facts surrounding this prosecution are not in dispute and may be thus summarized:

On the morning of May 29, 1955, between 11:00 a. m. and 12:00 o'clock noon, officers Clarence L. Barlow and E. E. Rice of the Los Angeles Police Department were on radio car duty in the vicinity of First Street and Grand Avenue, and also between Olive and Court Streets, in the city of Los Angeles. Defendant was observed by the officers in the vicinity of Olive and Court Streets, where he was standing and looking over an excavation. Defendant started to walk toward the officers, hesitated a moment, and then proceeded in the direction of the police car. Prior to this time the officers had received no information about him. One of the officers testified that defendant "* * * became nervous and so I got out of the car and as the defendant approached us I asked him if I couldn't talk to him for a moment. And during the conversation with the defendant I noticed that his eyes seemed to be pin-pointed and I asked the defendant if he wouldn't sit in the police car while we carried the conversation on and he said he would."

Before placing the defendant in their automobile, the officers gave him a quick "frisk" for weapons. They then drove to First Street and Grand Avenue, where a police call box was located, and "ran a warrant on the defendant. It came back clear. There was no warrant. We told the defendant he could go." As the latter was leaving the vehicle, officer Barlow "noticed the newspaper sticking out of his (defendant's) left pants cuff". The officer ordered defendant to stop and took the newspaper from the pants cuff. Three capsules (People's Exhibit 1) containing heroin were inside the newspaper. The paper was folded over on both sides and rolled. Not more than one inch in length of the paper was showing and approximately a quarter, three-eighths of an inch was sticking out of the cuff. The defendant was questioned about the capsules. He stated that he had purchased them about one-half hour prior to that from a colored fellow on Main Street.

Officer Earl E. Rice, a Los Angeles policeman, attached to Central Division, radio car, testified he had been attached to Central Station about twenty-one months. That he had made about four narcotic arrests in that area. That the four arrests were made over a period of a year. That he was not working narcotics.

Overruling defense counsel's objection that no proper foundation was laid, the court permitted the officer to testify that "[i]t is an area that we have known users and pushers of narcotics." On cross-examination, the officer testified defendant's "eyes were reddish and they seemed small to me. Like I say, I didn't give them a close examination."; that "I can't say whether every individual has a different size of pin-point in their eyes but they will vary between normal condition and under the influence of alcohol or narcotics."; that he had never seen defendant's eyes before to know what was normal.

The officer further testified that he did not recall if any of the persons he had arrested on Bunkerhill resided in that area. That his opinion of the area was based upon his own experience and what other officers had told him.

The sole ground urged for a reversal is that the court erred in admitting into evidence People's Exhibit 1, consisting of the three capsules of heroin, for the reason that such evidence was obtained in violation of the Fourth Amendment to the Constitution of the United States, and Article I, section 19, of the Constitution of the State of California, guaranteeing to every person the right to be free of unreasonable searches and seizures; and was therefore, inadmissible under the exclusionary rule announced in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. In support of this contention appellant urges that under the foregoing facts and circumstances, the officers had no reasonable or probable cause for arresting and searching him, while respondent contends that any search or seizure occurring when the officer removed the newspaper containing the three heroin capsules from appellant's pants cuff, was an incidental search based upon probable cause for arrest.

Penal Code section 836, subdivision 3, provides that an officer may make an arrest without a warrant, "When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." And, if an arrest under the subdivision just mentioned was lawful, the search incidental thereto would not be unlawful merely because it preceded rather than followed the arrest. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People v. Martin, 45 Cal.2d 755, 290 P.2d 855.

[1] The courts are in substantial agreement as to what constitutes reasonable cause or probable cause such as will justify one in arresting or prosecuting another upon a criminal charge. We consider as a clear and comprehensive statement of the rule, that announced in People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, 801, as follows: "'There must be such a state of facts * * * as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.'"

[2] Applying this rule to the case now engaging our attention, we are persuaded that it must be held that the officers had reasonable cause to believe that a felony had been committed and that appellant was guilty thereof. The officers were patrolling a district reputed to be one frequented by "pushers", peddlers of narcotics, and users of narcotics. The mannerism of appellant attracted the attention of the officers; he appeared to be nervous. During the conversation with appellant, the officers noted that his eyes seemed "pin pointed and reddish" akin to one "under the influence of alcohol or narcotics". As appellant alighted from the police car, the officers observed a piece of newspaper protruding from appellant's left pants cuff, wrapped in such a way as to resemble, in the officers' opinion, a bindle of narcotics. When all of the foregoing facts and circumstances are considered together, they impress us as authorizing a lawful detention of appellant based upon "reasonable cause", and the search, as an incident to that arrest, was therefore reasonable and justified the admission of the evidence obtained as a result of the search. We have examined the cases of People v. Simon, 45 Cal.2d 645, 290 P.2d 531, and People v. Brown, 45 Cal.2d 640, 290 P.2d 528, relied upon by appellant, but find them easily distinguishable from the factual situation presented in the instant case.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and FOURT, JJ., concur.

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140 Cal.App.2d 907

Jeanette NEWMAN, Petitioner and Appellant,

v.

The BOARD OF CIVIL SERVICE COMMISSIONERS OF CITY OF LOS ANGELES et al., Respondents.

Civ. 21265.

District Court of Appeal, Second District, Division 2, California.

April 19, 1956.

Hearing Denied June 6, 1956.

Mandamus proceeding. From an order of the Superior Court of Los Angeles County, Arnold Praeger, J., denying an alternative writ, the petitioner appealed. The District Court of Appeal, Fox, J., held that mandamus petitioner, seeking restoration to her former civil service position in municipal police department, could not escape application of doctrine of laches by waiving portion of back salary and seeking to recover only such back salary as was fair and equitable.

Affirmed.

1. Municipal Corporations ⇨218(9)

Employee of public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights.

2. Municipal Corporations ⇨185(14)

Lack of funds was not sufficient excuse for delay in asserting right to be restored to former civil service position in municipal police department.

3. Mandamus ⚷143(2)

Mandamus petitioner seeking restoration to her former civil service position in municipal police department could not escape application of doctrine of laches by waiving portion of back salary and seeking to recover only such back salary as was fair and equitable.

4. Municipal Corporations ⚷185(8)

Where employee, discharged by chief of police, did not allege any facts showing bias or prejudice or unfairness, on part of department general manager appointed as hearing examiner by Civil Service Commission, and her charges were based solely on her conclusions, Commission was justified in directing such examiner to conduct hearing into cause of discharge.

5. Evidence ⚷83(2)

Where it did not appear that hearing into cause of petitioner's discharge by chief of police had not been conducted in manner required by law, presumption was that hearing officer and Civil Service Commission had properly performed their respective duties. West's Ann.Civ.Code, § 1963, subd. 15.

6. Administrative Law and Procedure ⚷303
Mandamus ⚷172

Determination of penalty to be imposed by administrative agency lies with agency and not with court, and courts could be of no assistance to mandamus petitioner with respect to penalty of discharge imposed upon petitioner, who had held civil service position in police department of city.

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Jeanette Newman, in pro. per.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., George William Adams, Deputy City Atty., Los Angeles, for respondents.

FOX, Justice.

By this mandate proceeding petitioner seeks restoration to her former civil service position as an Intermediate Clerk Stenographer in the Police Department of the city of Los Angeles. Upon the filing of her petition, the court denied an alternative writ. Petitioner appeals from this order.

On February 2, 1953, petitioner was discharged by the Chief of Police. In due course she was furnished the grounds for her discharge. Upon her request to the Civil Service Commission for a hearing thereon the commission appointed Joseph W. Hawthorne, General Manager of the department, as hearing examiner to conduct a hearing into the cause of petitioner's discharge. Petitioner requested the commission to disqualify Mr. Hawthorne as hearing examiner on the ground that his close official relationship to the administration of the Police Department and her previous contact with him caused her to believe he was prejudiced against her and would favor the administration of the Police Department and could not conduct a fair and impartial hearing. The commissioners refused to reconsider the appointment of Mr. Hawthorne as hearing examiner and instructed him to proceed with the hearing. Thereafter he conducted hearings on three separate days at which evidence was introduced by both sides. Upon the completion of these hearings the examiner prepared and submitted to the Civil Service Commission his report finding that six of the seven grounds stated for petitioner's discharge were established and recommending that her discharge be sustained.

On July 24, 1953, the commission considered the examiner's report, adopted it, and voted to sustain petitioner's discharge.

On October 5, 1953, petitioner filed a demand for reinstatement with the commission, which denied it on November 13 1953.

Petitioner filed this proceeding on February 8, 1955. This was more than 18 months after her discharge had been sustained and almost 15 months after her demand for reinstatement was denied.

[1] On the face of the petition we are met with the question of laches. The rule on this question was stated by this court in Hicks v. City of Los Angeles, 133 Cal.App. 2d 214, at page 219, 283 P.2d 1046, at page 1050, as follows: "'Considerations of public policy require that an employee of a

public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights.' Jones v. City of Los Angeles, 120 Cal.App.2d 858, 859, 861, 262 P.2d 37, 39; Campbell v. City of Los Angeles, 47 Cal. App.2d 310, 315, 117 P.2d 901. In Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 62 P.2d 1047, where there was a delay of nine months in filing suit, during which time plaintiff had attempted to obtain reinstatement to his position by negotiation, the court stated, 17 Cal.App.2d at page 680, 62 P.2d at page 1050: 'It is to be presumed that, where one has been dismissed from an active position in the public service, someone else has been chosen to take his place. The work has to be done and it has to be paid for.' [Citations.] In the Campbell case, supra, it is said 'Unless facts be alleged which constitute a sound excuse for a delay of 15 months, such delay in commencing the action is absolutely indefensible' and deprives 'petitioner of all rights to equitable consideration.' 47 Cal. App.2d at page 315, 117 P.2d at page 904." This rule was recently applied by this court in Corcoran v. City of Los Angeles, 136 Cal.App.2d 839, 289 P.2d 556, where the period of delay in filing suit was 19 months after plaintiff's discharge was sustained as against approximately 18½ months in the instant matter, and about 16 months after his demand for reinstatement was denied as against almost 15 months in the case at bar, 136 Cal.App.2d at page 845, 289 P.2d at page 560. In Kimberlin v. Los Angeles City High School Dist., 115 Cal. App.2d 459, 252 P.2d 344, petitioner was barred by laches where he had delayed 12 months in filing suit for reinstatement. Under these authorities it is clear that petitioner has not shown a basis for any relief in the absence of a satisfactory explanation of her delay in filing suit.

[2] Petitioner's excuse for not acting more expeditiously is lack of funds. This, however, is not a sufficient excuse for delay in asserting one's rights. The rule has been stated by the United States Supreme Court in Leggett v. Standard Oil Co., 149 U.S. 287, 294, 13 S.Ct. 902, 905, 37 L.Ed. 737, in the following language: "No sufficient reason is given for this delay in suing. It is sought to be excused on the ground of the plaintiff's poverty during this period; but in the case of Hayward v. [Eliot Nat.] Bank, 96 U.S. 611, 618 [24 L.Ed. 855], this court said that a party's poverty or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights." See, also, 19 Am. Jur., sec. 503, p. 349. Furthermore, upon petitioner's making a proper showing of her impecuniosity she was entitled to sue *in forma pauperis* and thus be relieved of court costs, 13 Cal.Jur. 246, sec. 27. Of course she was entitled to appear *in propria persona* in the trial court just as she appeared in such capacity on this appeal.

Petitioner seeks to avoid the effect of laches by praying for only such amount of back salary as would be fair and equitable and expressly waiving any claim in excess of such amount.

Since the work of the Police Department must go on, the presumption is that petitioner's position was promptly filled after her discharge. Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680, 62 P.2d 1047. She does not allege the contrary.

In United States ex rel. Arant v. Lane, 249 U.S. 367, 372, 39 S.Ct. 293, 294, 63 L. Ed. 650, it is pointed out that "When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified *the government service may be disturbed as little as possible* and that two salaries shall not be paid for a single service." (Italics added.)

In Corcoran v. City of Los Angeles, supra, 136 Cal.App.2d at page 842, 289 P.2d at page 558, this court said: "With respect to actions brought by discharged public officers and employees to obtain reinstatement, it has been uniformly held that they must act with the utmost diligence in asserting their rights." If unreasonable delay occurs, prejudice is presumed. Corcoran v. City of Los Angeles, supra. However, such presumption does not arise in every situation for often the delay in asserting a party's claim to reinstatement in a public employment is excusable. See Dresser v. City of Torrance, 140 Cal.App.2d 42, 294 P.2d 962.

In Atlantic City v. Civil Service Commission of New Jersey, 3 N.J.Super. 57, 65 A.2d 535, 537, a discharged employee attempted to avoid the consequences of laches by waiving his claim for compensation for the period between the date of his dismissal and the filing of his suit. In discussing this question the court stated: "This waiver should not nor does it warrant this court eliminating from our consideration the fact of Baratta's unwarranted inaction. In Marjon v. Altman, supra [120 N.J.L. 16, 197 A. 724], Mr. Justice Heher stated: 'Moreover, the long delay was clearly disadvantageous to the municipality, in that reinstatement would entail liability for double compensation, to say nothing of the *detriment that frequently flows from the uncertainty respecting the incumbent's status.*'" (Italics added.)

[3] Assuming, arguendo, petitioner has waived[1] and can waive effectively back salary, see Kimberlin v. Los Angeles City High School Dist., supra, 115 Cal.App.2d at page 465, 252 P.2d 344, she does not thereby entirely eliminate prejudice to the city by her undue delay in filing suit for reinstatement. If petitioner were reinstated in her old position her successor would naturally have to be displaced and no doubt reinstated in another position, thus displacing another employee. This disruptive process might well continue on down through the department. Such uncertainty is detrimental to employee morale and to the department's efficiency and effectiveness. The service to the public is thereby disturbed and consequently suffers. Atlantic City v. Civil Service Commission of New Jersey, supra; United States ex rel. Arant v. Lane, supra; Corcoran v. City of Los Angeles, supra; Kramer v. Board of Police Com'rs, 39 Cal.App. 396, 401, 179 P. 216. Under the principles of these cases, it is clear that by seeking to recover only such back salary as is fair and equitable petitioner has not eliminated the element of prejudice caused the city by her delay, and she cannot thus escape the application of the doctrine of laches.

[4] Petitioner argues that the commission should have replaced Mr. Hawthorne as hearing officer on the basis of her charges that he was biased and prejudiced against her and could not give her an impartial hearing. There is no merit in this point. She did not allege any facts showing bias or prejudice or unfairness on the part of Mr. Hawthorne. Her charges were based solely on her conclusions. In such circumstances, the commission was justified in directing Mr. Hawthorne to proceed with the hearing.

[5] Examination of the record fails to indicate that she did not have a fair hearing. Because of a conflict in the testimony between petitioner and her supervisor, the hearing examiner held that the evidence was insufficient to prove charge No. 4. In holding that another charge (No. 7) was established, the hearing officer nevertheless characterized it as "somewhat trivial." The record indicates that petitioner was given a full opportunity to present her case. It does not appear that the hearing was not conducted in the manner required by law. The presumption is, therefore, that the hearing officer and the commission properly performed their respective duties. Civ. Code, § 1963(15); Hackett v. Morse, 45 Cal.App. 788, 791, 188 P. 308.

To recite the evidence produced at the hearing would serve no useful purpose. Suffice it to say, there is substantial evidence to support all the findings of the hearing examiner with the exception of charge No. 4. These findings were reviewed and approved by the civil service commission.

[6] Petitioner contends that the penalty of discharge was unduly harsh and excessive. In this matter, however, it is "the established rule that the determination of

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[1] On July 27, 1953, petitioner filed a claim for salary with the City Clerk. It was denied by the City Council on November 18, 1953.

the penalty to be imposed by an administrative agency lies with the agency and not with the court." Black v. State Personnel Board, 136 Cal.App.2d 904, 289 P.2d 863, 867. Under this rule it is obvious that the courts can be of no assistance to petitioner with respect to the penalty imposed.

In her reply brief petitioner presents and discusses certain asserted facts that are not in the record. Under approved appellate procedure we, of course, cannot consider such matters.

The order is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

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140 Cal.App.2d 710

In the Matter of the ESTATE of Louise SCHNEIDER, Deceased.

Herbert BROWNELL, Jr., Attorney General, Appellant,

v.

Elise KILIAN, Petitioner and Respondent,

Anna Valentine Seibert and other German Beneficiaries, Respondents.

Civ. 21489.

District Court of Appeal, Second District, Division 2, California.

April 12, 1956.

Rehearing Denied May 7, 1956.

Hearing Denied June 6, 1956.

Proceeding by executrix for instructions respecting the distribution of the estate of the deceased. From an adverse judgment in the Superior Court, Los Angeles County, Roy L. Herndon, J., the Attorney General appeals. The District Court of Appeal, Moore, P. J., held that the interests of German Nationals under the will of the testatrix was properly seized by the alien property custodian and that the Superior Court improperly distributed to such nationals the interest that was bequeathed them by the testatrix.

Reversed.

1. Aliens 🔑10, 14

Under the statute providing for reciprocal inheritance by United States citizens and those of enemy nations, whether the conditions of the statute can be fulfilled is usually a question of fact. West's Ann. Prob.Code, § 259.

2. Aliens 🔑14

In proceeding for distribution of an estate of testatrix containing bequests for German enemy nationals, finding that at time of death of testatrix reciprocal rights with respect to inheritance existed between the citizens of the United States and Germany within the statute was supported by evidence. West's Ann.Prob.Code, § 259.

3. Wills 🔑723

Upon the death of testatrix all legacies bequeathed by her, including beneficial interests in a trust which had failed prior to her death, vested in the designated beneficiaries subject to possession of the executrix for purposes of administration. West's Ann.Prob.Code, §§ 28, 142, 300; West's Ann.Civ.Code, § 694.

4. War and National Defense 🔑12
Wills 🔑723

Under will of testatrix making bequests to German nationals in trust which never came into existence because conditions prescribed for its termination came into existence before death of testatrix, legacies so bequeathed by the testatrix vested in the designated beneficiaries so that the Alien Property Custodian was authorized by Trading with the Enemy Act to seize them. Trading with the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c); Executive Order No. 9095, 50 U.S.C.A.Appendix, § 6 note.

5. Trusts 🔑12
Wills 🔑688

Where will created trust for benefit of German nationals, when the trust failed they were entitled to the principal sum which vested in, and was payable to each legatee, and subsequent spendthrift provisions of the will were as to them, inoperative.

6. Trusts ⚷12

A person cannot by his own act create a trust that will protect his property from the claims of his creditors.

7. War and National Defense ⚷12

Property which is subject to seizure or restrictions as to transfer under Trading with the Enemy Act, includes every kind of property, whether or not useful to war industries and equitable as well as legal interests are included. Trading with the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c); Executive Order No. 9095, 50 U.S.C.A.Appendix, § 6 note.

8. War and National Defense ⚷12

Where testatrix set up a trust for German nationals and the trust terminated before death of testatrix, so that the property was distributable to the nationals, even if the interests thus created were contingent, they constituted property interests, capable of transfer, or of inheritance, and were subject to seizure by the Alien Property Custodian under the Trading with the Enemy Act. Trading with the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c); Executive Order No. 9095, 50 U.S.C.A.Appendix, § 6 note; West's Ann. Civ.Code, §§ 669, 688, 693, 699; West's Ann.Prob.Code, § 92.

9. Wills ⚷552(1)

Where legatee named in will predeceased the testatrix leaving two children, the children became legatees by virtue of the statute with the same effect as if they had been so named in the will. West's Ann. Prob.Code, § 92.

10. War and National Defense ⚷12

Where testatrix made bequest in trust to sister, a German national who predeceased the testatrix leaving a surviving son and the trust terminated before death of testatrix so that the interest vested in the son and vesting order of the Alien Property Custodian under Trading with the Enemy Act did not name or purport to vest any interest of the son, amendment to the vesting order made after the presidential proclamation terminating the war with Germany so as to seize the son's interest was valid and the son's interest was lawfully seized. Proclamation No. 2950, 50 U.S.C.A.Appendix note preceding section 1; Trading with the Enemy Act, § 5(b) (1) as amended 50 U.S.C.A.Appendix, § 5(b) (1); Joint Resolution Oct. 19, 1951, 50 U.S.C.A.Appendix note preceding section 1; Trading with the Enemy Act, § 39, as added in 1948, 50 U.S.C.A.Appendix, § 39.

◆

Dallas S. Townsend, Asst. Atty. Gen. of the United States, Director, Office of Alien Property, Laughlin E. Waters, U. S. Atty., Max F. Deutz, Chief, Civil Division, Arline Martin, Asst. U. S. Atty., Southern Dist. of California, Los Angeles, Mary Eschweiler, Atty., Office of Alien Property, San Francisco, James D. Hill, George B. Searls, Irwin A. Seibel, Attys., Dept. of Justice, Washington, D. C., for appellant.

H. A. Gebhardt, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether, despite the vesting order of the Alien Property Custodian vesting in him all right, title and claim of certain German nationals named beneficiaries of a testamentary trust in the will of Louise Schneider, deceased, the superior court lawfully distributed to such nationals the interests provided for or bequeathed to them by decedent.

Decedent was an American citizen and a resident of California. March 29, 1943, she made her last will—whereby she bequeathed certain legacies to relatives of her deceased husband and herself who were nationals of Germany and resided in the Fatherland. The testatrix departed this life on March 31, 1945. On May 7, 1946, pursuant to statute, the Alien Property Custodian made a vesting order[1] declaring "All right, title, interest and claim of any kind or character whatsoever of Otto Viereck" and other specified German nationals "in and to the Estate of Louise Schneider, deceased" to be vested in him, the Alien Property Custodian, "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States."

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[1] Pursuant to the Trading with the Enemy Act, 50 U.S.C.A.Appendix, §§ 5(b) and 7(c); Executive Order 9095, 50 U.S.C.A.Appendix, following section 6.

The provisions of the will so far as pertinent to this proceeding are as follows, to wit:

> "Eleventh: I give, devise and bequeath the sum of Twenty Six Thousand ($26,000.00) Dollars unto Donald R. Peck, of Glendale, California, In Trust, or in the event of his death or refusal or inability to act, unto the Security First National Bank of Los Angeles, a national banking corporation, In Trust, for the following uses and purposes, to wit:
>
> "(A) Subject to the payment of the expenses of management of the trust estate and administering this trust, including a reasonable compensation for services rendered by the trustee to be determined by the court in which my estate is administered, corpus and income of and from the trust estate shall be held and distributed in the manner following:
>
> "1. The entire net income from said trust estate shall be distributed in quarterly or other convenient installments to my husband's sister, Emma Schneider. Should Emma Schneider die during the continuance of this trust, the income thereof shall be distributed in equal shares to my nieces, Elise Kilian, Martha Michels, Louise Hillebold and Marie Hofman, and to the survivor of them.
>
> "2. This trust shall terminate upon the death of the last survivor of Emma Schneider, Elise Kilian, Martha Michels, Louise Hillebold and Marie Hofman and the entire corpus thereof shall be distributed as follows:
>
> "a. One-half thereof shall be distributed in equal shares to my brothers and sisters living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of mine, said lineal descendants to take by right of representation and not per capita.
>
> "b. The other half shall be distributed in equal shares to the brothers and sisters of my deceased husband, Otto Schneider, living at the time of my demise and to the then living lineal descendants of any deceased brothers and sisters of my deceased husband, said lineal descendants to take by right of representation and not per capita.
>
> "3. If at any time during the continuance of this trust alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will and this trust, then upon the happening of that event this trust shall cease and terminate, anything to the contrary in this paragraph Eleventh of my will notwithstanding, and there shall thereupon be distributed by my trustee to the following named persons the amount of cash set opposite their respective names, to wit:

(a)	To my sister Lischen Viereck	$10,000.00
(b)	To my husband's sister, Anna Seibert	5,000.00
(c)	To my niece, Louisa Heitman	3,000.00
(d)	To my grandnephew, Otto Viereck	2,000.00
(e)	To my grandniece, Katchen Viereck	1,000.00
(f)	To my niece, Marie Krause	1,000.00
(g)	To my niece, Ruth Krause	1,000.00
(h)	To my husband's grandnephew, Otto Schneider	1,000.00
(i)	To my husband's nephew, Richard Schneider	1,000.00
(j)	To my grandniece, Louise Sonnenschein	1,000.00

> If the total corpus of this trust on hand at the time of distribution under this subdivision be insufficient to pay the aforesaid bequests in full said bequests shall abate ratably."
>
> "Twelfth: No beneficiary under any trusts created by this will shall assign,

transfer, convey, anticipate, pledge, hypothecate, or otherwise encumber his or her interest thereunder, and neither the principal of the trusts, nor any income arising therefrom, shall be liable for any debt of any such beneficiary or be subject to any bankruptcy proceeding, or claim of creditors, or be subject to any judgment rendered against any such beneficiary, or to the process of any court in aid of execution of any judgment so rendered; and all of the income and principal under the trusts shall be transferable, payable and deliverable only to the beneficiaries designated hereunder at the times entitled to take the same under the terms of the trusts, and the personal receipt of said beneficiaries shall, at the option of the trustee, be conditions precedent to the payment or delivery of the same by the trustee to such beneficiaries."

The language of Eleventh division of the will clearly and definitely creates a trust whose corpus is $26,000; makes provision for the payment of its net income to specified "income beneficiaries" and upon the death of the last survivor of such income beneficiaries, the trust shall terminate and the corpus be distributed to the beneficiaries of the trust named in A–2–a and A–2–b of the Eleventh.

Sub-paragraph 3 of Eleventh is outstanding in two respects, namely, (1) it prescribes the condition that must arise to "terminate" the trust, and (2) it specifies the amount payable to each beneficiary by the trustee.

Pursuant to the petition of the executrix for instructions re distribution of the estate, after hearing, the court below made its findings which appear on the margin hereof.[2] Whereupon the following order was made:

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[2] The Findings.

The Court finds that at the time of death of the decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of Section 259 of the Probate Code of California.

The Court finds that Otto Viereck is a German National and that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the specific bequest to Otto Viereck provided in paragraph Fourth of decedent's will.

The Court finds that Richard Schneider, a beneficiary under paragraph Eleventh (A), 3, (i) of decedent's will, predeceased the testatrix; that said beneficiary was not related to the decedent; that the bequest of $1,000 under said paragraph to said beneficiary has lapsed and falls into the residue of said estate to be distributed under the residuary provisions contained in paragraph Thirteenth of decedent's will.

The Court finds that the testatrix intended the interests created under paragraph Eleventh (A), 3 of her will to be conditional; that the intended condition precedent to the existence of the right to inherit was the co-existence of a right in the beneficiary personally to have and receive his share; that the testatrix did not intend to create any right by said provisions that would not avail to the personal benefit of the beneficiary; that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth in paragraph Eleventh of decedent's will, except to the extent that said Attorney General participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and falls into the residue of said estate.

The Court finds that Lischen Viereck, a beneficiary under paragraph Eleventh (A), 3, (a) of decedent's will, predeceased the testatrix; that said beneficiary was a sister of the testatrix and left surviving her two children, Wilhelm Viereck and Louisa Heitman; that said persons are entitled to receive, in equal shares, the bequest of $10,000 provided for Lischen Viereck in said paragraph.

The Court finds that, other than as heretofore specified, all of the beneficiaries set forth in paragraph eleven, subdivision (A), 3, of decedent's Will are residents and Nationals of Germany and are entitled personally to receive the respective sums specified in said paragraph.

The Court finds that by virtue of vesting orders heretofore filed the Attorney General of the United States is entitled to receive the shares of all of the German Nationals who participate in the residue of the estate under the provisions of paragraph thirteenth of decedent's will.

The Court further finds that the beneficiaries to whom distribution is hereinafter ordered are German Nationals.

"(c) The bequest of $10,000.00 to Lischen Viereck under paragraph Eleventh (A), 3, (a) of said Will shall be distributed in equal shares to Wilheim [sic] Viereck and Louisa Heitman.

"(d) The cash bequest to the persons, other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (A), 3, of said will shall be distributed to the persons and in the amounts specified therein."

As successor to the Alien Property Custodian, the Attorney General of the United States appeals from the provisions (c) and (d) of the order which awarded the $10,000 bequest of Lischen Viereck to her children Wilhelm Viereck and Louisa Heitman and the $3000 legacy to Louisa and the bequests to the other legatees named in XI, (A), 3 of the will.

Can Alien Enemies Take Under the Law?

All beneficiaries of the trust named in XI, (A), 3, of the will are German nationals, residing in Germany. Because Richard Schneider, unrelated to the testatrix, predeceased her, his legacy lapsed and became a part of the residue. Lischen Viereck, sister of testatrix, also predeceased the latter, but she was survived by two children, Wilhelm Viereck and Louisa Heitman. Louisa seeks to have distributed to herself not only the $3,000 specifically designated as payable to her upon the termination of the trust, but also her half of the $10,000 marked for her mother. Wilhelm also prays payment to himself of the other half of his mother's inheritance. That they cannot prevail is clearly the meaning of the law as applied to the document under consideration.

[1] When decedent executed her will in 1943, World War II cast a pall over the planet. It had already drawn the United States into the conflict with Germany, which rendered doubtful the likelihood that a German national for an indefinite period could inherit from his kinsman in America, despite the recently enacted statute, section 259, Probate Code, providing for reciprocal inheritance by citizens of the United States and those of a power at war with us. While Hitler was at the zenith of his fury, it did not appear probable that the condition of section 259 could be fulfilled, because it is usually a question of fact. Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695.

A reference to section 259, Probate Code, discloses that its chief ingredient is that the "rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

[2] Now, at the trial below, the court received uncontradicted evidence pertaining to the matter and made its finding that at the time of the death of decedent reciprocal rights with respect to inheritance existed between citizens of the United States of America and citizens of Germany within the purview of section 259 of the Probate Code of California. Such finding renders unnecessary a discussion of numerous points urged with respect to contingent future estates and the rights of the Alien Property Custodian concerning them. The finding establishes that prior to Mrs. Schneider's death, the time had already arrived, as the court found, when her relatives in the "Vaterland" were "legally entitled" to *"take and inherit* under my will and this trust." The italicized phrase presents no problem. "Take" is used in section 259; "inherit" means to succeed to ownership of a decedent's property by virtue of statutory succession.

The Right of Beneficiaries Residing in Germany to Take, Died A'Bornin.

Respondents say that they "did not acquire any right until the restrictions of war-time confiscation had passed, that their interests originated when they were personally able to receive the benefit of their inheritance which was after the time that German property could be vested and confiscated." This brings us to the observation that must be shocking to respondents: The trust provided by division Eleventh of the will never came into existence. The condition prescribed for its termination was fulfilled prior to the passing of testatrix. She emphatically chose to prefer her relatives in the homeland as against those who in comfort enjoyed the security and peaceful existence of America. It is patent, also, that she intended the former to possess the $26,000 as soon as they should be able to "take" it. Their counsel agreed at the trial that the trust never came into being.[3] The court acknowledged that fact by ordering distribution directly to the persons named in XI, (A), 3, whereby it ignored the trust.

[3, 4] Immediately, upon the death of Mrs. Schneider all legacies bequeathed by her, including the beneficial interests in the trust which had failed, vested in the designated donees, Prob.Code, secs. 300, 28; Estate of Laurence, 84 Cal.App.2d 500, 504, 191 P.2d 109; Burns v. McGraw, 75 Cal. App.2d 481, 488, 171 P.2d 148, subject only to the possession of the executrix for the purpose of administration. Prob.Code, sec. 142; Civil Code, sec. 694. However, their delayed possession did not affect the fact that each legatee and each beneficiary was at decedent's death, vested with right of ownership of his bequest or beneficial interest. Such vesting occurred in 1945 when the testatrix departed this life. Hence, at the time, in 1946, when the Alien Property Custodian made the vesting order vesting ownership thereof in himself these beneficial interests were then the properties of the several persons named in (A), 3 of Eleventh and the Custodian was authorized by the Trading with the Enemy Act to seize them.

[5, 6] Respondents emphasize the Twelfth division of the will. It is true that, like any other spendthrift clause, it is proof that the testatrix intended that the principal and income should be payable only into the hands of each beneficiary. But when the trust failed, the title to the principal sum vested in and was payable to each legatee and the spendthrift provisions did not become operative. "It is everywhere agreed that after the beneficiary has actually received the trust property his creditors may reach it and he may dispose of it as he wishes." Kelly v. Kelly, 11 Cal.2d 356, 362, 79 P.2d 1059, 1063, 119 A.L.R. 71. It is well settled, however, that a person cannot by his own act create a trust that will protect his property from the claims of his creditors. It is against public policy to allow a man thus to tie up his property. McColgan v. Walter Magee, Inc., 172 Cal. 182, 186, 155 P. 995; Nelson v. California Trust Co., 33 Cal.2d 501, 202 P.2d 1021.

[7] That the corpus of a testamentary trust which is already distributable to the beneficiary is his property and is seizable by the Alien Property Custodian under the statute is declared in 93 C.J.S., War & National Defense, § 26(4), page 74 as follows: "The property which is subject to seizure or restrictions as to transfer under the Trading with the Enemy Act includes every kind of property tangible or intangible, whether or not useful to war industries. Equitable as well as legal interests are included. Particular property or interests held to be within the statute include an interest in a decedent's estate[4], such as a vested legacy, a contingent or expectant estate in remainder, an award of compensation for death, an award under a workmen's compensation statute, or a fund held by an American national for

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[3] The Court: If Mr. Gebhardt's position prevails it comes into existence and terminates.
Mr. Gebhardt: And immediately terminates.

[4] Application of Miller, 2 Cir., 288 F. 760, 766; In re Bendheim's Estate, 124 Misc. 424, 209 N.Y.S. 141, 794; Central Hanover Bank & Trust Co. v. Markham, D.C., 68 F.Supp. 829; In re Carrington's Estate, 195 Misc. 442, 90 N.Y.S.2d 757, 758; In re Littman's Estate, 176 Misc. 679, 28 N.Y.S.2d 458, 459.

the benefit of an alien enemy. Other property or interests within the statute include the interest of a beneficiary in a trust, an interest in commissions or in a judgment, a debt, past-due installments owing to a wife under a separate maintenance decree, bonds or debentures, or corporate stock."

[8] Conceding that the interests thus created were contingent, they were nevertheless property interests capable of transfer or of inheritance. Civ.Code, secs. 669, 688, 693, 699; Sinclair v. Crabtree, 211 Cal. 524, 528, 296 P. 79. Since they were interests capable of transfer, they became property of the German beneficiaries promptly on the death of Mrs. Schneider in 1945.

The conclusion is, therefore, unavoidable that at the time of the vesting order, in 1946, the estate of each legatee and the beneficial interest of each beneficiary of the trust was subject to seizure under the Trading with the Enemy Act, as amended.

[9] The foregoing discussion applies to all persons named in subparagraph 3 other than (1) Richard Schneider whose legacy lapsed and fell into the residue, and (2) testatrix' sister Lischen Viereck, who predeceased her leaving two children, Wilhelm Viereck and Louisa Heitman. Prob. Code, sec. 92. They became legatees by virtue of the statute and with the same effect as if they had been so named in the will. Estate of Esposito, 57 Cal.App.2d 859, 862, 135 P.2d 167; Estate of Pierce, 32 Cal.2d 265, 270, 196 P.2d 1. "Although a beneficiary takes directly under the will of the testator under such an anti-lapse statute, he does so because the statute substitutes him for the predeceased devisee or legatee. He takes, not by virtue of the expressed intentions of the testator, but solely by virtue of the statute." Estate of Pierce, supra, 32 Cal.2d 270, 196 P.2d 4. The vesting order named Lischen Viereck and purported to seize all her right, title and interest in the Schneider estate; but of course she had none. That order also named Louisa Heitman who was given a legacy of $3,000 under subparagraph 3, an interest which was increased to $8,000 through her mother's death; but it did not name or purport to vest any interest of Wilhelm Viereck. An amendment to the vesting order was made on May 13, 1954, under which this interest was seized. Such amendment was after the presidential proclamation of October 24, 1951, No. 2950, declaring the state of war with Germany to have terminated on October 19, 1951. 50 U.S.C.A.Appendix, p. XXI, Note preceding section 1.

[10] By its terms, the statutory power of seizure was limited to a period "During the time of war or during any other period of national emergency declared by the President". 50 U.S.C.A.Appendix, § 5(b) (1). The earlier decisions are to the effect that that power cannot be exercised after the officially declared termination of hostilities. Miller v. Rouse, D.C.N.Y., 276 F. 715, 716–717; Matheson v. Hicks, D.C. N.Y., 10 F.2d 872, 873; Sutherland v. Guaranty Trust Co., 2 Cir., 11 F.2d 696, 698; United States Trust Co. of New York v. Hicks, D.C.S.D.N.Y., 16 F.2d 286, 288; In re Sutherland, 2 Cir., 23 F.2d 595, 599. But the Congressional Resolution declaring the end of the war with Germany, 50 U.S.C.A. Appendix, p. XX, note preceding section 1, says: "Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued." Referring to that resolution, it was held that a seizure made after the termination date is a valid exercise of the war power, and the Supreme Court denied certiorari. Ladue & Co. v. Brownell, 7 Cir., 220 F.2d 468, 471; Id., 350 U.S. 823, 76 S.Ct. 50. It therefore must be concluded that Wilhelm Viereck's interest was lawfully seized and falls in the same category as

those of all the beneficiaries other than Richard Schneider.[5]

We have derived the foregoing decision with fearful misgivings. Research has exposed a strange and regrettable anomaly in the foreign relations of our Central Government. For thirty-five years the United States has expended billions of dollars in attempting to recapture and retain the friendship and loyal adherence of our enemies opposed in two world wars. It has verily poured out its wealth to accomplish that purpose within the German Republic. Now, after more than ten years since fighting ceased, and over four years since World War II was declared terminated, 50 U.S.C.A.Appendix p. XX, note preceding section 1 that same government, actuated by generous impulses toward a fallen foe, in nurturing the German state and its subdued people, withholds from these individuals within Germany comparatively modest sums ranging from $1,000 to $8,000, aggregating $25,000. By confiscating such moneys, we forfeit more goodwill than might have been acquired by the payment of multiplied thousands to the Bonn Government whether applied directly or indirectly to that end.

That the government's insistence upon its share of Mrs. Schneider's estate is confiscation was conceded at the time of the oral argument. Also, it is apparent from a consideration of the "return" legislation which culminated in the enactment of section 39 of the Act passed in 1948, 50 U.S.C.A.Appendix, § 39, wherein it was provided as follows: "No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act [sections 1–6 and 7–39 of this Appendix], shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date. * * *" See discussion of this subject in Guessefeldt v. McGrath, 342 U.S. 308, 72 S.Ct. 338, 96 L.Ed. 342. The remedy lies with the Congress.

The order is reversed as to paragraphs (c) and (d) thereof; the following conclusions, designated in the order as findings, are stricken: "that the Attorney General of the United States is not entitled to any part of the twenty-six thousand dollar fund set forth in paragraph Eleventh of decedent's will, except to the extent that said Attorney General participates in the bequest therein of $1,000.00 to Richard Schneider which has lapsed and falls into the residue of said estate" (page 33, lines 23–29 of clerk's transcript herein); "that said persons are entitled to receive, in equal shares, the bequest of $10,000.00 provided for Lischen Viereck in said paragraph" (page 34, lines 2 and 3 of clerk's transcript herein); and "and are entitled personally to receive the respective sums specified in said paragraph" (page 34, lines 6 to 8 of clerk's transcript herein).

Paragraphs (c) and (d) of the order are stricken and in lieu thereof the following is inserted: "(c) The bequest of $10,000.00 to Lischen Viereck under paragraph Eleventh (A), 3, (a) of said Will shall be distributed to the Attorney General of the United States; (d) The cash legacies to the persons other than Richard Schneider and Lischen Viereck, specified in paragraph Eleventh (A), 3, of said Will shall be distributed to the Attorney General of the United States."

FOX and ASHBURN, JJ., concur.

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[5] General License No. 101, issued June 24, 1953, which unblocked frozen assets, specifically provides in section 511.101 (c): "Nothing in this section shall be deemed to apply (1) to any property or interest that has been vested, or as to which an outstanding supervisory order has been issued, by the Attorney General or the Alien Property Custodian or the Office of Alien Property Custodian." (18 Fed.Reg. 3687, 8 C.F.R., Section 511.101.)

141 Cal.App.2d 168

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ernest Sanford LANCEY, Defendant and Appellant.

Cr. 1110.

District Court of Appeal, Fourth District, California.

April 26, 1956.

Hearing Denied May 23, 1956.

Defendant was convicted of burglary in the first degree. The Superior Court of Riverside County, Hilton H. McCabe, J., entered judgment accordingly and entered order denying new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that in view of overwhelming evidence of guilt, there was no prejudicial error which would require reversal resulting from admission into evidence of testimony of arresting officers concerning defendant's statement to them as to prior offenses and improper conduct.

Judgment and order affirmed.

1. Burglary ⚷41(1)

Evidence sustained conviction for burglary in first degree. West's Ann.Pen. Code, § 459.

2. Criminal Law ⚷1169(11)

In prosecution for entering dwelling house with intent to commit theft, in view of overwhelming evidence of guilt, there was no prejudicial error which would require reversal resulting from admission of testimony of arresting officers concerning defendant's statement to them as to prior offenses and improper conduct.

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John P. Carroll, Indio, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with a violation of Section 459 of the Penal Code, it being charged that he entered a dwelling with the intent to commit theft on September 6, 1955. He was also charged with two prior convictions, one for burglary in the second degree and one for a violation of Section 503 of the Vehicle Code. He pleaded not guilty, and a jury found him guilty of burglary in the first degree. He appeals from the judgment and from an order denying his motion for a new trial.

On the evening of September 6, 1955, while James Brady was sitting in the front yard of his home in Indio he heard his back door slam twice. This was around 8:00 P.M. He entered his house but did not see anyone although he noticed that the light on the back porch was out, and turned it on again. About an hour later, he reentered his house and found that his watch, which had been lying on a stand by his bed, was missing. He later discovered that 16 cartons of Camel cigarettes and a pillow slip marked "Brady–102" were also missing. He reported the matter to the police.

The appellant was observed by a witness between 7:30 and 8:00 P.M. walking down the alley behind the Brady house, empty-handed. Ten or fifteen minutes later this witness saw the appellant return along this alley with a white "bag" in his right hand. Around 10:00 P.M. that night the appellant approached a bartender at a club in the same block as the Brady house, and offered to sell him cigarettes at $1 per carton. The bartender bought two cartons. About the same time the appellant offered a bartender at another nearby club some cartons of cigarettes but did not mention the price when the bartender refused to buy. About the same time a Mr. Humbarger, while on the street, purchased five cartons of Camel cigarettes for $5 from an unidentified man. These cigarettes were in a white bag and the bag was turned over to Humbarger. Humbarger immediately left the bag and the cigarettes with the bartender to whom the appellant had sold two cartons of cigarettes, while he went to get something to eat. The bartender placed the bag with its contents under the bar. The next morning the police picked up these cigarettes which, with the watch taken from Brady, were in the pillow slip marked "Brady–102". Around 10:00 P.M. on the night of the 6th, the appellant was also observed near a trash can in the next block from the first club mentioned, wiping something from the ends of cartons of cigarettes.

At 4:00 A.M. the next morning (the 7th) Mrs. Brady heard her back door slam. She went to a window and saw the appellant outside the house near a box containing some tools. He picked something out of the box and thinking the man was going toward the front of the house she ran to a front window. She then heard a crash and a light over the back door and the glass in the back door were knocked out. She identified the defendant as the person who was at her house and described his attire, which fitted his clothing at the time he was arrested.

The appellant was arrested at 5:00 A.M. on September 7 when he was found asleep in an automobile near the Brady home. About 10:30 A.M. on that day he was questioned by the officers as to the cigarettes he had been selling. He first said he had bought them from a man on the street, and later stated that he had bought them from a man at a bar and took delivery of them behind a garage. At that time he offered to plead guilty to the charge of petit theft but refused to plead guilty to a felony charge, although he did not directly deny that he entered the Brady house.

The appellant took the witness stand and testified that he arrived in Indio on the morning of the 6th, obtained some liquor, and sat around the depot with a stranger who offered to sell him between 20 and 25 cartons of cigarettes; that he left the stranger and obtained a room at a hotel, where he registered under the name of Taylor; that he did not smoke this brand of cigarettes and sold two cartons to the bartender; and that he was intoxicated on that evening but was in full possession of his faculties. He also denied that he had been in the Brady house or in that alley. He admitted his previous convictions and also admitted that he had had a conversation with the police officers on the morning of the 7th, but stated that the officer's version of the conversation was exaggerated.

Appellant's sole contention is that the court erred in admitting into evidence certain testimony of the arresting officers concerning appellant's statement to them as to prior offenses and improper conduct on his part. It is argued that while evidence of other offenses may be admitted where it has a bearing on the question of intent such evidence is not admissible where it merely tends to prove an inclination toward crime, and that the matter objected to falls in that category. One of the officers testified that during the conversation with the appellant on September 6 he asked the appellant as to his occupation and how he made his living, and that "he told me it was usually by rolling drunks or by taking money from drunks, shoplifting, and he said something about having a woman and that she was working for him, who is now in jail in Los Angeles, and other illegal means. He named numerous things that he had done in the past." The other officer testified that in that conversation, when asked what his occupation was, the appellant "said he was a thief". In support of the contention that this was reversible error the appellant cites People v. Canfield, 173 Cal. 309, 159 P. 1046; People v. Clark, 55 Cal.App. 42, 203 P. 781; People v. Arlington, 123 Cal. 356, 55 P. 1003; People v. Wallace, 89 Cal. 158, 26 P. 650; People v. Mohr, 157 Cal. 732, 109 P. 476; People v. Whiteman, 114 Cal. 338, 46 P. 99; and People v. Dugat, 77 Cal.App. 263, 246 P. 344. In the first of these cases, a new trial had been granted and the court pointed out that Section 4½ of Article VI of the Constitution might well have been applied had a new trial been denied. In the second of these cases, not only were the facts very different but other grounds for reversal existed. In two of the other cases the question of using an assumed name was not involved as it was here. Under many recent cases the question as to whether such an error was sufficiently prejudicial to justify a reversal has depended upon the facts of the particular case.

[1, 2] In the instant case, the evidence of appellant's guilt was very convincing and might well be described as overwhelm-

ing. The general character of the appellant and his tendency or inclination toward crime quite well appeared from his own testimony before the jury, and the matters objected to although inadmissible were, in fact, no more than cumulative. We are far from convinced that a miscarriage of justice his occurred and, in view of the convincing evidence of the appellant's guilt, it would not be reasonable to assume that the jury would have acquitted him if that evidence had not been received. Under the circumstances of this case, and in view of Section 4½ of Article VI, it must be held that no such prejudice appears as would require a reversal. People v. Tokich, 127 Cal.App.2d 639, 274 P.2d 226; People v. Martin, 127 Cal.App.2d 777, 274 P.2d 509.

The judgment and order are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

140 Cal.App.2d 934

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1954 CHEVROLET BEL AIR, Engine No. 0855790F54Y, Texas License No. CF7995, Defendant.

General Motors Acceptance Corporation, a corporation, Claimant, Respondent and Cross-Appellant.

Civ. 16935.

District Court of Appeal, First District, Division 2, California.

April 20, 1956.

Rehearing Denied May 18, 1956.

Hearing Granted June 20, 1956.

Proceeding for forfeiture of automobile used to transport narcotics. The Superior Court, County of Alameda, A. T. Shine, J., entered judgment upon finding that claimant acceptance company, which had purchased conditional sales contract to defendant automobile had done so after making reasonable investigation of purchaser and that its interest was valid, and appeals were taken. The District Court of Appeal, Dooling, J., held that evidence supported such finding.

Judgment affirmed.

1. Forfeitures 🔑5

Party asserting lien on automobile in narcotics forfeiture proceeding had burden to show that it made investigation required by statute of moral responsibility, character, and reputation of buyer and that it did not limit its investigation merely to inquiry of buyer's financial standing and credit rating. West's Ann. Health and Safety Code, § 11620.

2. Forfeitures 🔑5

Under statute authorizing holder of any interest in vehicle subject to forfeiture because of use in transportation of narcotics to protect interest by showing that it was created after reasonable investigation of moral responsibility, character and reputation of purchaser, investigation may be sufficient though only one reference is interviewed. West's Ann. Health and Safety Code, § 11620.

3. Forfeitures 🔑5

In proceeding for forfeiture of automobile used to transport narcotics, evidence supported trial court's findings that acceptance corporation which held conditional sales contract to automobile had made reasonable investigation of moral responsibility, character and reputation of buyer before buying contract. West's Ann. Health and Safety Code, § 11620.

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Edmund G. Brown, Atty. Gen. of California, Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for plaintiff-appellant.

Aaron Turner, John Felton Turner, Oakland, for claimant-appellant.

DOOLING, Justice.

This is a proceeding for forfeiture to the state of an automobile seized while it was being used for the transportation of narcotics. The People appeal from that portion of the judgment of the Superior Court which recognizes the lien of respondent-appellant, General Motors Acceptance Corporation, against the defendant vehicle in the sum of $1,938.89. The claimant and intervenor, General Motors Acceptance Corporation, appeals from the part of the judgment which ordered the defendant vehicle forfeited to the State of California. The default of the registered owner, Lucille Verner, was entered on her failure to appear and answer and there is no appeal taken by her.

The motor vehicle was seized pursuant to Health & Safety Code section 11611 while it was in the possession of one Lee Spencer with the consent of the registered owner, Lucille Verner.

Health & Safety Code section 11620 provided at the time this action arose: "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged." The trial court found and it is not disputed that the conditional sales contract was sold to General Motors Acceptance Corporation for a valuable consideration, was a bona fide contract and that General Motors Acceptance Corporation had no knowledge that the vehicle was being or was to be used to transport narcotics. The court also found: "That the legal owner and claimant General Motors Acceptance Corporation did, prior to the creation of its right, title, and interest in the conditional sales contract under which its interest was created and by which said vehicle was sold to Lucille Verner, make a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, Lucille Verner." It is the position of the People that there is insufficient evidence to support this finding.

The deposition of Mr. Edwin M. Lowe, an employee of General Motors Acceptance Corporation in Abilene, Texas, was read into evidence. He testified that he handled the purchase of retail contracts from automobile dealers and that when such contracts are offered to General Motors Acceptance Corporation (hereafter referred to as GMAC) by one of their dealers it is his duty to check the contract and make an investigation of the responsibility, reputation and character of the purchaser named in the contract, so that GMAC can determine whether it will buy the contract and assume responsibility for collecting the purchase price. He gave the following account of the transaction involving the vehicle in question:

"On August 11, 1954, Wade Forester, owner of Forester Chevrolet Company of Sweetwater, Texas, called me on the telephone and told me that he was negotiating with Lucille Verner for the sale of a 1954 Chevrolet Belaire automobile. He asked me to make an investigation of her credit and character and reputation from sources and references in California furnished by her. I called the Bank of America at Oakland, California, and was informed by an employee to whom I talked that he could not find any record of a business transaction with Lucille Verner, although she claimed to have financed the purchase of an Oldsmobile from Howard Motor Sales of Albany, California, through this Bank. I then called the Mercantile Acceptance Corporation at Oakland, California, and I learned that it had financed the purchase of a 1949 Ford for Lucille Verner with a loan of approximately $300 to $400, and that her payments had been made promptly as due. I inquired as to her character and morals, and was told that they had no knowledge or information thereof. I then called Howard Motor Sales at Albany, California, and talked to Mr. Howard Rohrer, who identified himself as the owner of the business. I told him who I was and that I was with General Motors Acceptance Corporation in Abilene, Texas. I told him that a Lucille Verner of Oakland, California, was in Sweetwater, Texas, that she was negotiating for the purchase of an automobile and that we had been asked to finance the purchase. I stated that before doing so we were making an investigation both as to her moral and financial responsibility and reputation. I stated that Lucille Verner had informed us that he had known her for a couple of years and was well acquainted with her and that we could get from him whatever information we wished in regard to her. He stated that he sold Lucille Verner a 1952 model Oldsmobile and she made 21 monthly payments on it promptly, and he considered her credit good. I then asked him about her character, morals and reputation, and he stated that he had known her nearly two years and that he considered her reputation good and said that he had never heard of her being in trouble of any kind and had no knowledge of anything detrimental to her character or moral responsibility. I believe he stated that during a period of nearly two years, he had collected each of the payments on the car she was purchasing then and had transmitted them to the Bank of America in Oakland who had the conditional sales contract on the automobile. After talking with Mr. Rohrer, I then called Wade Forester and told him that based on the information received in my calls to California, General Motors Acceptance Corporation would purchase the contract of Lucille Verner, and he then completed the sale of the car to her. This all occurred on August 11, 1954. After we received the contract from Forester Chevrolet Company a day or two later, we paid Forester Chevrolet Company the full contract price less our financing and insurance charges."

He further stated that he never saw or talked to Lucille Verner, the purchaser. He said that prior to the time of the purchase of the contract he had no information that would lead him to believe that the purchaser was not a person of good moral responsibility, character and reputation and that he learned nothing in the course of his investigation that would cause him to suspect that the automobile was to be used in transporting narcotics or for any other unlawful purpose. Mr. Lowe was asked whether it was not a fact that his entire investigation was to determine whether Lucille Verner had the financial ability to pay in accordance with the contractual obligations. He aswered: "No. We have certain forfeiture laws in Texas that are comparable to those in California. In addition, the character and reputation of the purchaser is particularly important to us when the purchaser is a colored person. I made three long distance telephone calls to California, one being to Mr. Rohrer, a gentleman in business in an area near the purchaser's home. I was informed that he had known her over a period of some time. Mr. Howard Rohrer was very willing to volunteer the information to me by telephone as to Lucille Verner's reputation and character as I have outlined above. Our investigation was in fact two-fold: I wanted to find out if she paid her bills and I wanted to find out enough about her moral responsibility and character whether she had a good reputation in her community, and I was satisfied this was so as a result of telephone calls to California."

Mr. Howard Rohrer, owner of Howard Motor Sales in Albany, California, testified that in August of 1954 he received a telephone call from Mr. Lowe of the GMAC offices in Texas in regard to Lucille Verner. He told Mr. Lowe in response to questions that he knew Lucille Verner very well and that he had known her approximately two years. He stated that Mr. Lowe inquired as to the character and reputation of Lucille Verner and that he "told him I had considered her one of our very best customers in the colored field * *." He testified that during the time he knew Lucille Verner he learned nothing derogatory about her and that he "learned nothing at all excepting what I would consider to be flattering to her character."

[1] In attacking the court's finding of reasonable investigation on the part of the claimant the People first point out that the burden is on the claimant to show that it has made the investigation required by Health & Safety Code, § 11620, and that this investigation must be of the moral responsibility, character, and reputation of the purchaser and not limited merely to an inquiry as to his financial standing or credit rating. People v. One 1953 Pontiac, 135 Cal.App.2d 195, 286 P.2d 885. In claiming that GMAC has not met the burden of rea-

sonable investigation imposed on it by Health & Safety Code section 11620 the People rely heavily on the following language found in People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013, 1016; "* * * It would seem that a *bona fide* investigation should, among other essentials, reveal the home address of the prospect, his employer, either past or present, the source of his income, his family or social connections, and as in the case here of a stranger, some inquiry as to his prior location and his standing in that community. * * *" It is their contention that the investigation of the purchaser was not adequate when tested by the standards set forth in this case. People v. One 1949 Ford Tudor Sedan, 115 Cal.App.2d 157, 351 P.2d 776, 782, contains a comprehensive discussion of several cases discussing the sufficiency of the investigation required by the statute. The case relied on above by the People is there referred to as "one of the more extreme cases holding an investigation insufficient as a matter of law." The court seemed to express disapproval of setting forth a specific test of reasonableness to be applied to all situations stating that whether a sufficient or insufficient inquiry has been made is a question of fact, and generally must be governed by the facts of each case. It did note that there were certain general principles, which had been summarized in People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, 161 P.2d 264, 268, to be used in testing the reasonableness of such investigations:

"1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden of proof on the issue rests with the claimant.

"2. The question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions.

"3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a 'reasonable' investigation of the factors involved. What is reasonable must be governed by the facts of each case.

"4. An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the 'moral responsibility, character, and reputation of the purchaser.'" Subject to these general rules it was said that a precise test is impracticable.

[2, 3] In People v. One 1941 Cadillac Club Coupe, 63 Cal.App.2d 418, 147 P.2d 49, the claimant asked the purchaser's landlord if he knew anything against the purchaser and the landlord replied that he did not. This was stated to be evidence of good reputation. This seems similar to the answer given by Mr. Rohrer to Mr. Lowe in response to a like question. Further an investigation can sufficiently comply with the law when only one reference is interviewed. People v. One 1939 Buick Coupe, 56 Cal.App.2d 163, 132 P.2d 308. Thus if the interview with Mr. Rohrer was otherwise sufficient, it would not seem that the investigation should be held unreasonable because of the fact that only one person was interviewed with regard to the purchaser's moral responsibility, character, and reputation.

The People argue that the claimant should have been put on notice that the purchaser's moral character, reputation, and responsibility was questionable because she claimed to have financed a car through the Oakland Branch of the Bank of America and his investigation revealed no such transaction. This was a question for the trial court to decide. It should be noted that Mr. Rohrer also told the claimant's investigator that the car in question was financed through this bank. The court could infer that Mr. Lowe reasonably concluded that the employee at the bank contacted by him had not found the record of such transaction even though one did exist. (It developed that the purchaser had in fact engaged in this business transaction with the Berkeley rather than the Oakland Branch of this bank.) As has been pointed out in several of the cited cases the statute furnishes no standard by which to measure the "reasonable investigation" required and much must depend on the facts of each case and the judgment of the trial court thereon. We are satisfied that the evidence is sufficient to support the trial court's finding in this respect.

At the oral argument counsel for GMAC stated that it would not press its appeal if the judgment protecting its lien was affirmed. This makes it unnecessary to consider GMAC's appeal.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

140 Cal.App.2d 778

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert HOCKING, Defendant and Appellant.

Cr. 3204.

District Court of Appeal, First District, Division 2, California.

April 16, 1956.

Rehearing Denied May 1, 1956.

Prosecution for armed robbery. The Superior Court, City & County of San Francisco, John B. Molinari, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, J., held that where defendant failed to get a trial within sixty days of filing of information, but all continuances in the matter were ordered at defendant's request or with his consent, or were occasioned by defendant's own conduct in moving for a psychiatric examination resulting in his commitment in a state hospital, and in escaping from such hospital and fleeing the state, there was no unreasonable delay in bringing defendant to trial six years after the information was originally filed.

Judgment affirmed.

1. Criminal Law 🔑1086(1)

Where record did not disclose any motion for a new trial was made, there could be no appeal from an order allegedly denying a new trial.

2. Criminal Law 🔑576(5)

Where defendant pleaded guilty to a charge of armed robbery by his plea of guilty he waived any right he may have had to object that he was not tried within sixty days of date of filing of information. West's Ann.Pen.Code, § 1382; West's Ann. Const. art. 1, § 13.

3. Criminal Law 🔑576(5)

The right to a speedy trial guaranteed by statute and by State Constitution is one which a defendant may waive and is not jurisdictional. West's Ann.Pen.Code, § 1382; West's Ann.Const. art. 1, § 13.

4. Criminal Law 🔑1035(1), 1044

Where a defendant does not object in trial court to going to trial or make a motion to dismiss an information because of failure to be brought to trial within sixty days after filing of the information, he may not predicate error on that ground in appellate court. West's Ann.Pen.Code, § 1382.

5. Criminal Law 🔑576(5)

Where defendant consented to continuances, failed to object to continuances and fled the jurisdiction, such conduct constituted a waiver of his rights to a speedy trial. West's Ann.Pen.Code, § 1382.

6. Criminal Law 🔑576(5)

If a defendant does not object to a continuance of his trial date beyond sixty days after filing of information he waives his statutory privilege and consent to the continuance will be presumed. West's Ann.Pen.Code, § 1382.

7. Criminal Law 🔑1141(1), 1144(7)

When a motion to dismiss an information on the ground that it was not brought to trial within sixty days as required by statute has been denied by the trial court, it will be presumed that good cause existed for the delay, and the burden is on defendant to show that the court abused its discretion in denying the motion. West's Ann.Pen.Code, § 1382.

8. Mental Health 🔑435

In absence of proof that a defendant had not been lawfully committed to a mental institution, and in a collateral attack upon the validity of an order of commitment which was within the power of the Superior Court to make, District Court of Appeal would presume that Superior Court's official duty was regularly performed and that commitment proceedings were in accordance with legal requirements. West's Ann.Code Civ.Proc. § 1963, subds. 15, 16.

9. Criminal Law ⚿576(5)

Where defendant failed to get a trial within sixty days after filing of information, but all the continuances in the matter were ordered at defendant's request or with his consent, or were occasioned by defendant's own conduct in moving for a psychiatric examination resulting in his commitment in a state hospital, and in escaping from such hospital and fleeing the state, there was no unreasonable delay in bringing defendant to trial six years after the information was originally filed. West's Ann.Pen.Code, § 1382.

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Harry S. Wainwright (Appointed), San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of conviction on a felony charge, violation of section 211, Penal Code (armed robbery). Appellant, Albert Hocking, entered a plea of "not guilty by reason of insanity" on June 9, 1955, and on August 1, 1955, pleaded guilty to one count of robbery. He was declared sane by a jury on August 16, 1955, and the following day was sentenced to state prison.

The only issue presented by this appeal is whether appellant was denied his right to a speedy trial as guaranteed by Article I, § 13 of the California Constitution and section 1382 of the Penal Code.

Appellant was arrested on November 17, 1949, and a preliminary hearing was held November 28, 1949. The information, charging him with four counts of armed robbery, was filed on December 8. He was arraigned on December 15 and pleaded "not guilty" on December 21. Trial was set for January 26, 1950. Several continuances were granted, and on February 15, 1950, on appellant's own motion he was taken to the Detention Hospital in San Francisco for psychiatric examination, the matter being continued with his consent. He was sent to Mendocino State Hospital on March 6, 1950, as mentally ill. Appellant was under observation and treatment there until his escape in October 1951. Several continuances had been granted in the meantime, and on January 30, 1951, the matter was ordered off calendar.

Appellant went to Philadelphia, Pa., where he committed a robbery, was tried and found guilty. He was sentenced to a Pennsylvania penitentiary in February, 1952, and served approximately three years. Following his release in 1955, he was returned to San Francisco to stand trial for the robberies committed here. On June 9, 1955, appellant entered the additional plea of "not guilty by reason of insanity."

[1-4] The appeal herein is designated as being from the final judgment of conviction and from an order denying a new trial. Since the record does not disclose that any motion for a new trial was made, there can be no appeal therefrom. People v. Campbell, 138 Cal.App.2d 16, 291 P.2d 47. The final judgment was rendered after a plea of guilty by appellant and after a jury verdict on the sanity issue finding him sane. There can be no doubt that appellant by his plea of guilty waived any right he may have had to object that he was not tried within sixty days of the date of filing of the information. It was held in People v. Workman, 121 Cal.App.2d 533, 263 P.2d 458, that the right to a speedy trial guaranteed in Article I, § 13 of the State Constitution, and section 1382 of the Penal Code, is one which a defendant may waive. See, People v. Greene, 108 Cal.App.2d 136, 140, 238 P.2d 616; People v. Tenedor, 107 Cal.App.2d 581, 583, 237 P.2d 679. That case held also that where a defendant does not object to going to trial nor makes a

motion to dismiss under section 1382 of the Penal Code, in the court below, he may not predicate error on that ground in the appellate court. And, see, People v. Newell, 192 Cal. 659, 669, 221 P. 622; People v. Dale, 79 Cal.App.2d 370, 378, 179 P.2d 870.

Even if appellant had not been foreclosed by the above rule from urging that he has been deprived of his right to a speedy trial, the record clearly demonstrates that all the continuances herein were ordered for good cause or at appellant's request or with his consent.

The information had ben filed on December 8, 1949. Appellant entered his plea of "not guilty" on December 21, 1949, and trial was set for January 26, 1950. On that date the case was continued until February 15, 1950. On February 15, 1950, *on appellant's motion,* he being then represented by counsel, Judge Seigert ordered appellant to be taken to the Detention Hospital for psychiatric examination, and ordered the case continued with consent of appellant and his counsel, to March 1, 1950, for trial. On February 28, 1950, the case was continued until March 7, 1950, at which time the court was informed by the clerk that appellant had been sent to Mendocino State Hospital as criminally insane. On March 3, 1950, a judgment of commitment had been signed by Judge Molkenbuhr, whereupon appellant was taken to Mendocino. On that same date a psychopathic criminal hold order was signed by Judge Molkenbuhr directing suspension of the trial during appellant's commitment to Mendocino, and ordering him returned to the custody of the Sheriff of the City and County of San Francisco upon expiration of said commitment. The cause was continued until June 15, 1950. Further continuances were ordered until January 30, 1951, when the case was ordered off calendar.

On February 6, 1953, on motion of the District Attorney, the cause was ordered restored to the calendar, and a bench warrant was issued for appellant. The cause was continued for trial to April 13, 1955. Appellant had been returned to this jurisdiction from Pennsylvania on April 9, 1955. On April 13, 1955, the matter was continued until May 10, then to May 17, May 19, May 24, and finally to June 21, 1955. On June 9, 1955, the cause was advanced from June 21, 1955, and appellant entered the additional plea of "not guilty by reason of insanity." The court appointed two alienists, and continued the cause until June 21, 1955.

On June 21, 1955, appellant moved to discharge the Public Defender as counsel and to act as his own counsel which motion was granted. He then interposed a written motion to dismiss the information on the ground that he had been denied a speedy trial prescribed by Article I, § 13 of the California Constitution and section 1382 of the Penal Code. The case was continued until June 23, 1955, for hearing of this motion. Appellant previously having applied for a writ of habeas corpus, which the court had granted and made returnable on June 23, 1955, the court on that date heard arguments in regard thereto, as well as on the motion to dismiss. The court found appellant to have been legally committed, denied the motion to dismiss, and set the trial for July 11, 1955.

Further continuances were ordered until August 1, 1955; when appellant with the permission of the court, withdrew his plea of "not guilty" to the first count in the Information and entered a plea of "guilty". By consent the trial on the insanity plea was continued until August 15, 1955, on which date trial was begun. On August 16, appellant was found sane and on August 17, 1955, he was sentenced.

[5, 6] The right to a speedy trial is a right which may be waived and is not jurisdictional. People v. Workman, supra; People v. Hawkins, 127 Cal. 372, 59 P. 697. As to all continuances prior to June 21, 1955, appellant waived his right to a speedy trial by consenting to the continuance, by failing to object, or by having fled the jurisdiction. Furthermore the trial court found that good cause had existed for all the delays when it ruled on appellant's motion on that date. If a defendant does not object to a continuance beyond the sixty day period, he waives his privilege and

consent will be presumed. People v. O'Leary, 130 Cal.App.2d 430, 436, 278 P.2d 933. Appellant had impliedly consented to June 21 as a trial date by appearing in court on June 9, 1955, and failing to raise any objection when the date of June 21 was set. See, People v. George, 91 Cal. App.2d 537–542, 205 P.2d 464. No objection was offered to any of the continuances between June 21 and the date of trial, and appellant's express consent is recorded as to one of them.

[7] When a motion to dismiss on the grounds asserted herein has been denied by the trial court, it will be presumed that good cause existed for the delay, and the burden is on appellant to show that the court abused its discretion in denying the motion. People v. Douglass, 100 Cal. 1, 34 P. 490; People v. Coahran, 104 Cal. App.2d Supp. 861, 231 P.2d 592.

Appellant urges that his commitment to Mendocino was illegal and void, hence his confinement there denied him a speedy trial. He argues that since Penal Code, § 1368 provides that if a doubt arises during the pendency of an action as to defendant's sanity, "the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; * * *."

In the present case the issue of appellant's mental condition was determined by the Superior Court. The Clerk's Transcript herein shows only that at the hearing on the motion to dismiss the court admitted in evidence the record of Superior Court action No. 27293 Order and Commitment to Mendocino State Hospital, whereupon the motion was denied, the court finding that defendant had been legally committed.

Appellant cites In re Shaw, 115 Cal.App. 2d 753, 252 P.2d 970, a habeas corpus proceeding. In that case petitioner's commitment to a state hospital for the insane was held void, because it was made by a municipal court. Only the Superior Court has jurisdiction in sanity proceedings. The court in that case also pointed out that a sanity proceeding is civil in its nature and is not part of a criminal proceeding.

[8, 9] It is true that it has been held that provisions of the Penal Code prescribing proceedings that must be had when a doubt arises as to defendant's sanity, are entirely distinct from commitment proceedings which were formerly part of the Political Code and now set forth in Welfare & Institutions Code, Div. 6, Chapter 1. People v. Superior Court, 4 Cal.2d 136, 142, 47 P.2d 724. Section 5160 of the latter Code provides that "Commitments of insane persons charged with the commission of public offenses are provided for in section 1026 of the Penal Code and in Chapter 6, Title 10, Part II of the Penal Code." Appellant, however, has presented herein no transcript of the proceedings in Superior Court action No. 27293 which the trial court had before it when it decided that he had been legally committed. In the absence of proof to the contrary, and in a collateral attack upon the validity of an order which is within the power of the court to make, it must be presumed that official duty was regularly performed and that the commitment proceedings were in accordance with legal requirements, Code of Civ.Proc. § 1963, subd. 15; Napa State Hospital v. Dasso, 153 Cal. 698, 700, 96 P. 355, 18 L.R.A.,N.S., 643. There is a further presumption that the court was acting in the lawful exercise of its jurisdiction. Code Civ.Proc. § 1963, subd. 16; People v. Superior Court, 4 Cal. 2d 136, 147, 47 P.2d 724. Appellant's commitment for a period of approximately 22 months to Mendocino, not having been shown by him to have been void, established good cause for the delay during that period. There was no unreasonable delay in bringing appellant to trial when all the circumstances of the case are considered, the delays that did occur having been necessary or proper or occasioned by appellant's own conduct or with his consent. See, People v. Flores, 37 Cal.App.2d 282, 99 P.2d 326.

The judgment must therefore be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

141 Cal.App.2d 60

Paul LOPEZ, a minor, by and through his guardian ad litem Frank Lopez, and Frank Lopez, Plaintiffs and Appellants,

v.

The CAPITOL COMPANY, a corporation, Ray J. Wayte, individually and doing business under the fictitious name of Beatty Safway Scaffold Co., et al., Defendants and Respondents.

Civ. 4989.

District Court of Appeal, Fourth District, California.

April 23, 1956.

Rehearing Denied May 14, 1956.

Hearing Denied June 20, 1956.

Personal injury action. The Superior Court, Fresno County, Arthur C. Shepard, J., rendered judgment of dismissal after sustaining demurrers, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that scaffold erected at one of busiest intersections in downtown area did not constitute an attractive nuisance, and even if city ordinance was violated by failing to have scaffolding protected by "closed doorways" there could be no recovery for injury to trespassing child.

Affirmed.

1. Negligence 🔑33(1), 39

As a general rule, owner of property owes no duty to mere trespassers to keep property in safe condition, but where attractive contrivance, alluring to children and inherently dangerous to them, is maintained with knowledge of owner, maintenance thereof may constitute negligence out of which liability will arise for injuries resulting from such neglect.

2. Negligence 🔑136(19)

Applicability of attractive nuisance doctrine may, in some cases, be question of law.

3. Negligence 🔑39

Applicability of attractive nuisance doctrine involves elements of lure to children, foreseeability of their playing on property where unreasonable risk of harm exists, and presence of concealed or unknown danger, and it involves whether defendant should have anticipated that injury would be apt to result from his failure to do something which the circumstances reasonably required, as distinguished from something that resulted only from child's own activity.

4. Negligence 🔑6

Violation of statute or ordinance is actionable negligence only as to those persons for whose benefit or protection it was enacted.

5. Negligence 🔑33(3), 39

Scaffold erected at one of busiest intersections in downtown area did not constitute an attractive nuisance, and even if city ordinance was violated by failing to have scaffolding protected by "closed doorways" there could be no recovery for injury to trespassing child.

6. Negligence 🔑1

Negligence is relative to time, place and circumstances.

◆

Lopez & Hyde, Fresno, for appellants.

Stammer, McKnight & Barnum, Dean A. Bailey, Fresno, for respondent Capitol Co.

Richard A. McCormick, Hansen, McCormick, Barstow & Sheppard, Fresno, for respondent Beatty Safway Scaffolding Co.

BARNARD, Presiding Justice.

Paul Lopez, a minor seven years of age, was injured when he climbed upon and fell from a scaffolding erected upon a public sidewalk. The accident occurred while the defendants were doing certain remodeling on the first story of a 10-story office building located on the corner of Fulton and Fresno Street in downtown Fresno. In this action for damages general demurrers were sustained to the complaint and to three amended complaints, all with leave to amend. The plaintiff then refused to further amend and a judgment of dismissal was entered, from which the plaintiffs have appealed.

It was alleged, in the first cause of action, that in doing this remodeling the defendants erected upon the adjacent sidewalk a scaffolding of such a nature as to be attractive to young children as a plaything for them to climb upon; that the defendants knew or should have known "that young children pass along and upon said public sidewalk", and would be attracted to and likely to climb over and upon said scaffolding, and likely to fall from or injure themselves; that the defendants negligently failed to completely enclose said scaffolding, but left openings of 8–10 feet in width along a wooden partition erected on said sidewalk, although said scaffolding could be enclosed without affecting its use; and that this accident occurred on a Saturday afternoon when no work was being done by the defendants, and when those openings in the partition were not being used.

It is then alleged that said scaffolding "was of a novel and unique character and not a common contrivance whose dangers were recognizable to children", and was attractive to children of this age; that this scaffolding consisted of tubular pipes in a perpendicular position but at a slight angle, with "horizontal cross bars of pipe every two feet or thereabouts, the entire contrivance closely resembling the 'monkey bars' or climbing devices found in public playgrounds for children"; that said scaffolding could be seen from the portion of the sidewalk used for passage of the public, through the openings in the board partition, and said "open partitions" constituted an invitation to children of this age to enter and climb upon the scaffolding; that said scaffolding contained hidden and unrecognizable dangers to children of this age since loose planks twelve feet long 2″ thick and 10″ wide were placed on top of the scaffolding at a distance of 10 or 12 feet above the ground; that these planks were placed in an overlapping manner, one over the other, with no support in the middle and no means of securing the planks to the scaffolding at the point where they overlapped; and that as a result said planks, although giving the appearance of being strong and secure were in fact loose, wobbly, insecure and dangerous, all of which was or should have been known to the defendants.

It was then alleged that on this occasion Paul Lopez walked along and beside said scaffolding, and was attracted by the openings mentioned and by this scaffolding; that he "did enter and climb upon said scaffolding to play and in doing so did fall from said loose, wobbly and insecure boards on said scaffolding, a distance of approximately 12 or 15 feet, landing upon the cement pavement in such a manner as to cause severe and permanent injury" to his left arm; and that all of this was the direct and proximate result of the negligence of the defendants as above alleged.

A second cause of action repeated by reference all of the allegations of the first cause of action and, in addition, alleged that in conducting this remodeling work the defendants had violated a city ordinance by leaving these openings in the fence in front of said scaffolding unprotected by any "closed doorways". A copy of portions of this ordinance, being a part of the Uniform Building Code, is set forth in the complaint. The portion set forth is entitled "Chapter 44—Protection of Pedestrians During Construction or Demolition." The first section provides "No person shall perform any work on any building or structure, if by so doing he endangers pedestrians on the street that abuts the property line, unless the pedestrians are protected as specified in this chapter." Another section relates to "Protection of Pedestrians on Public Property". It provides for the erection of fences, under certain conditions, and that doorways may be cut in the fence if they are protected by doors and kept closed except when opened to permit materials or persons to pass through.

[1–6] The appellants contend that the third amended complaint was sufficient to set forth a cause of action under the attractive nuisance theory, and that the court erred in sustaining demurrers thereto. While it is admitted that in some cases a court may declare, as a matter of law, that the instrumentality in question is not an attractive nuisance it is argued that this is generally a question for the jury and that, under the decision in Clark v. Pac. Gas & Elec. Co., 118 Cal.App. 344, 5 P.2d 58, 6 P.2d 297, it should be held that here the question was one of fact for the jury. In that case the boy was not injured because he fell from the pole but because he touched an electric power line, which constituted a novel and hidden danger which was not obvious to the boy and which, in effect, constituted a trap. Moreover, the order of the then Railroad Commission which the defendant had violated was one the obvious purpose of which was to prevent any unauthorized person from climbing the pole and coming in contact with such wires.

It is well established, as an exception to the general rule that the owner of property owes no duty to mere trespassers to keep the property in a safe condition, that where an attractive contrivance is maintained with the knowledge of the owner, which is alluring to children and inherently dangerous to them, this may constitute negligence out of which liability will arise for injuries resulting from such neglect. There is no dispute here as to the general principles governing the applicability of the doctrine. Its application in a particular case must depend upon the circumstances there appearing. Some of the difficulties in deciding the question of the applicability of the doctrine, and some of the principles and facts to be considered, are pointed out in many cases in this state, including Puchta v. Rothman, 99 Cal.App.2d 285, 221 P.2d 744 and Marino v. Valenti, 118 Cal.App.2d 830, 250 P.2d 84. The doctrine has been applied in cases where hidden dangers exist which would be outside the experience of young children, including cases involving drowning under certain conditions, access to dynamite or dynamite caps, movable machinery, high tension wires, and boards piled near where children play, in a manner that is inherently unsafe. Thus far, the doctrine has never been applied in a case involving only an opportunity to climb upon something, the danger of falling being something that is known and realized to all children from earliest infancy, or in a case involving a mere attraction to something as an opportunity to play. In Loftus v. Dehail, 133 Cal. 214, 65 P. 379, 380, the court said:

> "But it by no means follows, * * * that anything or everything which a jury may find or a court may determine, to be attractive as a playground or plaything for children casts a responsibility of guard and care upon the owner of that thing. * * * Venturesome boys and even girls make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight."

In Doyle v. Pacific Elec. Ry. Co., 6 Cal.2d 550, 59 P.2d 93, 94, the court said:

> "But it is not every contrivance or apparatus that a jury will be entitled to treat as an 'attractive nuisance.' Before liability may be imposed, always there must be something in the evidence tending to show that the device was something of a new or uncommon nature with which children might be supposed to be unfamiliar, or not to know of its danger. * * * There is nothing uncommon about a ladder. They are present in practically every home or house, and the danger of falling from them is familiar to children as well as to adults. The ladder was dangerous, but it was not uncommon, and in this case it was not a proximate cause of the injury."

Under the cases just cited, and Giddings v. Superior Oil Co., 106 Cal.App.2d 607, 235 P.2d 843, it appears that in some cases it may properly be held, as a matter of law, that the attractive nuisance doctrine is not applicable, and that the facts are not sufficient to warrant leaving the decision of that question to a jury. In general, it may be said that the cases where the doctrine has been applied have been cases where with the owner's knowledge children of tender years habitually come on his property to play, when a dangerous condition exists there which involves an *unreasonable* risk of harm to such children, or where there is an unknown concealed danger or contrivance which constitutes a trap, the existence of which the child could not be expected to suspect. The applicability of the doctrine involves the elements of lure to children, the foreseeability of their playing on property where an unreasonable risk of harm exists, and the presence of a concealed or unknown danger. It involves whether the defendant should have anticipated that an injury would be apt to result from his failure to do something which the circumstances reasonably required, as distinguished from something that resulted only from the child's own activity.

The conditions which are required to make the doctrine of attractive nuisance applicable, as recognized by the decisions in this state, are briefly stated in Section 339 of the Restatement of Torts, as follows:

> "1. The place where the condition is maintained must be one of which the possessor knows or should know that such children are likely to trespass.
>
> "2. The condition must be one of which the possessor knows or should know and which he should recognize as involving an unreasonable risk of harm to such children.
>
> "3. The child because of his immaturity either does not discover the condition or does not appreciate the danger involved.
>
> "4. The utility to the possessor of maintaining the conditions must be slight as compared with the risk to the children involved."

We think that all of these required conditions were not sufficiently met by the allegations of this complaint. The place was at one of the two busiest intersections in downtown Fresno. Traffic is heavy at all times, especially on Saturday afternoons. It would not normally be expected that children would play there. While, as alleged, it was to be expected that young children would pass along the adjacent public sidewalk or the portion kept open for that purpose, it was to be expected that this would be for the purpose of going to some other destination and not for the purpose of playing in that area. This is especially true of younger children who, at such a place, would usually be accompanied by an older person. Under the circumstances it was hardly to be expected that children would leave the partitioned walkway, enter the enclosure, climb up 12 feet and walk on the planks placed there for use of the workmen. It is not claimed that such a thing was known to have occurred before, and it seems unreasonable to hold that small children were likely to trespass in the manner alleged under the circumstances as they existed at the time.

Nor do we think the existing condition was one which the respondents should have recognized as involving an unreasonable risk of harm to such children. There was nothing unusual or uncommon for such a place while building operations are in progress. There was nothing to attract children except a possible opportunity to climb, which is present almost anywhere. While a scaffold may be attractive to a child as a place to climb it is not a device which is new or uncommon, or something with which children should be supposed to be unfamiliar. It involves the usual danger from climbing but there is no novel or hidden danger with which a child would be unfamiliar. While it has some resemblance to a ladder, that is something with which children are familiar. This was a solid frame, with heavy planks suitable for men to work upon. It is not alleged that there was any slipping or tipping of these heavy planks, and the only danger was the usual chance of falling. There was nothing to have indicated that an unreasonable risk to children existed, especially at a point where children would not normally be expected to come on the property or to play in that area. The allegation that the planks were wobbly and insecure, in view of the other allegations as to the way in which they were placed, is not sufficiently substantial to distinguish this case from the ordinary climbing case. Even if the respondents should have known that a child might enter and climb on this scaffold they would not normally think of this as an unreasonable risk, as distinguished from the ordinary risk of climbing. Children climb on all sorts of things, usually without harm, and it would be impossible to guard against this, or the possibility of falling which always accompanies it, in most of the situations where an opportunity for climbing presents itself.

It can hardly be said, in reason, that this child was too young to appreciate the danger involved. From the time they are born all children realize the danger of falling and instinctively clutch at something when they feel that danger is near. While the instinct to climb is practically universal, and it is carried on in a venturesome spirit, a consciousness of the risk of falling is always present. Beyond question, the minor plaintiff when climbing this scaffold knew that there was a risk of falling if he was not careful, knew that if he slipped he would fall, and knew that if he fell he might hurt himself. He was injured by a danger, the risk of falling, of which he was conscious when he started to climb. The respondents should not be expected to know, aside from other considerations, that any child would not realize such danger as is inherent in any climbing, or that he would not discover when he reached the top of the scaffold that these planks were narrow and that some danger of falling was involved in walking on them.

Insofar as the comparison between the utility of the scaffold and the risk to children necessarily involved is concerned, the cost of complete fencing and the inconvenience of maintaining it is not slight but is apparently greater than the risk to children that was reasonably to be expected. If, in considering the applicability of the attractive nuisance doctrine, it should be held that this scaffold should have been completely enclosed it would naturally follow that all such scaffolds must be so enclosed. This would be unreasonable as these scaffolds are commonly used and seen on the sidewalks of all cities, often where small repairs or improvements are being made upon business buildings. They are frequently used in painting and other work where they have to be moved frequently, often several times in one day. It would be impractical and unduly burdensome to require complete enclosure in all such cases, and it should not be required in this instance insofar as that element or condition of the attractive nuisance doctrine is concerned.

The claimed violation of a city ordinance, which is included in the second cause of action, does not change the situation or relieve the appellants from the burden of bringing themselves within the attractive nuisance exception to the general rule. The appellants concede in their briefs that this matter "must be considered in conjunction with the attractive nuisance doctrine and not separately." It is well settled that the violation of a statute or ordinance is actionable negligence only as to those persons for whose benefit or protection it was enacted. Nunneley v. Edgar Hotel, 36 Cal.2d 493, 225 P.2d 497; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. The complaint does not allege just what work was being done at the time in question, and it does not too clearly appear therefrom that this ordinance was being violated. Assuming that it was, it clearly appears that the harm intended to be prevented by the ordinance was injury or inconvenience to pedestrians lawfully using the sidewalk. As a trespasser the minor plaintiff was not one of the class of persons whom the ordinance was intended to benefit, and there was no causal connection between the violation of the ordinance and the injury. The ordinance added nothing to respondents' duty insofar as the duty to trespassers is concerned. Any such duty must depend on the attractive nuisance exception to the general rule, and a violation of the ordinance, if any, was not a proximate cause of the injury. Regardless of the ordinance or any violation thereof the appellants must bring themselves within the requirements of the attractive nuisance doctrine. When all of the elements of the doctrine are not present, there is no duty to so enclose the property that such a trespass is impossible.

Negligence is relative to time, place and circumstances, and the question here is as to what was the duty of the respondents and as to what they should have foreseen in view of the knowledge which the complaint charges them with possessing. Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825. We cannot agree that reasonably prudent persons would, under the circumstances alleged, have realized the necessity of taking steps to prevent the possibility of a small child climbing on this scaffold. If any other facts existed which would tend to bring the appellants within the exception to the general rule they had an ample opportunity to allege them.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

140 Cal.App.2d 771

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Henry VAN RANDALL, Defendant and Respondent.

Cr. 3159.

District Court of Appeal, First District, Division 2, California.

April 16, 1956.

Defendant was charged with conspiracy to commit crime and conspiracy to violate gambling house ordinance and with prior felony convictions. The defendant moved to dismiss indictment for lack of probable cause to indict. The Superior Court, City and County of San Francisco, Eustace Cullinan, Jr., J., entered order granting motion on theory that failure to prosecute others for similar infractions of law denied equal protection of the law. The People appealed. The District Court of Appeal, Kaufman, J., held that on such a motion the defendant could not raise question of discriminatory enforcement of law.

Order reversed.

1. Indictment and Information ⇨137(1)

Under statute providing for setting aside indictment or information and enumerating grounds for setting aside, indictment or information can not be set aside on any grounds other than those named in the statute. West's Ann.Pen.Code, § 995.

2. Indictment and Information ⇨137(4)

An indictment or information can be set aside for lack of probable cause to indict only if there is no evidence that crime has been committed or no evidence to connect defendant with such crime and trial court on such motion may not substitute its judgment as to weight of evidence, and will not inquire into the sufficiency of the evidence in support of the information or indictment. West's Ann.Pen.Code, § 995.

3. Indictment and Information ⇨137(4)

An indictment will not be set aside or a prosecution thereon prohibited on ground of lack of probable cause to indict if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. West's Ann.Pen.Code, § 995.

4. Indictment and Information ⇨144

Legality of evidence presented to grand jury may be questioned on motion to dismiss indictment on ground of lack of probable cause to indict, for if all of the evidence is result of an illegal search or seizure the indictment cannot stand. West's Ann.Pen.Code, § 995.

5. Criminal Law ⇨1144(1)

Where defendant did not raise issue of illegal search and seizure on motion to dismiss indictment on ground of lack of probable cause to indict, but raised it for first time on appeal from denial of motion, it must be presumed that search and seizure was legal unless illegality affirmatively appears from transcript of grand jury proceedings, and if in fact search and seizure was not legal defendant would have an opportunity to prove that fact at trial. West's Ann.Pen.Code, § 995.

6. Indictment and Information ⇨144

Record of proceedings of grand jury indicting defendant failed to show that arrest and search were illegal.

7. Indictment and Information ⇨144

On motion to dismiss indictment for conspiracy to violate gambling house ordinance, on ground of lack of probable cause to indict, defendant could not raise question of discriminatory enforcement of ordinance. West's Ann.Pen.Code, § 995.

8. Conspiracy ⇨38

Discriminatory enforcement of antigambling ordinance is no defense to charge of conspiracy to violate ordinance.

9. Indictment and Information ⇨144

Duty of trial court in passing on motion to dismiss indictment on ground of lack of probable cause to indict was to test the evidence before the grand jury for reasonable and probable cause on basis of grand jury transcript, and defensive matter or evidence in mitigation which was not before grand jury could be considered at the trial. West's Ann.Pen.Code, § 995.

10. Indictment and Information ⇨10.2(10)

Record disclosed reasonable and probable cause for indicting defendant for conspiracy to commit crime and conspiracy to violate gambling house ordinance. West's Ann.Pen.Code, § 182.

◆

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Harmon Skillin, Gerald J. Kilday, San Francisco, for respondent.

KAUFMAN, Justice.

The People appeal from an order granting a motion to dismiss the indictment under section 995 of the Penal Code. On May 2, 1955, the Grand Jury of the City and County of San Francisco charged respondent Henry Van Randall, with a violation of section 182 of the Penal Code, conspiracy to violate section 288 of the Police Code of the aforesaid City and County (maintaining a gambling house). He was also charged with three prior felony convictions. Respondent was arraigned on May 6, and on May 12, made the motion to dismiss, which on May 27, 1955, was granted.

On April 22, 1955, certain San Francisco police officers were sent to the Myers Social Club at 4526 Third Street, San Francisco, where they entered the premises by going through the front door of the establishment, then through two swinging doors, one behind the other, the last one opening into a large room in the rear. The front of the building gave the appearance of a cigar store, but neither cigars nor cigarettes were found therein. In the rear of the building were between 40 and 45 persons seated around three tables. The five men at the last table were engaged in what appeared to the officers to be a game of stud poker. Cards and money were on the table in front of them and $47.25 was on a handkerchief on this table. Officer Murray questioned July Phelan who identified himself as a dealer. He told Murray that the $47.25 was the pot of that particular game, that the money in a plastic box on the table was the house cut from the pot, which was ten per cent. At another table the dealer identified himself as James Cannon, who stated to the officer that they were playing draw poker. There was $31.70 on this table representing the pot, the house cut and money from the players. From the position of the cards it appeared to the officer that a draw poker hand was being dealt. At the third table the officer testified it was obvious that a card game was in progress, but he could not determine what type it was. This officer also identified gambling equipment taken in the raid of the establishment. Officer Murray further testified that it was ascertained that the gas and electric services were under the name of Lawrence, that when they paged Lawrence, Van Randall came forward, saying that Lawrence was in Kansas City and had nothing to do with it.

Inspector Frank Ahern, who participated in the raid, testified that tables equipped for gambling were found upstairs. He asked for Van Randall whom he knew to be the owner and was told that he had gone home for a rest. Van Randall's nephew, Johnnie Walker, who lived at the same address accompanied Ahern on the drive to Van Randall's home. Van Randall was found sleeping on the chesterfield. Ahern awakened him and brought him back to the club. Van Randall had the keys to the house boxes on the tables. He told Ahern that he was the sole owner of the club, that the dealers a each of the tables took a 10% cut of which he took 5% leaving them 5%.

Respondent admitted that the Myers Club had been operating for about six weeks, and prior to that it had been closed for about a year. When asked about the circumstances under which he opened it, he said he just opened it up, that no one told him that he could do so, that it was chartered for a social club. Beyond that he refused to testify on the ground that his answers might incriminate him.

The trial court at the hearing of respondent's motion under section 995, Penal Code, interjected into the case the issue of discriminatory enforcement of the antigambling laws stating that he could take judicial notice of the fact that similar offenses were practiced widespread in San Francisco, that church organizations raised money through "bingo" lotteries, and that these affairs were even advertised. Relying on the case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, he dismissed the indictment because he felt that the failure to prosecute others for similar infractions of the law was a denial of the equal protection of the law as far as this respondent was concerned. The court admitted that the record before the Grand Jury had contained no evidence showing the existence of widespread gambling by church groups.

[1] Appellant contends that a constitutional question cannot be raised under section 995, Penal Code, and that the trial court may not set aside an indictment on any grounds other than the two named in the statute. Of those two, only the ground of lack of probable cause was urged by respondent at the hearing on the motion. The rule before the 1949 amendment to section 995 which added lack of probable cause as a reason for dismissing an indictment, that the trial court was without jurisdiction to entertain or grant such motion or set aside an indictment or information upon any grounds other than those expressly specified in the section, would still appear to be sound. See People v. Schmidt, 64 Cal. 260, 30 P. 814. At the time that People v. Schmidt, supra, was decided neither an indictment, nor an information could be set aside for lack of reasonable or probable cause. But the principle of construction, *expressio unius est exclusio alterius,* is still applicable, and the motion can therefore be granted only for lack of probable cause or the other specifically enumerated grounds.

[2] As to what may be considered in determining whether there is reasonable and probable cause to indict a defendant, the test laid down in People v. Platt, 124 Cal.App.2d 123, 268 P.2d 529, is that an indictment or information should be set aside only if there is no evidence that a crime has been committed or no evidence to connect defendant with such crime. The trial court on such motion may not substitute its judgment as to the weight of the evidence, and will not inquire into the sufficiency of the evidence in support of the information or indictment. And, see, People v. Sears, 124 Cal.App.2d 839, 269 P.2d 683; People v. Nagle, 25 Cal.2d 216, 153 P.2d 344. This court reversed an order setting aside an indictment for lack of reasonable and probable cause in People v. Hopkins, 101 Cal.App.2d 704, 226 P.2d 74, 77, a case wherein defendant was accused of manslaughter for having assisted a narcotic addict by holding his arm while the addict administered a shot of heroin to himself from which he subsequently died. This court, citing Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713, to the effect that if there is some evidence to support the indictment, the court will not inquire into its sufficiency, but the lack of any evidence establishes that the Grand Jury has exceeded its authority. The court further noted that section 921 of the Penal Code requires the Grand Jury to find an indictment "'when all the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury.'"

[3] In Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P.2d 250, 254, the Supreme Court stated that "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. People v. Nagle, 25 Cal.2d 216, 222, 153 P.2d 344. An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." Respondent herein admitted that he was the proprietor of the club, there was testimony before the Grand Jury as to admissions made by him concerning the percentages he shared with the two dealers, there was the testimony of the officers relating the admissions made by the dealers as well as the officers' testimony concerning the types of card games in progress and the paying off of the players by the dealers. None of this evidence was contradicted by respondent before the Grand Jury. There was therefore some evidence for the Grand Jury to infer that respondent and his dealers had some form of compact between

them designed to violate the ordinance which would be sufficient to hold respondent on a conspiracy charge.

[4] Although appellant argues that a constitutional question may not be raised in this type of proceeding, it is now settled that the legality of the evidence presented to the Grand Jury may be questioned, for if all of the evidence is the result of an illegal search or seizure the indictment cannot stand. In Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23, 25, it was held that a defendant has been held to answer without reasonable or probable cause if his commitment is based entirely upon incompetent evidence. The court stated that "no problem is presented in applying this rule in cases involving searches and seizures in which the facts bearing on the legality of the search or seizure are undisputed and establish as a matter of law that the evidence is or is not admissible. In many cases, however, the evidence before the magistrate bearing on this issue may be in conflict or susceptible of conflicting inferences or consist only of the testimony of prosecution witnesses, and under these circumstances the court in ruling on a motion to set aside the information will frequently not be in a position to make a final determination as to the admissibility of the evidence. Accordingly, the information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion (citations), and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue. (Citations.) In the absence of evidence to the contrary, it is presumed that the officers acted legally (citation), and if the issue is raised for the first time on a motion to set aside the information, the motion should be denied unless the evidence before the committing magistrate establishes that essential evidence was illegally obtained."

[5, 6] In the case now before the court, respondent did not raise the issue of illegal search and seizure on the motion to dismiss the indictment, but raises it for the first time on this appeal. Therefore, unless an illegal search and seizure affirmatively appears from the transcript of the Grand Jury proceedings it must be presumed that the search and seizure was legal, and if in fact it was not, respondent will have an opportunity to prove that fact at the trial. Here, as in People v. Farrara, 46 Cal.2d 265, 294 P.2d 21, it does not appear whether or not the officers had warrants. There is some evidence from which it might be inferred that Inspector Ahern had reasonable cause to believe that respondent was involved in a conspiracy before he went out to his home with respondent's nephew and brought respondent back to the establishment. There is no evidence to show whether or not respondent went voluntarily with Ahern or whether he had actually been arrested at that point. Since the record does not show that the arrest and search were illegal, the evidence must be held to have been sufficient to warrant an indictment by the Grand Jury.

Respondent maintains that the indictment should be dismissed because of discriminatory enforcement of the anti-gambling laws in San Francisco, referring to the fact that charities and churches raise money by such illegal methods but are unmolested while the gamblers of respondent's class are prosecuted.

[7–9] This contention has no merit. Moreover it appears that it is not a question to be raised on a motion to dismiss the indictment, as the law itself is not attacked as unconstitutional but only the manner of its enforcement. Clearly, respondent has not been indicted under a void ordinance. Respondent relies on Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, a case in which a San Francisco ordinance was held unconstitutional which fixed no standard by which licenses for laundries were to be granted or withheld except by the will of the Board of Supervisors. It was proved in that case that licenses were withheld from all Chinese proprietors of laundries. In a later case, Ah Sin v. Wittman, 198 U.S. 500, 25 S.Ct. 756, 49 L.Ed. 1142, which involved a San Francisco ordinance directed at gambling establishments, appellant relied upon the Yick Wo case, arguing that Chinese operators were discriminated against. The court affirmed the judgment of the lower court, and pointed out that appellant was seeking to set aside a criminal law of the state not on the ground that it was unconstitutional on its face nor discriminatory in tendency and ultimate actual operation as was the ordinance in the Yick Wo case, but it was made so by the manner of its administration. This, it was held, was a matter of proof which must be made out completely. The duty of the court below in passing on the motion herein was to test the evidence before the Grand Jury for reasonable and probable cause on the basis of the Grand Jury transcript. Defensive matter or evidence in mitigation which was not before the Grand Jury can be considered at the trial. See People v. Nathanson, 134 Cal.App.2d 43, 47, 284 P.2d 975.

Appellant maintains that when the contention of unequal enforcement of the laws has been raised as a defense in criminal cases in this state, it has been rejected. In People v. Montgomery, 47 Cal.App.2d 1, 117 P.2d 437, 446, it was said that appellant therein argued that "equal protection should also be extended to any person to enable him to commit a crime on a basis of equality with all other persons." The court stated that the remedy for unequal enforcement of the law "does not lie in the exoneration of the guilty at the expense of society", and noted the obvious distinction between extending protection to persons of the Chinese race in pursuance of the business of laundering, the Yick Wo case, supra and extending protection to those engaged in pandering, and that while equal protection will be extended in pursuit of lawful occupations, no one has the right to demand protection in the commission of a crime. The court decided that the only possible extension of the Yick Wo case to a criminal matter would be "an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime." In People v. Darcy, 59 Cal.App.2d 342, 354, 139 P.2d 118, in which a dissenting opinion argued for the validity of this type of defense, a petition for hearing was denied by the Supreme Court.

Respondent cites Wade v. City and County of San Francisco, 82 Cal.App.2d 337, 186 P.2d 181 and People v. Gordon, 105 Cal.App.2d 711, 234 P.2d 287, in reference to discriminatory enforcement. The first of these cases dealt with the alleged discriminatory enforcement of a licensing ordinance concerned with solicitation of magazine subscriptions on the public streets and sidewalks, the second with alleged discriminatory enforcement of the Unfair Trade Practices Act. These cases are similar in principle to the Yick Wo case, and distinguishable from People v. Montgomery and People v. Darcy, supra.

[10] In view of the fact that the record of the Grand Jury proceedings discloses reasonable and probable cause for indicting respondent for conspiracy to violate the ordinance, it was error to grant the motion to set aside the indictment. See People v. Hopkins, supra.

Order reversed.

NOURSE, P. J., and DOOLING, J., concur.

141 Cal.App.2d 158

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Vernon H. COX, Defendant and Appellant.
Cr. 1202.

District Court of Appeal, Fourth District,
California.
April 25, 1956.

Proceeding upon writ of error coram nobis to review robbery conviction. The Superior Court of Fresno County, Edward L. Kellas, J., entered order denying application, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that record supported action of trial court in denying petition, in that all but one of matters could and should have been raised on motion for new trial or on appeal, and that matter, concerning claim that notice of appeal had actually been filed, was not reviewable in such proceeding.

Order affirmed.

1. Criminal Law ⚷997(4)

Claim of defendant that he had timely filed notice of appeal from robbery conviction by mailing letter to clerk was not reviewable in proceeding upon writ of error coram nobis, in view of fact that it must have occurred after judgment and would not have prevented rendition of judgment had it been known to court.

2. Criminal Law ⚷997(2)

Claim of defendant convicted of robbery that he had been denied right to have compulsory process to obtain witnesses in his favor, was not sustained by record, and, in any event, was not reviewable in proceeding upon writ of error coram nobis, since matter could have been corrected on motion for new trial or by appeal.

3. Criminal Law ⚷997(4)

Where defendant, who had been convicted of robbery, claimed in proceeding upon writ of error coram nobis, that he had been induced by police to admit guilt of other unsolved crimes, but it was not alleged that confession had been obtained of robbery for which defendant had been convicted, and affidavit of district attorney denied that confession was offered or used at trial, assertion of error was insufficient, and, in any event, it was not reviewable in such proceeding.

4. Criminal Law ⚷997(2, 5)

Where defendant, who had been convicted of robbery, claimed in proceeding upon writ of error coram nobis, that his counsel did not perform his duty, matter should have been raised on motion for new trial or on appeal, was not supported by record, was denied by affidavit of district attorney, and, in any event, was not reviewable in such proceeding.

5. Criminal Law ⚷997(15)

Claim of defendant, who had been convicted of robbery, in proceeding upon writ of error coram nobis, that he had been convicted by very irregular and doubtful testimony, in that identification of him as one who committed robbery was insufficient, was itself insufficient in view of denial in affidavit of district attorney, and in that facts were within knowledge of trial judge.

6. Criminal Law ⚷997(2)

Claim of defendant convicted of robbery that court had committed error by permitting defendant to be prosecuted by devious and fraudulent manners, was not reviewable in subsequent proceeding upon writ of error coram nobis, in view of reviewability of matter on motion for new trial or on appeal, and fact that the matter could have been presented to trial court before judgment.

7. Criminal Law ⚷997(9)

Claim of defendant convicted of robbery that he had been suffering from state of duress, and that he did not know or understand what was taking place in courtroom, concerned matter within observation of the trial judge, and was unsupported by record, and, in any event, was not reviewable upon proceeding upon writ of error coram nobis.

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Vernon H. Cox, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying an application for a writ of error *coram nobis.*

The defendant was charged in one action in the superior court with the crime of petit theft with a prior felony conviction, and pleaded guilty to that charge. In another action he was charged with the crime of robbery and three prior felony convictions. After a trial by jury, being represented by counsel, he was found guilty on that charge and the crime was fixed as robbery in the first degree. Judgment was entered on October 25, 1954, sentencing him to imprisonment on both charges, it being ordered that the sentence in the first of these actions run concurrently with the sentence in the other. No notice of appeal from that judgment was filed.

On May 10, 1955, the defendant filed a petition for writ of error *coram nobis*. Apparently, it was intended to relate only to the second action in which there was a jury trial. The district attorney filed a verified answer to this petition and the matter was heard on June 3, 1955, at which time several affidavits were received and considered by the court. The defendant was represented at that hearing by court appointed counsel. The petition was denied on June 9, 1955, and the defendant has appealed from that order.

[1] The appellant first contends that he filed a notice of appeal on October 25, 1954. It is alleged in his petition that he filed this notice at that time by writing a letter to the clerk "and deposited the letter in the United States mails with the postage prepaid." It appears by the affidavit of the clerk that no such notice was received. Moreover, any question as to whether an appeal was filed within the time allowed is not reviewable in this proceeding, since it must have occurred after judgment and would not have prevented a rendition of the judgment had it been known to the court.

[2] It is next contended that the defendant was denied the right to have "compulsory process" to obtain witnesses in his favor. Not only could this matter have been corrected on motion for a new trial or by appeal, but there is nothing in the record to sustain this claim. The appellant attached to his brief an affidavit dated May 6, 1955, signed by a Mr. and Mrs. Booth stating that they would have been willing to testify that the appellant was at his own home at the time the crime was committed. There is also attached the affidavit of the appellant's wife dated July 18, 1955, stating that the appellant was with her during the time the crime was committed. The latter affidavit was not even presented to the trial court, and Mr. and Mrs. Booth were next door neighbors of the appellant and his wife. No sufficient reason appears why such evidence was not produced at the proper time and, aside from its being merely cumulative, the matter is not reviewable in this proceeding. The fact that process was refused was also denied in one of the affidavits filed.

[3] It is contended that the appellant was "oppressed and secreted by the prosecution and petitioner's attorney." It seems to be argued in this connection that two named police officers tried to induce the appellant to admit that he had committed other unsolved crimes in Fresno. It is not alleged that a confession was obtained as to the robbery involved in the second action, and the affidavit of the district attorney denied that any confession was offered or used at the trial. If any error existed in the admission of evidence concerning other offenses that matter is not reviewable here.

[4] The contention that appellant's counsel did not perform his duty is not supported by the record before us, was denied by the affidavit of the district attorney, and is a matter that should have been raised on a motion for a new trial or on an appeal.

[5] It is contended that the appellant was convicted by "very irregular and doubtful testimony". It is argued that there was no sufficient identification of the appellant as the one who committed the robbery. The affidavit of the district attorney states that the defendant was positively identified by the testimony of two witnesses, and the facts were within the knowledge of the trial judge.

[6] Some contention is made that the court committed error by permitting the appellant to be prosecuted by "devious and fraudulent manners." Not only were the things claimed in this connection reviewable on a motion for a new trial or on an appeal, but nothing appears in this regard which could not have been presented to the trial court before judgment.

[7] Finally, it is contended that the appellant was "suffering from a state of duress, he did not know or understand what was taking place in the court room." Again this was denied by the affidavit of the district attorney, it was within the observation of the trial judge, and the contention

is not factually supported by the record before us.

The record supports the action of the trial court in denying the petition with respect to all of the contentions here raised. People v. Martinez, 88 Cal.App.2d 767, 199 P.2d 375; People v. Gennaitte, 127 Cal.App.2d 544, 274 P.2d 169. With the exception of the first, all of these matters could and should have been raised on a motion for a new trial or on an appeal. As to the first matter, while relief could have been had in another proceeding if the facts had justified such relief, the matter is not one which may be considered on an application for a writ of error *coram nobis.*

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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140 Cal.App.2d 796

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Erwin MORGAN, Defendant and Appellant.

Cr. 5467.

District Court of Appeal, Second District, Division 2, California.

April 16, 1956.

Rehearing Denied May 1, 1956.

Defendant was prosecuted for forgery with a charge of prior conviction. From a judgment of the Superior Court of Los Angeles County, Otto J. Emme, J., an order denying a motion for new trial, and an order denying a motion in arrest of judgment, defendant appealed. The District Court of Appeal, Ashburn, J., held that the evidence sustained conviction, that there were no reversible trial errors, and that the order denying motion on arrest of judgment was not appealable.

Judgment and order denying motion for new trial affirmed. Order denying motion and arrest of judgment dismissed.

1. Criminal Law 🔑1160

Before verdict of jury approved by trial court can be set aside on appeal upon the grounds of insufficiency of evidence, it must clearly appear, that upon no hypothesis is there sufficient substantial evidence to support the conviction.

2. Criminal Law 🔑1144(13)

Appellate court must assume in favor of verdict, the existence of every fact which a jury could reasonably have deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

3. Forgery 🔑44

In prosecution for forgery, evidence sustained conviction.

4. Forgery 🔑1, 16

The crime of "forgery" is committed, when one makes or passes false instrument with intent to defraud, and the fact that the instrument is never presented to a bank and no one is defrauded because defendant received no money on it, is immaterial. West's Ann.Pen.Code, § 470.

See publication Words and Phrases, for other judicial constructions and definitions of "Forgery".

5. Forgery 🔑7(1), 12(2)

Whether forged instrument is one of a particular name or character, or if genuine would create legal liability, is immaterial, the test being, whether upon its face, it will have the effect of defrauding one who acts upon it as genuine. West's Ann.Pen.Code, § 470.

6. Forgery 🔑14

Failure to consummate the fraud is not of the essence of forgery. West's Ann.Pen. Code, § 470.

7. Constitutional Law 🔑268

Defendant was not denied due process because of denial of right to aid of counsel where he rejected offers of counsel beginning with arraignment and continued throughout the trial until time set for sentence and judgment when he moved for a continuance in order to obtain counsel.

8. Witnesses ⚷9

In forgery prosecution, record did not establish that defendant was denied the right to subpoena witnesses.

9. Criminal Law ⚷1202(1)

Proof of prior convictions to support increased punishment was not insufficient because the prior case was pending on appeal, execution was stayed and defendant had not served any time on that conviction.

10. Criminal Law ⚷641(1)

By electing to appear in propria persona, a defendant cannot secure material advantages denied to other litigants.

11. Attorney and Client ⚷62

A litigant has the right to act as his own attorney but in so doing is restricted to the same rules of evidence and procedure as is required of those qualified to practice law.

12. Criminal Law ⚷1202(7)

In forgery prosecution, where defendant elected to appear in propria persona, placing the entire file of former conviction relied on for increased punishment in evidence was not reversible error, where defendant after the file had been excluded insisted upon restoration of the entire file to the status of evidence.

13. Witnesses ⚷217

In forgery prosecution, where an attorney was called as a witness by defendant and the attorney declined to answer a question on the ground that the matter was privileged, attorney was entitled to make the claim of privilege as against the contention that the client must do so in person.

14. Criminal Law ⚷1168(2)

In forgery prosecution, where the only thing brought to the attention of the jury for a second time after the case was reopened was the fact that an attorney called as a witness by defendant refused to violate his client's confidence, no prejudice was shown.

15. Criminal Law ⚷686(1)

In a forgery prosecution there was no impropriety in reopening the case after the judge decided that he had made an error which could and should be corrected.

16. Criminal Law ⚷686(1)

The matter of reopening a case is always one of discretion for the trial judge.

17. Criminal Law ⚷956(10)

In forgery prosecution record did not entitle defendant to a new trial on ground that a juror concealed an existing prejudice when examined on voir dire.

18. Criminal Law ⚷448(1)

In forgery prosecution, letter written by one designating himself "director intelligence division" and written on the letterhead of the Commissioner of Internal Revenue and addressed to the defendant and which dealt in conclusions as to the status of an agent of the Internal Revenue Service was not competent evidence.

19. Criminal Law ⚷1119(1)

In forgery prosecution record did not sustain claim that defendant and his witnesses were brought into court in handcuffs and chains.

20. Criminal Law ⚷667(2)

A motion for preparation of a daily transcript which was made at the beginning of the trial was properly denied in the exercise of discretion.

21. Criminal Law ⚷1141(2)

Error in giving and refusing instructions was not reviewable where defendant made no effort to explain wherein the error lay.

22. Indictment and Information ⚷144

Denial of defendant's motion to set aside an information for forgery was proper where the motion was made on grounds other than those prescribed by the statute. West's Ann.Pen.Code, § 995.

23. Criminal Law ⚷1023(12)

An order denying a motion in arrest of judgment is not appealable.

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Robert Erwin Morgan, in pro. per.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

[1–3] Defendant having been convicted of forgery and a charge of prior conviction of felonies—issuing check without sufficient funds and grand theft—having been found to be true, he appeals from the judgment and order denying motion for new trial and attempts to appeal from an order denying a motion in arrest of judgment. Appearing in propria persona he advances numerous contentions, none of which is meritorious.

In varying forms appellant asserts insufficiency of the evidence. The familiar rule governing review is thus stated in People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911, 916: "'"[B]efore the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground" of insufficiency of the evidence, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict."'" The evidence at bar abundantly establishes the fact of defendant's guilt. He did not take the stand to deny it but did through stipulations and statements in oral argument supply considerable substantial corroboration of the prosecution witnesses.

On Saturday, December 18, 1954, defendant presented to James M. Ross, an employee of Ralph's Grocery Company who was in charge of cashing checks at its store at Third and Vermont Streets, Los Angeles, a certain check for $25 payable to cash and bearing a signature, "Joseph M. Burman." The signature had been written by defendant, who knew Joseph M. Burman to be a prisoner in the county jail; Burman had not authorized defendant to sign his name to any check or to endorse his name upon any such instrument. In Ross' presence defendant endorsed the name Joseph M. Burman on the back of the check and wrote the word "cash" below it. Ross asked defendant for identification and he produced a temporary driver's license issued to said Burman; the license bore the address of 725 South New Hampshire, which was Burman's residence when not in jail. The check bore an address of 715 South New Hampshire. Ross, noticing the discrepancy, asked defendant which one was correct and he said the one on the driver's license; Ross then changed 715 to 725 where it appeared on the check and asked how he could verify the identification; defendant gave him a telephone number as that of his own office; Ross wrote that number on the check, said he would have to verify the same and went to a convenient telephone for that purpose. Defendant, who was just out of jail and had no office, started to leave the store "rather hurriedly." Ross saw this, followed him and called out asking defendant if he wanted the check or his change; defendant, then some distance from the store, started to run. At Ross' request James W. Watkins, another Ralph's employee who had seen defendant present the check and then leave the store, joined in the chase and he and Ross caught defendant, subdued him after a struggle and took him forcibly back to the store where he was held until police arrived. When asked why he left without getting money on the check defendant said it was getting around Christmas time and he did not want to have any trouble or get involved and he would just rather leave the check there and for them to keep it; that they could keep it and keep the money from it. He also said that the check was not good at that time but it would be when it was paid; that it would be good when presented to the bank on Monday morning. (It was then Saturday.) In the office, while waiting for the police, defendant repeated that the check was not then good but said it would be honored on Monday. He also told the arresting officer, one Wells, that the check was not then good but would be so on Monday. To officer Boring, on December 20th, defendant said that he had presented the check at Ralph's Grocery store on Saturday, that People's exhibit 1 which was then shown him was the check, that as "they" were going to verify it he started to leave the store without getting any money or merchandise, that Joseph M. Burman was a name that he used because he had the identification for that name, that he did not know Burman, that he had just recently been released from the county jail on an appeal bond and had several contacts to make where he could obtain some money that was owed him, that he had been unsuccessful in accomplishing this, needed some money to live on until the first of the week and used this method to get some money to provide for himself until Monday when he intended to open an account in the name of Joseph M. Burman to make this check good. Asked what he had shown for identification he said that he had used the temporary driver's license that was taken from him at the time of his arrest (being People's exhibit 2); that he had found it in a waste basket in the office of his attorney, Lowell Lyons. "I asked him if he knew a Joseph Burman and had permission to sign his name and he said he did not, that he intended to open this account and that this check would be good upon presentation." Defendant also said that as soon as he got some money from these various contacts he would open an account in the name of Joseph Burman so that this check would clear.

Joseph M. Burman testified that he last saw the driver's license in his own wallet which he gave to his wife with instructions to turn it over to his attorney, Lowell Lyons. Also that he gave defendant no permission to use the license for identification or otherwise and did not authorize him to sign the Burman name or to endorse it on any check; that he had no account in the branch bank on which the subject check was drawn.

Although defendant did not testify, he said to the jury in an opening statement that he wrote the check and presented it to Ralph's store; this he repeated in his final argument, adding that he walked out of the store. Throughout the trial he insisted that he had authority from Burman to sign his name and to use his driver's license as identification. He produced certain witnesses from the county jail who undertook to sustain these claims (which he did not support by his own oath). One of them had been convicted of armed robbery, another of burglary and a third of bookmaking. The jury did not believe them and took no stock in defendant's arguments.

[4–6] Appellant has asserted at all times that forgery was not proved because the check was never presented to the bank and no one was defrauded because he got no money on it. This argument does not go to the gist of a forgery charge. That crime is committed when one makes or passes a false instrument with intent to defraud. "The crime of forgery consists either in the false making or alteration of a document without authority or the uttering (making use) of such a document with the intent to defraud. Sec. 470, Pen.Code. Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine." People v. McKenna, 11 Cal.2d 327, 332, 79 P.2d 1065, 1068. "In the case of a forgery of an instrument it is not necessary that the forged writing create a valid and legally enforcible obligation in order to constitute the making of it a forgery. It is sufficient that it may possibly deceive another and was prepared with intent to deceive and defraud another. Where the writing alleged to have been forged shows on its face that it might be the means of fraud, no averments of extrinsic facts to show how this could be are necessary." People v. Brown, 101 Cal.App.2d 740, 742, 226 P.2d 647, 649. Failure to consummate the intended fraud is not of the essence. People v. Horowitz, 70 Cal.App.2d 675, 688, 161 P.2d 833. Defendant also claims that there was no showing that the check was not good; but the proof that Burman had no account in the bank on which it was drawn sufficiently disposes of that argument, as does the further fact that the check was a forgery.

The evidence is ample to prove without the aid of defendant's admissions above mentioned the fact of the forgery of the check by defendant and its utterance by him.

[7] Defendant claims that he was denied fundamental rights, such as the right to aid of counsel. The record shows that on seven different occasions, beginning with arraignment and continuing throughout the trial, defendant rejected offers of counsel, voicing a desire "to remain in pro. per." Defendant conducted all proceedings of the trial, examining and cross-examining witnesses, making numerous objections, and displaying familiarity with many of the technicalities of a criminal trial. Finally, on May 9th, the time set for sentence and judgment, defendant moved for a continuance of three weeks in order to obtain counsel. This date was almost three months after his initial refusal of such aid. The court adverted to defendant's former refusals of such offers and denied the motion. This ruling is the basis of defendant's claim of denial of due process. There is no semblance of merit in it. The right to counsel had been intelligently, effectively and repeatedly waived and defendant was not entitled to further delay upon the statement that he then desired counsel. In re Connor, 16 Cal.2d 701, 709, 108 P.2d 10; People v. Simon, 107 Cal.App.2d 105, 118, 236 P.2d 855. This case exemplifies the observation made by the court in Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 162, 280 P.2d 187, 192: "Experience in trial of cases indicates that all too often litigants who appear in propria persona deliberately attempt to capitalize upon their own ignorance or appearance of ignorance."

[8] On a parity with the claim of denial of counsel is the assertion that defendant was denied the right to subpoena witnesses. The record shows that the trial court displayed unlimited patience and was punctilious in according defendant full and free opportunity to subpoena and to present in court all witnesses desired by him.

[9] The claim of error in the matter of proof of defendant's prior conviction of felonies is plainly without foundation. Appellant makes two points. First, he says that the prior case was pending on appeal, execution was stayed and, as he had not served any time on that conviction, it was not provable. That this is not the law appears from the ruling in People v. Clapp, 67 Cal.App.2d 197, 200, 153 P.2d 758.

[10–12] The second contention concerning prior conviction is that there was reversible error in placing the entire file of the former case in evidence. Initially, that file was received by reference and without objection. On a later date during a discussion in chambers the court, on motion of the prosecutor and over defendant's objection, excluded all portions of the file other than the judgment and stay of execution. Immediately after that, in the presence of the jury, defendant moved for a mistrial upon the ground that part of the file had been withdrawn from evidence over his objection. The district attorney then consented to restoration of the entire file to the status of evidence; defendant insisted on it; the judge advised him "that there are matters in that file that are very detrimental to you." Defendant replied: "That is in regard to the conviction, your Honor. I am not trying to hide anything. There is nothing in there that proves detrimental to me as far as I am concerned. The Court: Very well. At the request of the defendant the entire file will go into evidence as his exhibit." Unless a defendant appearing in propria persona is entitled to greater rights than one who is represented by counsel, there is no possible basis for claim of error in this matter. People v. Clark, 122 Cal.App.2d 342, 349, 265 P.2d 43, 47: "But by electing to appear *in propria persona* a defendant cannot secure material advantages denied to other litigants. Certainly one appearing *in propria persona* cannot consent at the trial to the introduction of evidence, after first introducing the subject matter himself, and thus invite the introduction of evidence to rebut the inference he was trying to create, and then be permitted on appeal to complain that his invitation was accepted." Lombardi v. Citizens Nat. Trust & Sav. Bank, 137 Cal.App.2d 206, 289 P.2d 823, 824: "A litigant has a right to act as his own attorney, Gray v. Justice's Court, 18 Cal.App.2d 420, 63 P.2d 1160, 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.' Knapp v. Fleming, 127 Colo. 414, 258 P.2d 489; Monastero v. Los Angeles Transit Co., 131 Cal.App.2d 156, 160–161, 280 P.2d 187. The Supreme Court of Arizona, in Ackerman v. Southern Arizona Bank & Trust Co., 39 Ariz. 484, 7 P.2d 944, stated the principle in this language: 'A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney —no different, no better, no worse.' To that same effect is Biggs v. Spader, 411 Ill. 42, 103 N.E.2d 104."

Attorney Lowell Lyons was called as a witness by defendant in an effort to prove that Burman had entrusted his driver's license to Lyons, who was Burman's attorney, for the purpose of delivering it to defendant for use in raising bail for Burman. Asked if Burman had instructed him to turn over to defendant "identification and authorization to use his name" Lyons declined to answer on the ground that the matter was privileged as between attorney and client. Later, the following occurred: "Q. Did Mr. Burman tell you to deny that you turned over papers to me as his attorney? Mr. Mayerson (Deputy District Attorney): That question falls within the privilege already claimed by the witness, Your Honor. The Court: Objection is sustained."

[13] After the evidence and the arguments were closed and before instructing the jury, the judge decided that he had erred in this last ruling because privilege had been claimed by the state and not by Burman or his attorney. At the beginning of court on the next morning the judge announced that he had erred in this respect and on his own motion told Lyons to resume the witness stand. The question was repeated to Lyons, whereupon the attorney raised the point of privilege and was sustained. Additional questions were put to Lyons and were answered by him, following which another witness was recalled at the request of defendant and defendant was given time for additional argument; he took advantage of this privilege. Appellant now says that the attorney could not claim the privilege, that his client must do so in person and therefore there was error in the sustaining of objection as above indicated. Such is not the law. Ex parte McDonough, 170 Cal. 230, 149 P. 566, L.R.A.1916C, 593; People v. Kor, 129 Cal. App.2d 436, 440, 447, 277 P.2d 94.

[14–16] Defendant says that he suffered prejudice through the fact that the case was reopened after arguments were concluded and thus the matter was unduly emphasized. But the only thing thus brought to the attention of the jury for a second time was the fact that Lyons refused to violate his client's confidence. Defendant's witness who was recalled was the bookmaker who then testified that he saw Lyons give some papers to defendant which looked like a driver's license, and that he heard Burman's name mentioned at the time. There was no prejudice in any of this. Nor was there any impropriety in the judge's reopening the case when he decided that he had made an error which could and should be corrected. The matter of reopening is always one of discretion for the trial judge. People v. Berryman, 6 Cal.2d 331, 338, 57 P.2d 136.

[17, 18] Appellant attacks the verdict upon the ground that one juror concealed an existing prejudice when examined on voir dire. Hugo DiLillo, after stating that his answers to questions previously put to other jurors would be substantially the same, meaning that he was in no way prejudiced, said that his occupation was that of internal revenue agent, that he was connected with the audit division, auditing income tax and excise tax returns in the Los Angeles office. Then followed this: "The Defendant: Are you acquainted with any members of the law enforcement agency? The Prospective Juror: No. The Defendant: Are you considered to be a secret agent for the Internal Revenue Department? The Prospective Juror: No. The Defendant: Would you be considered a peace officer under your occupation? The Prospective Juror: No. The defendant: Would you give more credence to the testimony of a police officer than you would to the testimony of the defendant's witnesses? The Court: Solely because he is a police officer. The Defendant: Yes, for that purpose. The Prospective Juror: No. The Defendant: I pass, your Honor." In support of his claim appellant presents a letter from one J. Perry August, who designates himself "Director, Intelligence Division"; it is written on the letterhead of the Commissioner of Internal Revenue and addressed to the defendant. It deals in conclusions as to the status of an agent of the internal revenue service and in fact does not belie the testimony of the juror. Of course it is not competent evidence. In substance and in form appellant has failed to substantiate this charge, and the trial judge committed no abuse of discretion in rejecting the contention.

Other contentions of appellant are properly disposed of summarily.

[19] The claim that defendant and his witnesses were brought into court in handcuffs, irons and chains, is not supported by the record. When this point was made on motion for new trial the judge said: "In that connection you were not handcuffed or manacled at any time when you came into this courtroom. * * * You never came into this courtroom handcuffed. You came to the foyer of this building handcuffed." On the occasion to which the judge referred defendant was complaining that he and three witnesses were brought before the jury chained and manacled and in handcuffs and that remarks were made about it at the time. After discussion of the matter the court volunteered to instruct the jurors that defendant and three of his witnesses were in custody of the sheriff and were brought to the court room in handcuffs and were not to be prejudiced thereby. The judge did then give a careful instruction to the jurors in which he mentioned the fact that defendant and his witnesses "are not handcuffed when they come in the courtroom," and at its conclusion said: "I make this explanation so that you and each of you will disregard that situation in all respects while deliberating in this case. Is that what you wish me to say, sir? The Defendant: Yes. Thank you, sir." There was no error, prejudicial or otherwise, in these incidents.

The assertion is made that there were proceedings in chambers in the absence of defendant. This relates to the circumstances of reopening the case. The court refuted this claim, stating that he had reopened the case on his own motion when he discovered his error. Later, when hearing an application for correction of the transcript, the judge specifically stated that the prosecution was not present in connection with his considering the matter of changing his ruling. The record in no wise refutes the judge's statement.

[20] A motion for preparation of a daily transcript was made at the beginning of the trial and denied. This is a discretionary matter and no abuse has been shown. See People v. Chait, 69 Cal.App.2d 503, 524, 159 P.2d 445; Fraser v. Payne, 3 Cal.2d 630, 632, 45 P.2d 345.

[21] Error in giving and refusing instructions is asserted by appellant, but he makes no effort to explain wherein the error lies. In People v. Chait, supra, the court said, 69 Cal.App.2d at page 523, 159 P.2d at page 457: "It is also suggested that there was some sort of error in the refusal to give two other proposed instructions. But the appellants have not argued the point and have not said what error they have discovered. The reviewing court does not search for error but assumes that the judgment is sound unless error is disclosed by the parties interested. 2 Cal.Jur. p. 731." See also, People v. Gidney, 10 Cal.2d 138, 142, 73 P.2d 1186; People v. Jenkins, 118 Cal.App. 115, 119–120, 4 P.2d 799.

[22] Denial of defendant's motion to set aside the information under § 995, Penal Code, was proper. The grounds of motion there specified are exclusive, People v. Collins, 60 Cal.App. 263, 269, 212 P. 701; People v. Sacramento Butchers' Protective Ass'n, 12 Cal.App. 471, 477, 107 P. 712, and the motion at bar was made on grounds other than those prescribed by the statute.

Other points raised by appellant do not merit discussion. None of his claims of error is well taken

[23] The judgment and the order denying a new trial are affirmed. The order denying motion in arrest of judgment is not appealable. People v. Pierce, 110 Cal. App.2d 598, 611, 243 P.2d 585, and the purported appeal therefrom is dismissed.

MOORE, P. J., and FOX, J., concur

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141 Cal.App.2d 101

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William Stephen WELLMAN, Defendant and Appellant.

Cr. 1056.

District Court of Appeal, Fourth District, California.

April 24, 1956.

Prosecution for robbery. From a judgment of conviction of the Superior Court, San Diego County, John A. Hewicker, J., and from order denying new trial, defendant appealed. The District Court of Appeal, Mussell, J., held that there was no prejudicial error in giving of instructions at the trial or in comments made by trial court to jury.

Judgment affirmed.

1. Criminal Law 🔑1166½(12)

In prosecution for robbery, comments of trial court to jury that if money was in immediate presence, control and possession of defendant when it was placed on counter by bartender upon defendant's demand crime would be completed and that jury had to determine who had control of the money after it was placed on bar, which comments did not advise jury that it must find defendant had received control or custody of money, were not an attempt to control verdict by removing issue of whether a complete robbery was committed or whether there was merely an attempt to commit such offense and consequently was not prejudicial error.

2. Criminal Law 🔑1119(2, 4)

In prosecution for robbery, wherein defendant contended his right to cross-examine witness and argue his case to jury was unduly restricted in trial on his plea of not guilty by reason of insanity, record disclosed that defendant's counsel announced he had no further questions to ask witness on cross-examination and that argument to jury was limited to ten minutes to prosecution and equal time for defense, which limitation was not objected to.

3. Criminal Law 🔑645

In prosecution for robbery, refusal of trial court to allow defendant's counsel to make closing argument to jury was not error in view of Penal Code section providing People have right to open and close argument to jury. West's Ann.Pen.Code, § 1093, subd. 5.

4. Criminal Law 🔑814(17)

In prosecution for robbery, failure of trial court to instruct jury on alleged circumstantial evidence introduced in regard to question as to whether crime of robbery as distinguished from attempted robbery was committed, was not error where there were six eyewitnesses to robbery and circumstantial evidence was merely incidental and corroborative of the direct evidence of the crime.

◆

Barton C. Sheela, Jr., San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Emmet J. Seawell, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

The defendant was charged with the crime of robbery in that on or about August 10, 1955, he did wilfully, unlawfully, feloniously and by means of force and fear take approximately $100 from one Lewis L. Koers. The information further charged the defendant with having been convicted on two prior occasions of the offenses of robbery and assault with a deadly weapon. Pleas of not guilty and not guilty by reason of insanity were entered and on October 4, 1955, a jury returned a verdict finding the defendant guilty of robbery while armed with a deadly weapon and fixing the degree of the crime as robbery of the first degree. On October 7, 1955, the same jury found defendant to have been sane on the 10th day of August, 1955, at the time of the commission of the offense alleged in the information. A motion for a new trial was denied and defendant was sentenced to the state prison for the term prescribed by law. He appeals from the judgment of conviction, the sentence, and the order denying his motion for a new trial.

On August 10, 1955, at about 12:30 a. m., the defendant entered a bar known as the Sahara Club in La Mesa, San Diego county. He held a handkerchief to the left side of his face with his left hand and in his right hand he had a loaded 32 calibre automatic. He stepped up to the bar and upon being asked by the bartender (Mr. Koers) what he would have, replied "I want everything, all the money you've got in that register." Mr. Koers saw the gun pointed at him and replied "Yes, sir, I will get it." Thereupon Koers obtained the currency out of the cash register, which was a few feet away, placed the bills in two piles on the counter in front of the defendant, and upon being advised by the defendant that it was not enough, he wanted more, he returned to the register, took therefrom a handful of "halves and quarters" and laid them on the counter close to the bills in front of the defendant. The defendant then said, "I want more, that isn't enough". Mr. Koers, who was wisely cooperative under the circumstances, turned to make a third trip to the register when one of the patrons of the bar, a Mr. Gerald Lessard, struck the defendant on the back of his head with a metal disk which he, Lessard, had been using in a shuffleboard game. Defendant was then thrown to the floor by Lessard and a companion. Lessard then sat on the defendant until an ambulance arrived, at which time the defendant was taken away on a stretcher.

Appellant argues that the only substantial issue raised at the trial on the robbery charge was whether a complete robbery was committed rather than an attempt to commit such offense, and that the trial court erroneously removed this issue of fact from the jury by his comments on the evidence.

The argument that merely an attempt to commit robbery was shown is based upon the assumption that the defendant did not obtain possession and control of the money involved. In People v. Quinn, 77 Cal.App. 2d 734, 737, 176 P.2d 404, 405, this court said:

> "Section 211 of the Penal Code defines robbery as follows: 'Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' This requires the taking of personal property which is in the possession of another from his person or immediate presence but does not require that this be done by the use of the hands of the person doing the taking. Where there is an intent to so take the property while some asportation is required it is well settled that the distance it is taken may be very small. People v. Clark, 70 Cal.App.2d 132, 160 P.2d 553. A very slight removal is sufficient. Driggers v. State, 96 Fla. 232, 118 So. 20. It would be a strained and unreasonable construction of the language of the statute to interpret it as necessarily requiring the taking of the stolen property into the hands of the one committing the robbery."

In the instant case the bills were placed in front of the defendant in two piles and during the time the bartender was making the second trip to the register, the bills were "fanned out". As there was no one in close proximity to the defendant at the time, the jury could and apparently did reasonably infer from the circumstances that the defendant "fanned out" the bills and obtained both constructive and actual possession thereof.

[1] The comments of the trial judge which appellant claims were prejudicially erroneous are as follows:

> "The main point in this trial here seems to center around the term of asportation. The only thing I can say to you under the evidence, follow the indications of the evidence we have here. The defendant came in and directed Mr. Koers to bring him the money and, according to Mr. Koers, why the defendant had a gun in his hand and, of course, anybody with a gun in his hand is always quite emphatic in his demands. Nobody is going to resist him. So as far as asportation is concerned, if Mr. Koers was acting against his will under the sole direction and control of the defendant in this case and he transported the money from the sale, or from the cash register, to the counter and thereafter the property was in the immediate presence and control and possession of the defendant, why, of course, the crime would be completed.
>
> "Now I ask you, you put yourselves in Mr. Koers' position. I always feel that you can solve these matters better if you put yourself in the position of the defendant and also in the position of the victim. Put yourself on either side of the category and try to figure out what happened and what the impulses were. For instance, if Mr. Koers brought this money over and laid it down, say the paper money, and he laid it down on the counter in front of the defendant, he couldn't very well be expected to put it in the defendant's pocket or in his wallet for him; he wasn't going to get that close to him, and I think after he laid the money down he wasn't in a very good position of saying, 'Well, Mister, I am sorry, I think I gave you too much money, I want part of it back.' I don't think he was in that position. Under that circumstance it is up to you to determine who had control of this money after Mr. Koers laid it down. Was it still in the control and possession of Koers or in the control and possession of the defendant in this case. That is the thing you are going to have to determine. Of course, you can be a voluntary agent or involuntary agent. You may determine that in this particular case, under the evidence, of course.
>
> "I will define for you the term of robbery, and also an attempt, and I trust when I get to those terms you will listen carefully so as to get the distinction between completed robbery and attempt."

We find no prejudicial error in the quoted comments. The trial court stated to the jury that if the money was in the immediate presence, control and possession of the defendant when it was placed on the counter, the crime would be completed, and that the jury had to determine who had control of the money after it was placed on the bar. The jury was not advised that it must find that the defendant had received control or custody of the money, and the court stated that it would later define the term of robbery and also an attempt and admonished the jury to listen carefully so as to get the distinction between robbery and attempt. Robbery and an attempt to commit crime were correctly defined in later instructions given by the court. Where, as here, the court fairly and correctly instructed the jury with reference to all issues raised by the pleadings or produced by the evidence and did not attempt at any time to direct the return of a particular verdict, the comments made did not constitute prejudicial error. People v. Stanhope, 37 Cal.App.2d 631, 636, 99 P.2d 1075. In People v. Robinson, 73 Cal.App.2d 233, 238, 166 P.2d 17, 19, the court quoted from People v. Ottey, 5 Cal.2d 714, 728, 56 P.2d 193, as follows:

> " 'There is no merit to the contention that the court, if it venture to comment on the evidence or the testimony of witnesses or of any witness, must sum up all the evidence and the testimony both favorable and unfavorable. There is no such injunction, express or implied, in the language of the Constitution, and none that would compel it under established rules in other jurisdictions.

> The provision in the Constitution expressly permits the court to "make *such* comment on the evidence and the testimony and credibility of any witness *as in its opinion is necessary for the proper determination of the case.*" The court may therefore exercise its own discretion in respect to what comment it will make, so long as it does not withdraw any material evidence from the consideration of the jury * * * and does not attempt to control the verdict by a direction.' "

The trial court herein did not attempt to control the verdict by direction or withdraw issues of fact from the jury as claimed by the appellant.

[2, 3] Appellant next contends that in the trial on his plea of not guilty by reason of insanity the court unreasonably restricted him in his right to cross-examine a witness and to argue his case to the jury. These contentions are without merit. In this connection appellant refers to the testimony and cross-examination of two doctors called by the prosecution, Dr. Peterson and Dr. Gericke. The record shows that these witnesses were cross-examined at length by defendant's counsel and that he announced to the court that he had no further questions to ask either of them. While the court limited the argument to ten minutes to the prosecution and an equal time for the defense, the record does not show that defendant's counsel objected to the limitation or that he desired further time. Appellant contends that he had the right to make the closing argument to the jury. However, section 1093, subd. 5, of the Penal Code provides that counsel for the People have the right to open and close the argument to the jury. There was no error in the trial court's ruling that respondent had the right to open and close its case.

[4] Finally, appellant argues that the evidence as to whether the crime of robbery as distinguished from attempted robbery was committed was based entirely on circumstantial evidence and that the jury should have been instructed as to such evidence. The record shows that there were six eyewitnesses to the robbery and the circumstantial evidence was merely incidental and corroborative of the direct evidence of the crime. Under such circumstances the court was not required to instruct the jury upon the rules of law applicable to such evidence. People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805.

The judgment and order denying new trial are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

141 Cal.App.2d 70

Arnold LITT, also known as Arnold Litwin, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Civ. 21699.

District Court of Appeal, Second District, Division 1, California.

April 24, 1956.

Proceeding for writ of prohibition to prevent further prosecution of defendant under information charging six counts of misappropriation of corporate funds. The District Court of Appeal, Nourse, J., pro tem., held, in part, that if treasurer of corporation intended to appropriate corporate funds when he allegedly unauthorizedly filled in own name as payee on corporate checks and deposited them to own account in another bank, misappropriation was complete when he withdrew money and so deposited it, and further withdrawals from his own account could not be basis for any further criminal charge against him.

Peremptory writ granted in part and denied in part.

1. Criminal Law ⚿238

In prosecution upon information charging treasurer of corporation with misappropriation of corporate funds, evidence at preliminary hearing that defendant, who was authorized only to deposit two corporate checks to new corporate account, had unauthorizedly filled in own name as payee and deposited checks to own account, was sufficient to justify holding defendant for trial on both counts of information. West's Ann.Pen.Code, §§ 487, subd. 1, 995.

2. Prohibition ⚿30

Where defendant, who had allegedly misappropriated corporate funds by unauthorizedly filling in own name on two corporate checks as payee, on same day, and by depositing them to own bank account, was charged separately in relation to each check, if such misappropriation constituted only one offense and counts should have been joined, District Court of Appeal, upon defendant's application for prohibition to prevent further prosecution upon information, did not have power to order such joinder, but defendant's request for joinder should be made to trial court. West's Ann.Pen.Code, §§ 487, subd. 1, 995.

3. Embezzlement ⚿11(1)

If treasurer of corporation intended to appropriate corporate funds when he allegedly unauthorizedly filled in own name on corporate checks as payee and deposited them to own account in another bank, misappropriation was complete when he withdrew money and so deposited it, and further withdrawals from his own account could not be basis for any further criminal charge against him. West's Ann.Pen.Code, §§ 487, subd. 1, 995.

4. Criminal Law ⚿238

If treasurer of corporation did not intend to appropriate funds when he deposited corporate checks to own account, in absence of evidence at preliminary hearing that subsequent withdrawals from own account constituted misappropriation of corporate funds, withdrawals could not be basis of criminal charge against treasurer. West's Ann.Pen.Code. §§ 487, subd. 1, 995.

Louis D. Morrison, Long Beach, for petitioner.

S. Ernest Roll, Dist. Atty., Los Angeles, County, Fred N. Whichello, Deputy Dist. Atty., Los Angeles, for respondent.

NOURSE, Justice pro tem.

The District Attorney of Los Angeles County having by an information containing six counts charged the petitioner with that number of violations of section 487, subdivision 1, of the Penal Code, in that he did willfully, unlawfully and feloniously take certain moneys from Self Service Furniture Mart, a corporation, and the defendant's motion, made pursuant to the provisions of section 995 of the Penal Code to set aside this information and all counts thereof, having been denied, the defendant, as petitioner here, seeks a writ of prohibition to prevent his further prosecution upon the information.

We have come to the conclusion that a writ should issue as to counts 1, 2, and 3, but that the People are entitled to proceed against petitioner upon the remaining counts.

The facts in the matter are: Petitioner, hereinafter called defendant, was at all relevant times the treasurer of Self Service Furniture Mart, a corporation; one Becker was the president of that corporation, and one Jastro the vice-president.

The corporation maintained a commercial account in the Long Beach National Bank prior to September 22, 1954; a signature card filed with the bank as to the account required checks upon the account to be signed by any two of the above-mentioned officers of the corporation.

On September 22 Jastro and Litt caused a new signature card to be filed with the bank which required the signatures of Jastro and Litt only. On the morning of September 22, 1954, a check drawn upon this account in the sum of $10,000 was signed by Jastro and Litt. At the time Jastro signed it the name of the payee was left blank, but he testified that it was intended that the corporation be named as payee and that it be deposited to the account of the corporation in a new account to be opened by Litt in the name of the corporation with a branch of the Bank of America.

On September 23 defendant did open a commercial account with the Bank of America in the name of Self Service Furniture Mart, but in the signature card stated that he was doing business under that name and was the sole owner of the business. He deposited the $10,000 check, on which he had filled in his name as payee, in this account. This transaction is the basis of count 5 of the information.

On the afternoon of September 22 Jastro and Litt drew another check upon the corporation's account in Long Beach National Bank, this check being in the sum of $5,000. This check, like the $10,000 check, did not contain the name of the payee at the time it was signed by Jastro, and Jastro again testified that it was the understanding that the corporation would be named payee and that it would be deposited to the credit of the corporation in an account to be opened with the Bank of America. Petitioner filled in his name as payee and cashed the check on the following day at the drawee bank, and on the same day deposited $5,000 to the account that he had opened at the Bank of America as hereinbefore described. This second transaction is the basis of count 6 of the information.

[1, 2] From the facts we have recited it is apparent that there was ample evidence to justify the committing magistrate in holding the defendant to answer upon charges of violations of section 487, subdivision 1, in both instances. Petitioner claims that if there was a misappropriation of the corporation's funds through the two transactions, they in reality constituted but one misappropriation, and asks us to order a joinder of counts 5 and 6. This we have no power to do, and it is a matter which should be addressed to the trial court by proper proceedings there.

On September 24, Jastro and Litt drew a further check upon the corporation's account in the Long Beach National Bank, this check being in the sum of $3,750. This check, under the description of the item for which it is drawn in payment, bears the notation "repayment of loan." The check is made payable to defendant, who cashed the check at the drawee bank. Both Jastro and Becker testified that the corporation had not borrowed any money from the defendant and was not indebted to him on September 24, 1954, or at any other time. This transaction is the basis for count 4 of the complaint, and the evidence which we have recited was entirely sufficient to warrant the committing magistrate in holding the defendant to answer.

After the deposits of $10,000 and $5,000 in the account opened by the defendant at the Bank of America, no further deposits were made in that account. At the preliminary hearing the People introduced into evidence a statement of that account. From this it appears that there was withdrawn from that account on September 27 the sum of $5,500, on September 28 the further sum of $5,500, on October 1, 1954, the sum of $2,250, and on December 7, 1954, $1,746.55, which, with certain service charges made by the bank, closed out the account. No evidence whatsoever was offered by the People at the preliminary hearing as to whom the checks for these withdrawals were made payable, or for what purpose the withdrawals were made, except that it may be inferred from the evidence that the last withdrawal was made by the corporation. The other three withdrawals are the bases, respectively, for counts 1, 2, and 3 of the information.

[3] We fail to find anything in the evidence received by the committing magistrate to uphold these counts. If the withdrawals of $10,000 and $5,000 from the Long Beach National Bank by the defendant, and his deposits of them to his own credit at the Bank of America, were done with the intent of appropriating those funds to his own use, then the misappropriation was complete when he withdrew the money and so deposited it, and further withdrawals from his own account could not be the basis for any further criminal charge against him.

[4] On the other hand, if the deposits in the Bank of America were for the bene-

fit of the corporation, despite the fact that the defendant had represented that he was the sole owner of the business and was the only one who could draw upon the account, then there is no evidence whatsoever that the withdrawals from that account constituted misappropriations of the funds of the corporation, for there is no evidence that any of them was for other than a corporate purpose; and to hold otherwise would be to substitute conjecture for evidence.

Let a peremptory writ of prohibition issue, enjoining the respondent court from proceeding upon counts 1, 2, and 3 of the information SC No. 178057. As to the other three counts, a peremptory writ is denied and the alternative writ is discharged.

WHITE, P. J., and FOURT, J., concur.

141 Cal.App.2d 156

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Wendell HAVEL, Defendant and Appellant.

Cr. 1111.

District Court of Appeal, Fourth District, California.

April 25, 1956.

Prosecution for conspiracy to help a prisoner escape and for aiding a prisoner in escape. The Superior Court, Riverside County, O. K. Morton, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Griffin, J., held that where on a former appeal from a judgment of conviction in the same cause, District Court of Appeal fully considered merits of defendant's claims and found no error except in the manner of his arraignment for and pronouncement of judgment, and limited its reversal for such purpose, upon due arraignment and resentence after remand, defendant, on appeal from such resentence was not authorized to have an entire review of his former appeal.

Judgment affirmed.

1. Criminal Law 🔑1180

Where on a former appeal from a judgment of conviction in the same cause, District Court of Appeal fully considered merits of defendant's claims and found no error except in the manner of his arraignment for and pronouncement of judgment, and limited its reversal for such purpose, upon due arraignment and resentence after remand, defendant on appeal from such sentence was not authorized to have an entire review of his former appeal.

2. Criminal Law 🔑1192

Where, on appeal from a judgment of conviction, District Court of Appeal remanded cause for rearraignment for and pronouncement of judgment, any right to a new trial was particularly limited to arraignment for and pronouncement of judgment. West's Ann.Pen.Code, § 1262.

Wendell Havel, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy. Atty. Gen., for respondent.

GRIFFIN, Justice.

On a former appeal in this action, People v. Havel, 134 Cal.App.2d 213, 285 P.2d 317, this court fully considered the merits of defendant's claims and found no error except in the manner of arraignment for and pronouncement of judgment, and limited the reversal for this purpose.

Defendant was returned to court, the public defender was appointed to represent him, and he was duly arraigned and resentenced. No error in these proceedings is indicated or claimed.

[1] He now appeals from this judgment and attempts to have an entire review

of his former claims on appeal. This is not authorized under the form of the reversal.

[2] In addition, he claims that under section 1262 of the Penal Code a further trial was not authorized since the reversal did not direct a new trial. We see no merit to this claim. Section 1262 of the Penal Code was amended in 1951 [Stats.1951, ch. 1674, sec. 137] and now a reversal shall be deemed an order for new trial unless the appellate court shall otherwise direct. Any right to a new trial was particularly limited to arraignment for and pronouncement of judgment. This was rightfully accomplished.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

140 Cal.App.2d 748

STANDARD MACHINERY COMPANY, a corporation, Plaintiff and Respondent,

v.

Marvin J. COLEMAN and H. D. Pennington, individually and as copartners doing business as Coleman & Pennington; Coleman & Pennington; John Doe and Richard Roe, Defendants and Appellants.

No. 16688.

District Court of Appeal, First District, Division 1, California.

April 16, 1956.

Action on conditional sale contract and upon note. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., denied defendants' motion for change of venue to county of defendants' residence, and defendants appealed. The District Court of Appeal, Agee, J. pro tem., held that where first conditional sale contract was executed in San Francisco and second conditional sale contract was executed in Mendocino County, in which defendants resided, and intent of parties was merely to correct minor errors in first contract and was not to effect a novation by rescinding first contract and substituting the second contract, action to recover deficiency allegedly due under contract could be tried in San Francisco.

Order affirmed.

1. Venue 🔑7

If cause of action on promissory note executed in San Francisco was only action sued upon, venue of such action would properly lie in San Francisco. West's Ann.Code Civ.Proc. § 395.

2. Venue 🔑16½

If plaintiff unites two causes of action in one complaint and if he has right to have one cause tried in county of his residence and does not have such right as to the other cause, defendant is entitled to have the trial of the entire case in county of his residence. West's Ann.Code Civ. Proc. § 395.

3. Venue 🔑7

Where first conditional sale contract was executed in San Francisco and second conditional sale contract was executed in Mendocino County, in which defendants resided, and intent of parties was merely to correct minor errors in first contract and was not to effect a novation by rescinding first contract and substituting the second contract, action to recover deficiency allegedly due under contract could be tried in San Francisco. West's Ann.Civ.Code, §§ 1530, 1531; West's Ann.Code Civ.Proc. § 395.

◆

Brobeck, Phleger & Harrison, San Francisco, for appellants.

Irving M. Liner, Lionel B. Benas, Oakland, for respondent.

AGEE, Justice pro tem.

This is an appeal by defendants from an order denying their motion for a change of venue from the Superior Court in and for the City and County of San Francisco to the Superior Court in and for the County of Mendocino. Defendants are copartners doing business as Coleman & Pennington and both are residents of Mendocino County. Their motion was made on the ground of such residence.

[1, 2] Plaintiff's complaint is in two counts. The first count is based upon a deficiency alleged to be due under a conditional sale contract. The second count is based upon money alleged to be due under a promissory note admittedly executed by defendants in San Francisco. If this cause of action was the only one being sued upon, venue would properly lie in San Francisco as the county "in which the contract in fact was entered into * * *." Code Civ. Proc. § 395. However, as stated in Goossen v. Clifton, 75 Cal.App.2d 44, 49, 170 P.2d 104, 108, "if a plaintiff unites in one complaint two causes of action, in one of which the defendant has the right to have it tried in the county of his residence, in the other of which he is not, the defendant is entitled to have the cause tried in the county of his residence." Therefore, the discussion herein will be directed to the first count alone.

The first count involves the sale of a truck-crane by plaintiff to defendants under a conditional sale contract. Defendants' affidavits in support of their motion allege their residence in Mendocino County and that the contract was signed by defendant Coleman on behalf of the partnership in Mendocino County. Plaintiff's president filed his affidavit in reply. Defendants admit that they "do not take issue" with this affidavit. It states that the original contract under which the truck-crane was sold was negotiated and entered into and signed by Coleman on behalf of the partnership in San Francisco; that the truck-crane was delivered to defendants on the basis of this original contract signed by Coleman; that some errors were discovered in this contract form signed by Coleman and that it was therefore retyped and brought to Coleman in Mendocino County for re-signing; that "*the second contract signed in Mendocino County was solely and wholly done to correct the few errors without marking up the original contract, and as a convenience for said Coleman.*" (Emphasis added.)

It is a fair conclusion, in support of the trial court's ruling, that the intent of the parties was merely to correct minor errors in the first contract so that the face of the original would not be marked up and that it was not their intention to rescind the first contract and substitute the second therefor, thereby effecting a novation. Section 1530 of the Civil Code provides that a "Novation is the substitution of a new obligation for an existing one" and section 1531 of the Civil Code provides that the novation must be made "with intent to extinguish the old obligation."

According to plaintiff's affidavit, the sale agreement was negotiated and entered into in San Francisco. The contract evidencing the agreement was signed in San Francisco. However, it contained minor errors which did not completely reflect the true agreement. The purpose of the second agreement was to correct these errors and not to rescind the old agreement under which the truck-crane had already been delivered.

Defendants concede that if the first count had pleaded and was based upon the "pre-March 30 contract," venue would properly be laid in San Francisco. But they argue that it is the March 30th contract which is pleaded and this contract was admittedly signed in Mendocino County. There is nothing in the record which establishes the date upon which Coleman signed the original contract. Plaintiff's verified complaint alleges that the contract being sued upon was entered into in *San Francisco* "on *or about* March 30, 1954" (emphasis added), but the contract attached to the complaint and referred to therein is dated March 30, 1954, and is undoubtedly a copy of the one signed in Mendocino County.

[3] This raises the only real question. It seems clear that plaintiff could have sued upon the original contract, as modified by the March 30th contract, and maintained venue in San Francisco. In Joe Lowe Corp. v. Rasmusson, 53 Cal.App.2d

490, 127 P.2d 1002, the parties executed a contract of sale in San Francisco. Later, in Los Angeles, they executed a supplemental agreement changing the terms of payment. Suit was filed in Los Angeles. A motion for change of venue was denied by the lower court. On appeal the order of denial was reversed, the court holding that the agreement had been entered into in San Francisco and that the supplemental agreement did not substantially alter or change the original contract.

The order denying defendants' motion for change of venue is affirmed.

PETERS, P. J., and BRAY, J., concur.

141 Cal.App.2d 87

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Orin Vernon MOORE, Defendant and Respondent.

Cr. 5537.

District Court of Appeal, Second District, Division 3, California.

April 24, 1956.

Defendant was charged by an information with illegal possession of marijuana. The Superior Court, Los Angeles County, David Coleman, J., entered an order setting aside the information on the ground that all evidence against defendant was obtained by illegal searches of his person and his automobile. The People appealed. The District Court of Appeal, Vallée, J., held that under the circumstances the arresting officers had reasonable cause before the search and seizure to believe that defendant was guilty of illegal possession of marijuana and therefore the search, seizure and arrest without warrants were lawful.

Reversed

1. Arrest ⚷71

A search of a person and the place where he is arrested as an incident to a lawful arrest may be justified only if he is committing or attempting to commit an offense in the officer's presence, or the officer had reasonable cause to believe he had committed a felony, or the arrest is made pursuant to a warrant.

2. Arrest ⚷63(4)

"Reasonable cause" to justify an arrest is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion that the person is guilty of a crime, and may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt, and while information provided by an anonymous informer is relevant on the issue of "reasonable cause," an arrest may not be based solely on such information in absence of some pressing emergency.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest ⚷71

If, before the search and seizure, the officers were justified in making an arrest, it is immaterial that the search and seizure preceded rather than followed the arrest.

4. Arrest ⚷63(4), 71

Where officers had information from an anonymous informer that defendant was selling marijuana cigarettes and when confronted by officers defendant acted suspiciously and told conflicting stories, and where officers found a partially burned marijuana cigarette on floor mat of defendant's automobile when they searched it with defendant's consent, it was not unreasonable for officers to entertain an honest and strong suspicion that defendant was guilty of a crime and arrest him without a warrant, and as an incident to the arrest the officers could search his person and the trunk of his automobile without search warrant. West's Ann.Health & Safety Code, § 11500.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., for Los Angeles County, Jere J. Sullivan, Fred N. Whichello, and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for appellant.

No appearance for respondent.

VALLÉE, Justice.

The people appeal from an order setting aside the information, Penal Code, § 995, which charged defendant with possession of marijuana. Health & Safety Code, § 11500. The information was set aside on the ground that all evidence against defendant was obtained by illegal searches of his person and his car in violation of his constitutional rights. Defendant was arrested without a warrant and the searches were made without a search warrant.

On two or three occasions about two weeks prior to July 14, 1955 an informant told Officer Challoner of the Los Angeles police force and his partner that a person called "Moose" had been selling marijuana in quantities in a pool hall at 523 East Fifth Street, Los Angeles, and also in a place next door known as the Rainbow Café, that he was tall and thin, "had on a similar type of clothing as the defendant," was careless, and was "a tall stud." The officer testified the informant was not a member of or in the employ of the police department, and that he was in Los Angeles. He was not asked the name of the informant.

Officer Challoner had been in the pool hall many times and was familiar with the people who frequented it but had not seen defendant before the evening of July 14, 1955. That evening he and his partner went into the pool hall. Defendant was sitting there. As the officers entered, defendant glanced over at them. They looked the place over, watching defendant. He appeared nervous. They walked over to defendant and another person who was sitting by him and asked them to step to the rear of the pool hall, that they wanted to have a talk with them. Officer Challoner testified: "They both obliged, and we had a little talk with them. And the defendant gave conflicting statements as to how long he had been here in the city, and stated he had a vehicle and had all his clothes in the car, it was locked up in the trunk of the vehicle. We asked him if he minded if we went to the vehicle, if he'd come to the vehicle with us, and he said, 'No, it will be all right with me.'" The officers, with defendant, went to a place nearby where the car was parked. When they arrived the officers looked in the car, found a partially burned, brown marijuana cigarette on the floor mat of the right front seat and 2 packages of brown cigarette-type paper in an Army-type cap underneath the rear seat. Officer Challoner then asked defendant where the keys to the car were. Defendant said he had loaned the car to a David Bruce, that he did not know him very well, and he had not gotten his keys back. One of the officers then went through defendant's pockets and found keys which fitted the ignition and the trunk of the car. Defendant then said, "Well, I didn't really loan my car out. I just told you that." The officer unlocked the trunk and in it found a brown bag containing about half a pound of marijuana wrapped in a khaki shirt, and a paper sack containing about a quarter of a pound of marijuana wrapped in a road map. When asked, defendant said the shirt was his. He said he did not know where the stuff came from; that someone had broken into his car "a while back," taken some clothes, and whoever it was could have put it in the car. The officers then informed defendant he was under arrest.

[1-3] A search of a person and the place where he is arrested as an incident to a lawful arrest may be justified only if he was committing or attempting to commit an offense in the officer's presence, or the officer had reasonable cause to believe he had committed a felony, or the arrest is made pursuant to a warrant. People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531. Reasonable cause is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty of a crime. People v. Kilvington, 104 Cal. 86, 92, 37 P. 799. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to

evidence that would be admissible at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535. Information provided by an anonymous informer is relevant on the issue of reasonable cause, but in the absence of some pressing emergency an arrest may not be based solely on such information. Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36. Such information, together with the personal observations of the police, may justify their reliance on the information they had received. (Id.) If, before the search and seizure, the officers were justified in making an arrest, it is immaterial that the search and seizure preceded rather than followed the arrest. People v. Simon, 45 Cal.2d 645, 648–649, 290 P.2d 531.

[4] The officers had information that a tall, thin man, whose clothing had been described to them, had been selling marijuana in quantities in the pool hall. They were familiar with the place and with the people who frequented it and had never seen defendant there. When they entered the place they observed defendant. He answered the description given them by the informant and appeared nervous. He made conflicting statements as to how long he had been in the city and, when questioned, stated he had a car. When asked if he minded going to the vehicle with the officers, he replied, "No, it will be all right with me." When they reached the car, the officers looked in it and found a partially burned marijuana cigarette on the floor mat and 2 packages of brown cigarette paper underneath the rear seat. Then they asked defendant for the keys to the car and he stated he had loaned his car to another person and had not received the keys back.

In view of the information the officers had from the informant, the fact that defendant's appearance and clothing agreed with the description they had, his unusual and suspicious conduct, his conflicting stories, inspection of the car with defendant's consent and the finding of a partially burned marijuana cigarette on the floor mat and brown cigarette papers under the rear seat, it was not unreasonable for the officers to entertain an honest and strong suspicion that defendant was guilty of a crime. We think they had reasonable cause to arrest defendant on the information they had before the searches, and as an incident to the arrest were entitled to make the searches of the defendant and the trunk of the car.

The evidence before the magistrate was sufficient to justify the conclusion that a violation of Health and Safety Code, section 11500, had been committed, that the officers had reasonable cause before the search and seizure to believe defendant was guilty thereof, and therefore the search, seizure, and arrest were lawful.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

141 Cal.App.2d 143

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Gallego LUJAN, Defendant and Appellant.

Cr. 5518.

District Court of Appeal, Second District, Division 2, California.

April 25, 1956.

Defendant was convicted in the Superior Court of Los Angeles County, H. Burton Noble, J., of unlawful possession of narcotics, and he appealed. The District Court of Appeal, Ashburn, J., held that fact that defendant was under arrest and in handcuffs when he consented to search of his home did not invalidate the search.

Affirmed.

1. Arrest 🔑71

Propriety of search of the person immediately after taking person into custody depends upon validity of the arrest.

2. Arrest 🔑63(4)

"Reasonable cause" for belief of commission of felony, as grounds for search of person after arrest, does not connote actual knowledge, but may consist of information obtained from others and is not limited to evidence that would be admissible at trial.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest 🔑63(4), 71

Observation of known drug addict, apparently under influence of narcotics, driving automobile, furnished ample basis for immediate arrest without warrant and for search of the person or automobile as a normal incident thereto. West's Ann. Vehicle Code, § 506(a).

4. Criminal Law 🔑394

Where apparent commission of felony of driving automobile while addicted to or under influence of narcotics warranted arrest and search of person, fact that information and evidence thus obtained was used in prosecution upon more serious charge of possession of narcotics was not improper. West's Ann.Vehicle Code, § 506(a).

5. Searches and Seizures 🔑7(28)

Voluntary consent to search of home precludes later objection thereto, but whether consent was voluntary presents a question of fact.

6. Searches and Seizures 🔑7(28)

Evidence warranted finding that search of defendant's home, in which narcotics were found, was with express and voluntary consent of defendant and his wife.

7. Searches and Seizures 🔑7(28)

Fact that consent to search was given while under arrest and in handcuffs did not render the consent involuntary, so as to invalidate the search.

8. Criminal Law 🔑1165(1)

Where evidence seized in lawful search of defendant's person was abundantly sufficient to support conviction, any illegality in subsequent search of his home did not require reversal of conviction.

Forno & Umann, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Having been convicted of possession of heroin, Health & Safety Code, § 11500, defendant appeals from the judgment and an order denying his motion for new trial. He does not claim innocence or lack of sufficiency of the evidence. His plaint is that there was too much evidence and it was obtained by an illegal search and seizure within the purview of the recent line of decisions which are the progeny of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905.

On October 8, 1954, four officers attached to the sheriff's narcotic detail were cruising in an automobile on Olympic Boulevard in Los Angeles County when Sergeant Cook recognized defendant's car ahead of them; they passed it, within twelve feet, and he then identified defendant as the driver. Cook had known him since investigating a narcotics matter three years before; he himself had not arrested defendant, but another officer had done so and defendant was convicted of narcotic addiction. According to Cook's information defendant was known as a narcotic addict; he had recently kept defendant's home under surveillance and had arrested for narcotics violations some of the people he had seen come out of that house but what he had found or whether the arrests resulted in pleas or convictions does not appear. When Cook saw defendant on the 8th of October the latter was behind the wheel and appeared to be under the influence of narcotics. The Sergeant having had considerable experience in such matters, his car followed defendant to the intersection of Whittier Boulevard and Downey Road, where he stopped for a red signal. The officers came up beside him and he was seen to be in a lethargic condition; very slow in his actions; he dropped his head as he stopped at the intersection; his eyelids appeared to be half closed and he was in a drowsy state. Officers Stoops and Buchanan immediately approached defendant's car, Stoops on the passenger side where defendant's wife was sitting, and Buchanan went to the driver's side and opened the door; Buchanan had his badge in his hand, showed it to defendant and said "you are under arrest." There was a little scuffle; as defendant looked at Stoops he made a motion toward his right coat pocket but it had a flap on it and his hand went past the pocket. Stoops grabbed the hand but there appears to have been nothing in it. While this was going on defendant put his foot on the throttle and started forward; Stoops grabbed the gear shift lever and stopped the car. Cook and Buchanan pulled defendant out of his automobile and he dropped to the ground. As they picked him up Stoops made a search of his person, finding in his shirt pocket a rubber finger stall, a type of facility used in narcotic traffic, and in it were five gelatin capsules containing heroin. Defendant was asked how many capsules were in the finger stall and he first said that "a fix" was all that was in there; asked again how many capsules he said five.

The officers and the Lujans drove to defendant's home, part of them in his car and part in the police vehicle. Before doing so Cook had asked defendant whether he had anything at home; he said "no," that all he had were the capsules in the finger stall and that he was going to use them for himself. Cook asked about looking in his home and he said it was "o. k.," that he did not have anything there. "The Court: You asked him if you could go and search the home? The Witness: Yes. The Court: What did he say? The Witness: He stated that he had nothing at the house and it was all right with him. He stated a couple of times that there was nothing there, and I don't believe he knew there were capsules there." On arrival at the house Mrs. Lujan produced the door key and upon request handed it to Cook who opened the door; all officers and the Lujans entered; the husband and wife were seated in the living room and the search began. Defendant made no objection thereto and said nothing except "you won't find anything" and "all I have is what I had on me." The officers found in a clothes hamper in the bathroom one capsule of heroin; it was located under some clothing; they also found under the bathtub a box containing a number of empty gelatin capsules, and in an upright vacuum cleaner a number of rubber finger stalls.

[1, 2] It will be observed that the search of the person followed immediately after taking defendant into custody, and its propriety depends upon the validity of the arrest. People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582; People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People v. Gorg, 45 Cal.2d 776, 291 P.2d 469. When acting without a warrant, "the search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, Penal Code, § 836, subd. 1, or the officer had reasonable cause to believe he had committed a felony. Penal Code, § 836, subd. 5." People v. Simon, supra, 45 Cal.2d at page 648, 290 P.2d at page 533. Of course, reasonable cause does not connote actual knowledge. "It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. [Citing cases.] Thus in the present case it is entirely possible that the officer's belief that defendant had narcotics in her possession was fully justified by reliable information obtained by him from others in carrying out his duties." People v. Boyles, supra, 45 Cal.2d at page 656, 290 P.2d at page 537.

[3, 4] Sergeant Cook, who was in charge of the police detail, testified that they stopped defendant for violation of § 506(a) of the Vehicle Code, which makes it a felony for any person who is addicted to the use, or under the influence, of narcotic drugs to drive a vehicle upon the highway. Defendant was known to the officers as an addict, he was seen to be under the influence of a narcotic, and he was driving a car. This furnished ample basis for an immediate arrest without a warrant. Search of the person or the automobile, or both, for narcotics would be a normal incident to that arrest and not unrelated to the crime.

See People v. Martin, 46 Cal.2d 106, 293 P.2d 52, and People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57. The fact that defendant was later booked, tried and convicted on a more serious charge of possession of narcotics is immaterial. The information and evidence then used had been lawfully obtained and the State was free to employ it in enforcement of the criminal laws in any appropriate proceeding. There is no merit in the contention that the search of defendant's person or the seizure of the heroin found thereon was unreasonable or unlawful.

[5–7] The search of the home followed in a half hour. It was done with the expressed consent of defendant and of his wife who handed the door key to the officer. Such consent, if voluntary, precludes later objection to the search. People v. Michael, 45 Cal.2d 751, 290 P.2d 852; People v. Gorg, supra, 45 Cal.2d 776, 291 P.2d 469. But the consent must be a voluntary one and whether it was such presents a question of fact. People v. Michael, supra, 45 Cal.2d at page 751, 290 P.2d 852; People v. Gorg, supra, 45 Cal.2d 776, 291 P.2d 469. That question in this instance was decided by the trial judge contrary to appellant's contention, and upon evidence which suggests no other conclusion, cf. People v. Michael, supra, 45 Cal.2d at page 751, 290 P.2d 852, and People v. Gorg, supra, 45 Cal.2d 776, 291 P.2d 469, unless it be dictated by the fact that defendant was under arrest and in handcuffs at the time he gave his consent to a search of his home. Our state Supreme Court has not passed upon this specific point. It did, however, reject in Rogers v. Superior Court, 46 Cal.2d 3, 291 P.2d 929, the federal rule that a confession made during a period of illegal detention is inadmissible. In so doing it distinguished the Cahan case, supra, upon grounds not pertinent here. The opinion does hold that the fact that a confession is made during an unlawful detention is "only one of the factors to be considered in determining whether the statement was voluntarily made." No good reason appears for holding otherwise as to consent to a search given while under arrest and in handcuffs. When asked if the officers could search the home defendant assented, saying "a couple of times that there was nothing there." During the search he said "you won't find anything * * *. All I have is what I had on me." When confronted with the capsule there found he said he did not know it was there; that it must have fallen in the hamper while he was taking a fix. And Sergeant Cook volunteered the opinion that "I don't believe he knew there were capsules there." It would be but natural for one who has been arrested with narcotics on his person and who believes there is none in his home to acquiesce with alacrity to a search of that home; believing that nothing would be found, he would reason that his ready cooperation with the police would have a tendency to smooth somewhat the rocky road lying ahead of him, perhaps forestall a charge of selling, one which may carry a heavier penalty (see Health & Safety Code, §§ 11712, 11713) and much less likelihood of leniency in case of conviction.

Appellant relies upon Johnson v. United States, 333 U.S. 10, 12–13, 68 S.Ct. 367, 92 L.Ed. 436, which holds that a police officer's entrance into a home after identifying himself and saying, " 'I want to talk to you a little bit' ", "was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." 333 U.S. at page 13, 68 S.Ct. at page 368. The California Supreme Court declined to follow this and certain other federal precedents, saying that "they point to no compelling solution in the present case." People v. Michael, supra, 45 Cal.2d 751, 753, 290 P.2d 852, 854. Our conclusion that the mere fact of custody and handcuffs does not per se make a consent to a search involuntary, seems to be foreshadowed by the Michael and Gorg rulings, supra.

[8] If a contrary result were reached it would not entitle defendant to a reversal, for the evidence seized in the lawful search of his person was abundantly sufficient to support his conviction. He was taken in flagrante delicto. The search of his home (even if unlawful) falls in the same category as the trespass in People v. Boyles,

supra, 45 Cal.2d 652, 290 P.2d 535; and the evidence being sufficient for conviction without the aid of unlawfully seized items, the ruling in People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505, becomes applicable and requires an affirmance.

The judgment and order are affirmed.

MOORE, P. J., and FOX, J., concur.

Herbert H. DOWELL, Petitioner
v.
The SUPERIOR COURT of the State of California, In and for the CITY AND COUNTY OF SAN FRANCISCO, Respondent.*
Civ. 17054.

District Court of Appeal, First District, Division 1, California.
April 26, 1956.
Rehearing Denied May 25, 1956.
Hearing Granted June 20, 1956.

Mandamus proceeding. The District Court of Appeal, Peters, P. J., held that personal injury action plaintiff, showing that claims adjuster representing defendant had taken plaintiff's statement, concerning circumstances surrounding accident giving rise to action, while plaintiff was in hospital and that no copy of statement had been given to him, and that plaintiff had no recollection of what statement contained, established prima facie right to issuance of inspection order; and in absence of counter-showing it was an abuse of discretion to refuse such order.

Writ issued.

1. Mandamus 🔑42

Mandamus is proper remedy for appellate court to determine whether trial court abused its discretion in denying order directing production of statement for inspection. West's Ann.Code Civ.Proc. § 1000.

2. Appeal and Error 🔑961
Discovery 🔑85

Trial court has discretion to grant or deny application for order directing production of statement for inspection, but it is a legal discretion and not an unlimited, capricious one, and abuse of discretion on part of trial court can and should be controlled by reviewing court. West's Ann. Code Civ.Proc. § 1000.

3. Discovery 🔑88

Personal injury action plaintiff, showing that claims adjuster representing defendant had taken plaintiff's statement, concerning circumstances surrounding accident giving rise to action, while plaintiff was in hospital and that no copy of statement had been given to him, and that plaintiff had no recollection of what statement contained, established prima facie right to issuance of inspection order; and in absence of counter-showing it was an abuse of discretion to refuse such order.

Barbagelata, Zief & Carmazzi, Rinaldo A. Carmazzi, San Francisco, for petitioner.

A. B. Dunne, G. Blandin Colburn, Jr., Dunne, Dunne & Phelps, San Francisco, for real party in interest, Southern Pacific Co.

PETERS, Presiding Justice.

Petition for a writ of mandate.

Petitioner, Herbert H. Dowell, on September 7, 1955, was injured as a result of the alleged negligence of respondent, Southern Pacific Company. On September 8th, while petitioner was in the hospital as a result of injuries received in the accident, a claims adjuster representing respondent took petitioner's statement concerning the circumstances surrounding the accident. This statement was signed by petitioner, but no copy of the statement, then or thereafter, was given to him. On November 10, 1955, petitioner filed an action against respondent for damages for the injuries received in the accident. Thereafter, petitioner moved, under section 1000 of the Code of Civil Procedure, for an order directing respondent to produce the

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* Opinion vacated 304 P.2d 1009.

statement and to permit petitioner to inspect or copy it. Such motion was supported by the affidavit of petitioner and of one of his attorneys. No counter-affidavits were filed. The trial court denied the motion. Later, petitioner renewed his motion supported by similar affidavits. Again, no counter-affidavits were filed. Again the trial court denied the motion, whereupon this petition for a writ of mandate was filed.

[1] Mandamus is, of course, the proper remedy for an appellate court to determine whether the trial court abused its discretion in denying the order. (See cases collected 16 Cal.Jur. 2d 136, sec. 11.)

The petition for the writ of mandate and the affidavits filed in support of the motions for the order of discovery disclose that the issues raised by the pleadings in the main action on file are negligence of the respondent and contributory negligence of petitioner; that the claims investigator of respondent visited petitioner in the hospital the day after the accident and questioned petitioner for over an hour concerning the circumstances of the accident; that the statement was so secured with the intent of using it at the time of trial of the personal injury action; that neither petitioner nor his attorneys were at any time given a copy of the statement. The affidavit of petitioner avers that he "has no recollection of what the statement contains or says, and does not remember what affiant said in said statement * * *.

"That said evidence contained in this statement is material to the issue of liability * * *, that said statement would be admissible at the time of trial." As already pointed out, no counter-affidavits were filed.

There can be no doubt that under such a state of facts the trial court had the power and jurisdiction to compel a discovery. That was the precise holding in Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722. There, as here, the prospective plaintiff in a personal injury action gave a signed statement to a claims investigator of the prospective defendant. There, as here, an application was made under section 1000 of the Code of Civil Procedure for an order of inspection of the statement. There the trial court granted the order. In the resulting prohibition proceeding it was held that the trial court had the power to make such an order. The Supreme Court pointed out that, while section 1000 is based on the ancient bill of discovery in equity, it is not limited by the ancient rigid requirements of such a proceeding. In this connection the court stated, 42 Cal.2d at page 506, 267 P.2d at page 1028: "On the contrary, in Union Trust Co. [of San Diego] v. Superior Court, supra, 11 Cal.2d 449, at page 462, 81 P.2d 150, at page 157, this court stated: 'That the trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method * * *.' It further quoted from Corpus Juris, volume 18, page 1116, to the effect that provisions such as section 1000 are '"remedial in their nature and should be liberally construed."' * * *

"There is no question but what the documents here sought to be inspected are material and relevant to questions in issue, would be admissible in evidence, and are within the scope of Section 1000 of the Code of Civil Procedure".

[2] The distinction between the Holm case and the instant one is, of course, that in the Holm case the trial court granted the order of inspection while here it denied it. Respondent contends that section 1000 by the use of the language that upon application a trial court "may" grant the application is permissive only, and that the trial court has discretion to grant or deny the writ. There can be no doubt that section 1000 does confer discretion on a trial court, but it is a legal discretion, not an unlimited capricious one. Abuse of discretion on the part of a trial court can and should be controlled by an appellate court.

[3] Was there an abuse of discretion here? We think there was. The Holm case necessarily stands for the proposition that where facts are averred identical to those here, the petitioner has made out a case that would support the granting of the

order. What does that mean? It necessarily means that when a petitioner avers facts identical to those here averred he has made out, at least, a prima facie case. Prima facie he has established a right to the issuance of the order. At that point in the proceedings the facts averred warrant the order of inspection. The opposing party has the legal right to make a counter-showing by filing counter-affidavits, or by raising valid equitable defenses setting forth legal reasons why the order should not be granted. In such a case the "discretion" of the trial court comes into play. But until a counter-showing is made there is nothing upon which this "discretion" may operate. If, as here, no counter-showing is made, the petitioner is entitled to his order of inspection, and such right will and should be enforced by mandamus.

This conclusion is in accord with common sense and fair play. A lawsuit is not a game. It is an attempt to ascertain the true facts, and to apply the law to the true facts. Procedures aimed at bringing out the true facts should be encouraged and liberally enforced. Our modern discovery procedures, pre-trial, etc., are all aimed at this worthwhile objective. It certainly would be a step backward, as well as being unscientific and illogical, if we were to hold that on a certain state of facts a trial court has the power to grant discovery, and that on identical uncontradicted facts another trial court has the power to deny it. That would mean that the right to such an order would depend on the whim or caprice of a particular judge, rather than on the merits of the application.

The appellate courts have frequently frowned upon any rule that would permit opposite conclusions being reached on the same state of facts. This was dramatically illustrated in the cases of Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850, and Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847. There separate plaintiffs were injured by the same occurrence. They filed, in separate counties, separate actions against the defendant. In one, the trial court found that the accident was proximately caused by the negligence of the city. In the other, on substantially similar evidence, the trial court found that it was not. Admittedly, the evidence was conflicting on this issue, and either finding was supported. The Supreme Court held, as a matter of law, that one of the cases had to be reversed. In so holding, the court, 5 Cal.2d at page 548, 55 P.2d at page 849, stated: "It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases." See also Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 780, 135 P.2d 569; Colburn Biological Institute v. Shaffer, 12 Cal.2d 168, 169, 82 P.2d 938.

Certainly, the theory of those cases is applicable here.

Both parties spend much time analyzing the many conflicting federal cases discussing the federal discovery procedures. The federal rule of discovery is different from that in California, and the federal cases are of little or no help in interpreting the California statute.

So far as the justice of compelling discovery under the facts here disclosed is concerned, we are impressed with the conclusion of the New York court in Bearor v. Kapple, Sup., 24 N.Y.S.2d 655, 658 to the effect:

"It shocks the conscience, and belittles intelligence and reason where a skillful paid agent, uninvited, can enter the home of a sick person injured in an automobile accident or otherwise, and by one ruse or another obtain the signature of the injured person to a statement in writing prepared by the agent, and then depart without so much as even leaving with the sick person a copy of this important writing. * * *

"There is no sound reason why plaintiff should not have a copy of the written statement he signed. His attorney should not be left in the dark. A lawsuit is not a game of wits."

Let the writ of mandate issue as prayed.

BRAY and FRED B. WOOD, JJ., concur.

141 Cal.App.2d 17

Hugh M. TERRELL, Plaintiff and Appellant,

v.

LOCAL LODGE 758, INTERNATIONAL ASSOCIATION OF MACHINISTS and Menasco Manufacturing Company, a Corporation, Defendants,

Menasco Manufacturing Company, a Corporation, Respondent.

Civ. 21495.

District Court of Appeal, Second District, Division 1, California.

April 23, 1956.

Rehearing Denied May 10, 1956.

Hearing Denied June 20, 1956.

Discharged employee brought action against employer and union to recover damages for alleged wrongful discharge. The Superior Court of Los Angeles County, A. Curtis Smith, J., entered summary judgment in favor of the employer, and the discharged employee appealed. The District Court of Appeal, Fourt, J., held that where collective bargaining agreement between union and employer contained grievance procedure, which consisted of four steps, and which was the exclusive procedure for settling all claims or disputes against employer by union and by any employee represented by union, and union, though requested to do so by discharged employee, who was a member of union, elected not to take the fourth step which provided for arbitration, employer was entitled to summary judgment.

Judgment affirmed.

1. Judgment 🔑185.2(5)

The propriety of granting or denying a motion for summary judgment depends on sufficiency of affidavits that have been filed. West's Ann.Code Civ.Proc. § 437c.

2. Judgment 🔑181(21)

Where collective bargaining agreement between union and employer contained grievance procedure, which consisted of four steps, and which was the exclusive procedure for settling all claims or disputes against employer by union and by any employees represented by union, and union, though requested to do so by discharged employee, who was a member of union, elected not to take the fourth step which provided for arbitration, employer was entitled to summary judgment in action against employer by employee for damages. West's Ann.Code Civ.Proc. § 437c.

Hugh M. Terrell, in pro. per.

Gibson, Dunn & Crutcher, Jerome C. Byrne, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a summary judgment granted the defendant and respondent Menasco Manufacturing Company, against Hugh M. Terrell, plaintiff and appellant.

At the time in question, the respondent and Local Lodge 758, International Association of Machinists, hereinafter referred to as the union, were parties to a collective bargaining agreement, hereinafter referred to as the contract, which governed and controlled the terms and conditions of employment for all employees of the respondent represented by the union. Appellant, a member of the union, and employed by respondent, was discharged by the latter on or about September 11, 1953.

There is in the contract a part entitled "Grievance Procedure"[1], which provides the exclusive procedure for settling all claims or disputes against the respondent by the union and by any employees represented by the union. The procedure provided for four steps of negotiations in brief as follows: the first step we are not concerned

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[1] "Grievance Procedure

"Sec. 1 A grievance is defined as a written claim or dispute against the Company by an employee, employees or the Union, or by the Company against the Union, concerning rates of pay, hours or working conditions, or the interpretation or application of the terms of this Agreement.

"Sec. 2 All grievances must be filed and processed in accordance with the procedure here set forth.

"Sec. 3 Employee Grievances — Step One

"3.31 A grievance may be filed with the immediate Foreman by the employee(s) individually or through the appropriate Steward for the District in which the employee works.

"3.32 Normally within twenty-four (24) hours, but not to exceed three (3) working days, the District Steward, the Senior Steward, the Division Director or his designated representative, the Foreman concerned and, at the option of the employee, the employee, shall meet and attempt to settle the grievance.

"3.33 If no agreement is reached within three (3) working days, the grievance may be appealed to Step Two.

"Sec. 4 Union, Company or Appeal Grievances—Step Two

"3.41 A grievance filed by the Union, the Company, or appealed from Step One, shall be considered in Step Two.

"3.42 Within three (3) working days after receipt by the Union Office and the Office of the Director of Industrial Relations of any Step Two grievance, the Business Representative of the Union, the Senior Steward concerned, the Division Director concerned and the Director of Industrial Relations, or their designated representatives, shall meet and shall attempt to settle the grievance.

"3.43 If agreement is not reached within three (3) working days, upon written request from the Union or the Company, the other party shall give written reason for denial.

"3.44 If agreement is not reached in Step Two, upon written request from the Company or the Union, the grievance may be appealed to Step Three.

"Sec. 5 Appeal Board—Step Three

"3.51 The Appeal Board shall consist of:

"a. For the Company, the President of the Company or, in his absence, another Officer of the Company, the Director of Industrial Relations, and a representative to be selected by the President of the Company.

"b. For the Union, the Business Representative, the President of the Union or, in his absence, his agent, and an employee representative to be selected by the Union.

"3.52 The Appeal Board shall meet in the Office of the President of the Company within ten (10) working days from date of receipt of appeal notice and shall attempt to reach a settlement.

"3.53 If a settlement is not reached within three (3) working days, upon written request of either the Company or the Union, the grievance may be appealed to Step Four.

"Sec. 6 Arbitration—Step Four

"3.61 Upon receipt of a written request for arbitration of the grievance not settled in Step Three, the Company and the Union shall:

"a. Within three (3) working days agree upon arbitration by a single arbiter, in which case he shall be selected by lot from an agreed list of arbiters within five (5) working days after such agreement is reached; or if no agreement is reached on a single arbiter, then

"b. Within three (3) working days agree upon arbitration by a Committee and each name a member to said Committee within two (2) working days after such agreement. The selected members shall meet within three (3) working days and choose a third arbiter (from the agreed list of arbiters). The third arbiter shall act as Chairman of the Arbitration Committee.

"3.62 Upon receipt of written request for arbitration, representatives of the Company and the Union shall meet and prepare a submission agreement in simple form and language stating the issue or issues in dispute. If the Company and the Union representatives are unable to agree on a joint statement of issues to be decided by the Arbiter or by the Arbitration Committee, the submission shall contain the Company's statement of issues and the Union's statement of issues with the notation that the parties could not agree thereon.

"3.63 The decision of the Arbiter or a majority of the Arbitration Committee shall be final and binding on the Company and on the Union and may not be further appealed. The decision shall be within the scope and terms of this Agreement, but shall not add to, subtract from, alter or change the scope and terms with in this proceeding; the second step provides for a meeting of two company and two union representatives to attempt to reach a settlement; step three provides for an appeal board consisting of three company and three union representatives, and step four provides for arbitration by an impartial arbitrator in the event the company or the union requests in writing an appeal to such arbitrator. The contract provides that only the company or the union is empowered to appeal a grievance to either step three or step four.

Appellant filed his grievance on September 12, 1953, and a step two meeting was held and resulted in a failure to settle the grievance. The union appealed the grievance to step three. A step three meeting was held on September 18, 1953, however the grievance was not resolved at that meeting. The union chose not to appeal the grievance to a step four proceeding.

Appellant brought this action against the respondent and the union. In the cause against the respondent he averred that he was a member of the union; that he was employed by the respondent under the terms of the agreement; that he was wrongfully discharged; that he took up his grievance with the union and demanded that the company and the union continue the grievance procedure through and including arbitration; that neither did so; that he suffered a loss of $24,320. In the cause against the union he averred that he became a member thereof in 1952; that he worked under the contract; that the union undertook to represent and protect him and that they failed to do so to his loss in the sum of $34,320.

Respondent, after proper preliminary proceedings, made a motion for a summary judgment, and pursuant to the provisions of section 437c of the Code of Civil Procedure, filed an affidavit of the personnel manager of the company wherein it was set forth that steps two and three were taken and that no appeal to step four was taken as provided for in the contract. The affidavit of the personnel manager likewise sets forth the grievance procedure as is provided in the contract. Appellant filed a counter-affidavit wherein he set forth that he was discharged and that he demanded of the union that it process his claim and represent him. He further set forth that he made certain inquiries from time to time and made demands upon the union and the respondent that they proceed with the grievance procedure. It was not denied by appellant, but to the contrary it was vehemently claimed by him, that step four had not been taken.

of this Agreement. The decision shall be rendered in writing within ten (10) days from the time of presentation to the Arbiter or the Arbitration Committee and shall specify the effective date of the decision.

"a. The Arbiter or the Arbitration Committee shall not have the power to decide an issue unless it involves:

"(1) An interpretation of the provision of this Agreement.

"(2) Alleged violation of this Agreement.

"(3) Grievances related to wages, hours or working conditions.

"3.64 General Rules

"a. The expenses and pay of the Arbiter or the Chairman of the Arbitration Committee shall be limited to $80.00 per day and shall be borne equally by both parties to the Agreement.

"b. Time limits in any Step may be mutually extended.

"c. Each grievance shall begin with the lowest applicable Step, and at any Step of the Grievance Procedure shall be considered as settled unless it is referred to a higher Step of the Grievance Procedure within five (5) standard working days.

"d. A grievance regarding alleged improper discharge or release must be filed with the Director of Industrial Relations and the Union within fifteen (15) calendar days from date of occurrence. The lowest applicable step for such grievance is Step Two.

"e. Other grievance shall be without effect unless presented in writing to the lowest applicable step within fifteen (15) calendar days from the date of occurrence or within fifteen (15) calendar days from the date the employee, employees or the Union first acquired knowledge of the fact or facts upon which the grievance is based.

"f. Settlement of a grievance in any Step of this Grievance Procedure may or may not be retroactive and shall not be limited by other sections of this Article."

[1] The rule is well settled that the propriety of granting or denying a motion for a summary judgment depends upon the sufficiency of the affidavits that have been filed. Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244; Cone v. Union Oil Co., 129 Cal.App.2d 558, 562, 277 P.2d 464.

In the case of Cone v. Union Oil Co., supra, 129 Cal.App.2d at pages 562, 563–564, 277 P.2d at page 467, the court said: "The obvious purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials. While it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists or whether the defense interposed is sham or feigned. Kelly v. Liddicoat, 35 Cal.App.2d 559, 561, 562, 96 P.2d 186.

* * * * * *

"* * * It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citing cases.] This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal.Jur.2d 304, sec. 184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 159, 162 P. 631. The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations, Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671 220 P.2d 973. Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. (Citing cases.)"

[2] Appellant has not alleged, and there is nothing in the record before us indicating that under the terms of the contract either of the parties was required to appeal to steps three or four. The union, as heretofore pointed out, as the representative of appellant, exercised its discretion in this case and elected not to proceed to arbitration under the step four procedure. It therefore failed to exhaust the grievance procedure which is, by the contract, the exclusive method for adjusting claims or disputes of an employee against the company.

We have carefully examined the record in this matter and are of the opinion that the court was well within its discretion in granting the summary judgment.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
William BRIDGEHOUSE, Defendant and
Appellant. *
Cr. 5448.

District Court of Appeal, Second District,
Division 3, California.
April 23, 1956.

Hearing Granted May 23, 1956.

Defendant was convicted of murder in the second degree. The Superior Court of Los Angeles County, Joe Raycraft, J., entered judgment accordingly and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that court could have properly given two instructions, requested by defendant, to effect that if he had been unconscious at time of shooting, he should have been found not guilty, but in view of other instructions given and fact that evidence of unconsciousness was slight, refusal so to instruct was not prejudicial error.

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* Opinion vacated 303 P.2d 1018.

Judgment affirmed.

1. Homicide ⚷250

Evidence sustained a murder conviction.

2. Criminal Law ⚷778(2)

In murder prosecution, court committed no error in refusing instruction proffered by defendant that there is disputable presumption that defendant was conscious if he acted as if he was conscious, but that such presumption does not change state's burden of proving guilt beyond a reasonable doubt. West's Ann.Pen.Code, § 26.

3. Criminal Law ⚷46

There must be something more than defendant's mere statement that he does not remember what happened to justify a finding that defendant was unconscious at time he committed allegedly criminal act. West's Ann.Pen.Code, § 26.

4. Criminal Law ⚷829(3)

In murder prosecution, court could have properly given two instructions, requested by defendant, to effect that if he was unconscious at time of shooting, he should be found not guilty, but in view of other instructions given and fact that evidence of unconsciousness was slight, refusal so to instruct was not prejudicial error. West's Ann.Pen.Code, § 26.

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Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with murder. In a trial by jury he was convicted of murder in the second degree. He appeals from the judgment and from the order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to support the verdict, and that the court erred in refusing to give certain instructions requested by him.

On January 9, 1955, appellant shot and killed William Bahr, who was a guest in the home of Mrs. Huff, the mother-in-law of appellant. Appellant and his wife were not living together. About 10 a. m. on said January 9, appellant and his son, aged about 2½ years, went in an automobile to the home of Mrs. Huff. The son remained in the automobile, and the appellant went into the house. At that time appellant had a .38 revolver "in his belt." Mrs. Huff was in a bedroom which was opposite the den. Bahr was sitting on a davenport in the den. Appellant went to the doorway of the bedroom, and asked Mrs. Huff for socks for his son. Mrs. Huff told appellant the socks were in the pantry. Appellant left the bedroom. About five minutes later he returned to the doorway of the bedroom. Mrs. Huff told appellant that he looked "white and shaking," and that she had something the doctor had given her which she thought would calm him. She left the bedroom and went through the pantry and into the kitchen. Then she walked back toward the bedroom, and as she came to the pantry doorway she saw appellant firing shots at Bahr. At that time appellant and Bahr were standing and facing each other—Bahr was between the davenport and coffee table, and appellant was on the other side of the coffee table. Mrs. Huff testified that she heard five or six shots, that Bahr "started falling before the end of the shots" and he fell forward over the coffee table.

A police officer, called as a witness by the People, testified that he arrived at the Huff residence about 10:25 a. m.; appellant was sitting at a table in the kitchen, with his head in his hands. Appellant stated that he did the shooting, and that he laid the gun down "somewhere"; he (officer) found a .38 revolver on the mantle in the room (den); there were six empty "cartridges" in it. The officer testified further that appellant stated, in answer to questions, that when he left his home that morning he put the gun in his belt. He thought it was fully loaded; he went to the home of Mrs. Huff to get socks for his son; when he walked through the hall he saw his wife's boy friend (Bahr) sitting on the couch; he (appellant) had the gun in his belt when he went in, because he did not want to leave it in the car with his son; after he got the socks, he went back into the bedroom and talked to Mrs. Huff; then he went into the room where Bahr was, and he said to Bahr "We might as well get it over with"; Bahr stood up, and appellant drew the gun and shot; he kept on shooting and emptied the gun at Bahr; he did not think Bahr was making any offensive move when he (Bahr) stood up; he did not know when he went to the home of Mrs. Huff that Bahr was in the house; it (shooting) was a thing that happened spontaneously. The officer testified further that, about 25 minutes after the first conversation, he (officer) asked appellant to go over the "entire thing" again; as appellant talked the officer made notes, and later that morning at the station a typewritten statement was made from those notes. The officer read the statement into evidence, which statement was in substance the same as his testimony regarding the first conversation. The officer also read into evidence a statement which appellant made at the police station, which statement had been taken in shorthand and then transcribed. Appellant stated therein that he did not remember whether he said anything before shooting Bahr—that he did not actually remember pulling the trigger—all he remembered was that the gun was "clicking on empties."

An autopsy surgeon testified to the effect that seven bullet wounds were in the body of Bahr.

Defendant testified that when he went to Mrs. Huff's house he was tired, "perhaps" to the point of exhaustion; after he went to her bedroom the second time, he walked into the room where Bahr was sitting; he thought he spoke to Bahr—it "is very hazy"; it is appellant's recollection that at that time he (appellant) wanted to discuss the legal action he was taking against Bahr. He did not recall whether Bahr said anything to him—he had a vague memory of Bahr springing from the couch; the next thing he remembered was that he was pulling the trigger on some empty "cartridges"; he was not conscious at any time of any bullets exploding, the whole action was of an explosive nature and "distorted by a haze of mental void"; he had been wounded while in the Army; many times while in the Army, and also in recent civilian life, he had been in such a state of fatigue that he could not speak rationally.

In October, 1954, appellant had commenced an action for divorce. On January 4, 1955, he applied for an order restraining his wife from associating or cohabiting with Bahr in the presence of the minor child of the appellant and his wife. An order to show cause in re such application was served on the wife on January 7. On January 8, at the request of the wife, appellant had a discussion with her regarding the divorce and order to show cause. Appellant testified that the wife said that she would not hesitate to lie or to use any method to fight the action.

[1] Appellant argues, with respect to his contention as to insufficiency of the evidence, that there was no evidence of malice toward the deceased; that the evidence indicates that there was no mental state at all insofar as appellant was concerned; and that there was no evidence that the appellant was conscious of what was going on at the time the shooting occurred. It would serve no useful purpose to summarize the evidence hereinbefore referred to. The evidence was sufficient to support the judgment.

[2–4] Appellant asserts further that the court misdirected the jury, in that, there was no instruction to the effect that if appellant was unconscious at the time of the shooting he should be found not guilty. Appellant requested three instructions on the subject of nonresponsibility of a person for an act committed by him while he was unconscious. The instructions were refused. One of the instructions was: "When the evidence shows that a defendant acted as if he was conscious, the law presumes that he then was conscious. This presumption is disputable, but is controlling on the question of consciousness until overcome by a preponderance of the evidence, which means such evidence as when weighed against the presumption and any evidence supporting the presumption has more convincing force, and from which it results that the greater probability of truth lies therein. The rule of law just announced does not change, or make an exception to, the law which places upon the people the burden of proving defendant's guilt beyond a reasonable doubt." The court did not err in refusing to give that instruction. The same instruction was held to be erroneous in People v. Hardy, 33 Cal.2d 52, at pages 63 to 66, 198 P.2d 865, at pages 871 to 873. Another instruction, requested by appellant and refused by the court, was a portion of section 26 of the Penal Code as follows: "All persons are capable of committing crimes except those belonging to the following classes: * * * Five—Persons who committed the act charged without being conscious thereof." Another refused instruction, requested by appellant, was: "Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime. This rule of law does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of sound mind as, for example, somnambulists or persons suffering from the delirium of fever or of the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind." Appellant cites People v. Baker, 42 Cal.2d 550, 268 P.2d 705, wherein defendant was convicted of murder. In that case the defendant had had frequent epileptic seizures for 25 years, had been committed to mental hospitals three times, and was under the care of a physician who had prescribed anticonvulsant medicine for defendant. The court therein said at page 575 of 42 Cal.2d, at page 720 of 268 P.2d: "In this case there was ample evidence of voluntary intoxication, and there was also evidence that defendant was unconscious at the time of the offense because he was in the 'clouded state' of an epileptic attack. The evidence of unconsciousness being present, the instruction based on Penal Code, section 26(5) was properly given, for defendant's complete defense based on unconsciousness was entirely separate from his partial defense based on intoxication." In the present case the evidence with respect to alleged unconsciousness was meager in comparison with the evidence in the cited case. The appellant herein said at the trial that he did not recall whether Bahr said anything to him—he had a vague memory of Bahr springing from the couch; the next thing he remembered was that he was pulling the trigger on empty "cartridges", he was not conscious of any "bullets" exploding, the whole action was of an explosive nature and distorted by a haze of mental void. "[A] defendant's mere statement of forgetfulness, unsupported by any other evidence, is at most very little evidence of unconsciousness at the time of performing a particular act. There must be something more than his mere statement that he does not remember what happened to justify a finding that he was unconscious at the time of that act." People v. Coston, 82 Cal.App.2d 23, 40, 185 P.2d 632, 641. There was evidence herein that appellant's mother-in-law noticed, prior to the shooting, that he was white and shaking. It is to be noted, however, with respect to appellant's statement of alleged lack of memory, that about 25 minutes after the shooting and at the scene thereof he related to a police officer details of the shooting and details of his actions during the morning preceding the shooting; and also that about 25 minutes after the first statement to the officer and at the scene of the shooting, the appellant related to the officer the substance of the same details. It is also to be noted that it was not until the appellant was at the police station that he said he did not remember pulling the trigger—that all he remembered was that the gun was "clicking on empties." Even though the testimony of the officer, with respect to appellant's statements of details, indicates that appellant was conscious, there was some evidence which might be regarded as evidence of unconsciousness; and a theory of the defense was that appellant was unconscious. It would have been proper to give the two instructions, last above referred to, regarding unconsciousness. Under the evidence and instructions herein, the failure to give those instructions was not reversible error. It is not claimed that appellant did not know what he was doing when he armed himself with a gun in preparation for a visit to the home of his mother-in-law where he might encounter Bahr. The evidence with respct to unconsciousness was slight. The conduct of appellant preceding the shooting, and his conduct and statements soon thereafter, were substantial evidence that he was conscious at the time of the shooting. The court gave an instruction [1] pertaining to the question of intent. It also gave an instruction [2] to the effect that evidence bearing on the mental and nervous condition of appellant at the time of the offense had been received, and that such evidence might be considered by the jury in determining whether or not defendant did any act charged against him "and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed, must accompany that act to constitute a certain crime or degree of crime. You do not [at this time] have before you any issue as to defendant's legal sanity." (It is true, however, that the instruction just referred to is complex, and that the point involved therein should have been more clearly stated.)

The judgment, and the order denying the motion for a new trial, are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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[1] Instruction: "The intent or intention with which an act is done is manifested by the circumstances connected with the offense and the sound mind and discretion of the person committing the act. All persons are of sound mind who are neither idiots, nor lunatics, nor affected with insanity. Upon the trial of the issue raised by the plea of not guilty, the defendant is conclusively presumed to have been sane at the time the offense is alleged to have been committed.

"If and when a jury has found that one person killed another, then in determining the intent or state of mind of the person who committed the act, at the time of and immediately preceding its commission, the jurors may fittingly consider the means used to accomplish the killing.

"The wilful use of a deadly weapon without excuse or provocation in such a manner as to imperil life generally indicates a felonious intent.

"A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend the natural, probable and usual consequences of his own acts. Therefore when one person assails another violently with a dangerous weapon likely to kill, and which does in fact destroy the life of the person assailed, the presumption is that such assailant intended death or other great bodily harm.

"Any such presumption as I have mentioned, however, may be overcome by contrary evidence; and any such evidence is sufficient to overcome it which creates in the minds of the jurors a reasonable doubt that the defendant's intent was as so presumed. In the absence of evidence to the contrary, the presumption must prevail."

[2] Instruction: "You are reminded, however, that a person might be legally sane, as we define that term in dealing with the question of criminal responsibility, and yet be in an abnormal mental or nervous condition; and because of such condition he might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime. We have received evidence bearing on the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged. Such evidence may be considered by you in determining whether or not defendant did [any] act charged against him and, if so, whether or not, at that time, there existed in him the specific mental factor which, as you have been instructed, must accompany that act to constitute a certain crime or degree of crime. You do not [at this time] have before you any issue as to defendant's legal sanity."

The PEERLESS CASUALTY COMPANY, a corporation, Plaintiff and Respondent,

v.

CONTINENTAL CASUALTY COMPANY, a corporation, Defendant and Appellant.

CONTINENTAL CASUALTY COMPANY, a corporation, Cross-Complainant and Appellant,

v.

The PEERLESS CASUALTY COMPANY, a corporation and Underwriters at Lloyd's, Cross-Defendants and Respondents.*

Civ. 16741.

District Court of Appeal, First District, Division 2, California.

April 23, 1956.

Rehearing Granted May 22, 1956.*

Action for declaratory judgment determining liability of three automobile liability insurers. The Superior Court of the City and County of San Francisco, Milton D. Sapiro, J., rendered a judgment determining liability, and plaintiff and defendant appealed. The District Court of Appeal held that under the policy limits and other insurance clauses of the policies, the first liability insurer of the lessor of tractor-trailer should pay ⅙ of the property damage, including ⅙ of the $1,053.40 excess over the $5,000 primary limit of the policy, and remainder of excess should be prorated between lessor's other insurer and lessee's insurer in ratio of their coverages.

Reversed in part with directions, and affirmed in part.

1. Insurance 🔑512½

Provision in automobile liability policy, that if insured had other insurance against loss coverage, insurance "shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the total applicable limits of liability of such other insurance," would operate as an "escape clause" in absence of excess of its coverage over other coverage, but as a modified "excess clause" if there were such excess.

See publication Words and Phrases, for other judicial constructions and definitions of "Escape Clause" and "Excess Clause".

2. Insurance 🔑512½

Where lessor's automobile liability policy covering leased tractor-trailer, which was limited to $10,000 for each person injured and $5,000 for property damage, provided that if insured had other insurance, insurer should not be liable for a greater proportion of loss than the applicable limits of liability stated in the declaration bore to total applicable limit of liability of all valid and collectible insurance against such loss, and lessee's liability policy, which was limited to $100,000 for each person injured and $25,000 for property damage, provided that if insured had had other valid and collectible insurance against loss, insurance should be excess insurance with respect to such loss but should apply only in the amount by which applicable limit of liability stated in the declarations exceeded the total applicable limits of liability of such other insurance, escape clause of lessee's policy should not prevail over pro rata clause of lessor's policy, but where property damage liability of $6,053.40 was incurred, the excess over $5,000 should be prorated as between insurers.

3. Insurance 🔑512½

Prorating with other insurance should not be applied where policy provides coverage for excess over specifically stated, existing insurance only, or where standard automobile liability policies themselves show that insurance on automobile was intended to be primary and that on the driver excess.

4. Insurance 🔑512½

Excess clauses in automobile liability policy which specifically provided only that coverage was excess coverage after specified coverage of another policy did not justify exemption from proration with respect to the excess over $5,000 property damage covered by other policy.

5. Insurance 🔑512½

Automobile liability policy providing that liability should attach only after primary insurers had paid or had been held liable to pay full amount of their respective ultimate net loss liability (for property damage to limit of $5,000) and that liability should not attach unless and until primary insurers should have admitted liability for the primary limit or limits, or insured should by final judgment be adjudged to pay a sum exceeding such primary limit or limits, would be construed most favorably to insured, as providing for liability when claims against insured, validity of which was shown by admission of primary insurer or by judgment, exceed the primary limit.

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* Petition of Continental Casualty Co. dismissed June 20, 1956.

* Opinion vacated 301 P.2d 602.

6. Insurance ⚷512½

In prorating liability among automobile liability insurers, one insurer should not be given benefit of coverage by another policy which was expressly made secondary to the first insurer, but third insurer must be given benefit of second insurer's coliability as to excess property damage over maximum specified in third policy.

7. Insurance ⚷512½

Where lessor of tractor-trailer was insured by two liability policies, the first of which had a $5,000 property damage limit and pro rata clause as to other insurance, and second of which had a $20,000 property damage limit with an excess clause but was made subject to first policy, and lessee of tractor-trailer had a policy with escape clause and $25,000 property damage limit, and property damage liability of $6,053.40 was incurred, lessor's first insurer should bear its full ⅙ of the property damage, including $175.57 as proportionate part of excess over the primary limit, and remainder of excess must be prorated between other two insurers in ratio of their coverages ($25,000 and $20,000), so that lessor's first insurer was liable for $1,008.90, lessor's second insurer for $390.15, and lessee's insurer for $4,654.35.

◆

Carroll, Davis & Burdick, San Francisco, for appellant Continental Cas. Co.

Dana, Bledsoe & Smith, San Francisco, Wilbur J. Russ, San Francisco, of counsel, for respondent Peerless Cas. Co.

Hancock, Elkington & Rothert, San Francisco, for respondent Underwriters at Lloyd's.

Weinstock, Anderson, Maloney & Chase, San Francisco, Sidney L. Weinstock, John R. Maloney, San Francisco, of counsel, amici curiae in support of contentions of appellant.

PER CURIAM.

This is an appeal on an agreed statement from a declaratory judgment determining the liability of three insurers, relative to the damage caused in one and the same accident. A tractor and trailer, leased by its owner, Nevada Trading Company (further called Nevada) to Vaughn Millwork Company (further called Vaughn) and driver by Vaughn's employee Campbell, collided in this state with a truck and trailer which suffered property damage and whose driver was injured. At the time of the accident Nevada had in its name:

1. a policy of comprehensive liability insurance issued by the Peerless Casualty Company (further called Peerless) covering the motor vehicle involved, with a limit for bodily injury of $10,000 for each person injured and of $5,000 for property damage.

2. two policies of excess liability insurance issued by the Underwriters at Lloyd's, London (further called Lloyd's), the first of which provided coverage after exhaustion of the coverage of the above Peerless policy, to which specific reference was made, with a limit for bodily injuries of $15,000 for each person injured (after the $10,000 of the Peerless policy) and $20,000 for property damage (after the $5,000 of the Peerless policy) and the second of which provided coverage after exhaustion of the coverage of the above two policies, with a limit for personal injuries of $175,000 for each person injured (after the above total of $25,000 primary coverage).

Vaughn had at said time in its name one policy of comprehensive liability insurance issued by Continental Casualty Company (further called Continental) with a limit for bodily injuries of $100,000 for each person injured and of $25,000 for property damage.

Each of the above policies provided liability insurance directly to Campbell as an additional insured for the claims ensuing from the accident. Pursuant to an agreement reserving judicial determination of the respective liabilities of the several insurers, Peerless and Lloyd's settled said claims by payment of $5,946.60 for personal injuries and $6,053.40 for property damage. The controversy of the parties relates mainly to the effect to be given to the "other insurance" clauses of the Peerless and Continental Policies.

The other insurance clause of the Continental Policy reads:

> "13. Other Insurance
>
> "If the insured has other valid and collectible insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the total applicable limits of liability of such other insurance."

The part of the other insurance clause of the Peerless policy applicable to the circumstances of this case reads:

> "N. Other Insurance
>
> "If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limits of liability stated in the declaration bear to the total applicable limit of liability of all valid and collectible insurance against such loss; * * *."

The trial court held that Peerless and Continental were liable for the total amounts of the settlements in proportion of the maximum coverage provided by their respective policies for the two kinds of damage involved. Lloyd's was held not liable on its policies. (The proportionate liability of Peerless does not exhaust the coverage provided by its policy.) Continental appeals, claiming primarily that this decision, in prorating the loss, disregards the other insurance clause of its policy. We have concluded that the decision is supported by the authority of Air Transport Mfg. Co. v. Employers' Liability, etc., Corp., 91 Cal. App.2d 129, 204 P.2d 647, hearing in the Supreme Court denied, and should be upheld.

In the Air Transport case, supra, a truck rented by Air Transport from American U-Drive and driven by an employee of Air Transport, was involved in an accident in which one person was injured. Air Transport and American U-Drive each had in its name a liability policy with a limit of $25,000 as to the claim of one injured person. The policy in the name of Air Transport issued by Pacific contained another insurance clause requiring prorating like the Peerless policy in our case. The policy in the name of American U-Drive issued by Employers' contained another insurance clause reading as follows: "8. Other Insurance. If other valid insurance exists protecting the Insured from liability for such bodily injury, sickness, disease or death or such injury to or destruction of property, this policy shall be null and void with respect to such specific hazard otherwise covered, whether the Insured is specifically named in such other policy or not; provided, however, that if the applicable limit of liability of this policy exceeds the applicable limit of liability of such other valid insurance, then this policy shall apply as excess insurance against such hazard in an amount equal to the applicable limit of liability of this policy minus the applicable limit of liability of such other valid insurance." Both the trial court and the appellate court held that notwithstanding the latter clause Employers' was liable for its proportionate part (half) of the claim. Rejecting other bases of decision sometimes used, the court held that the liability of the insurers should be decided by construction of the other insurance clauses involved and in so doing held, that because of its pro rata clause the Pacific policy did not constitute such unconditional insurance as would render void the policy of Employers' under its clause and that by reason of the latter's policy, that of Pacific afforded only pro rata insurance. Employers' had therefore to bear the remaining portion of the loss.

[1] Appellant tries to distinguish the Air Transport case, supra, by the conten-

tion that it involves a conflict between a "pro rata" clause and an "escape" clause, whereas the present case is said to involve a conflict between a "pro rata" and an "excess" clause, which "excess" clause is more regularly granted recognition and preponderance by the courts than an "escape" clause. We do not agree. The other insurance clauses, generally inserted in liability insurance policies and given many different formulations, are often distinguished in three types: "Pro rata" clauses providing for the apportionment of the loss with other valid insurance; "excess" clauses providing for liability up to the limits of the policy covering excess loss only after exhaustion of other valid insurance; and "escape" clauses providing for avoidance of liability when there is other valid insurance. See 5 Stanford L.R. 147; 38 Minn.L.R. 838, 840. The clauses of Continental in the case before us and of Employers' in the Air Transport case are neither characteristic excess nor characteristic escape clauses. Although the clause of Continental is formulated more like an excess clause and the one of Employers' more like an escape clause their effect is exactly the same and each is a composite of escape and excess elements. Each provides for excess insurance if and in so far only as its coverage exceeds all other valid coverage combined and does not provide for any coverage if its coverage is not so in excess. In the absence of such excess it works as an escape clause, if there is such excess as a modified excess clause (which does not cover excess loss to the limit of its agreed coverage but only to the excess of such limit over other valid coverage). The clause of Continental does not say so expressly as the clause of Employers' that it shall be void in the absence of an excess of its coverage over all other coverage, but as it applies only in the amount of such excess it does not provide any coverage if there is no excess.

[2] Both in the Air Transport case and in our case there was no such excess. In the Air Transport case the coverage under both policies was the same; in our case the combined coverage of the other policies (Peerless and Lloyd's) is the same as that of Continental with respect to property damage (each $25,000) and exceeds that of Continental with respect to coverage of injury to one person ($200,000 as against $100,000). In both cases the clauses compared worked as escape clauses conflicting with pro rata clauses. With respect to the Air Transport case such was recognized expressly by the appellate court which decided it in distinguishing said case in Norris v. Pacific Indemnity Co., Cal.App., 237 P.2d 666, 672.

Under approximately similar facts and policy provisions a contrary result was reached in McFarland v. Chicago Exp., 7 Cir., 200 F.2d 5, 7. In that case Employers', whose policy has the mixed escape and excess clause, was the insurer of the owner of the truck and the pro rata clause was contained in the policy of the user of the truck, directly responsible for the accident. Such may have influenced the decision although according to its terms the opinion, like the one in the Air Transport case, is based on " 'a construction of the language employed by the respective insurers.' " The McFarland opinion, however, starts its reasoning from the other side and holds that because of its escape clause the Employers' policy is not valid and collectible insurance to which the pro rata clause in the other policy applies, on which ground it is concluded that the writer of said policy was not entitled to prorating with Employers' but must bear the whole loss.

[3] We see no reason to deviate from the decision given in this state in the Air Transport case, which reaches a result which we consider preferable. It is clear that the reasoning used in said case, based on construction of the language of the policy clauses, is not conclusive, considering that on the same basis the McFarland case reaches the opposite result. It is pointed out in Oregon Auto Ins. Co. v. United States Fidelity & Guaranty Co., 9 Cir., 195 F.2d 958, 960, that such reasoning is "completely circular, depending, as it were, on which policy one happens to read first." The Oregon case accepts the principle that the mutually repugnant clauses should be disregarded and prorating applied as if the policies did not contain any other insurance

clauses. Other methods applied to solve the difficulty of the inconsistent clauses are stated and rejected in the Oregon case as well as in our Air Transport case. Nevertheless there are situations where no prorating with other insurance should be applied; e. g., where, as in the Lloyd's policies in this case, the policy provides coverage for the excess over specifically stated, existing insurance only or where, as is accepted in Norris v. Pacific Indemnity Co., supra, for standard automobile liability policies, the policies themselves show that the insurance on the car was intended to be primary and that on the driver excess, 237 P.2d at page 672. Each case must therefore be solved on its specific facts.

In the case before us we find no ground why the escape clause of Continental should prevail over the pro rata clause of Peerless; hence there is reason to disregard both and to prorate in accordance with the principle of the Oregon case. It can even be said that an escape clause is less desirable than a pro rata or excess clause, because, without prohibiting other insurance, it deprives the insured, if other insurance is taken out, of some of the protection he expects, whereas pro rata or excess clauses leave him all coverage expected and regulate the distribution of the loss among the several insurers only. The clause in the Continental policy has the added disadvantage that its partial escape character is more or less camouflaged and does not provide clear warning for the insured. Under these circumstances the application of prorating is the more equitable.

[4] Continental's further contention that if prorating is applied the coverage provided by the Lloyd's policies should also be included in the proration is to a limited extent meritorious. Evidently the second Lloyd's policy whose primary limits are not reached by the total damage claims cannot be involved and the same applies to the personal injury coverage of the first Lloyd's policy as the primary limit of $10,000 for net loss with respect to one person is not reached. The question is, however, presented as to the property damage coverage of the first Lloyd's policy because the settlement in that respect, $6,053.40, exceeds the primary limit of $5,000—contained therefor in said policy. If the Continental coverage had not been involved in this case, Lloyd's would have had to pay the excess over $5,000—covered by Peerless. We have concluded that the excess clauses in the first Lloyd's policy which specifically provide only that its coverage is excess coverage after the $5,000 coverage of Peerless do not justify exemption from proration with respect to the excess over $5,000 property damage. Gillies v. Michigan Millers, etc., Ins. Co., 98 Cal.App.2d 743, 221 P.2d 272, a fire insurance case on which Lloyd's relies for its total exclusion from prorating, is distinguishable because in that case the excess coverage was expressly written as excess after *both* primary policies involved, see, 98 Cal.App. at page 748, 221 P.2d 272.

[5] The provisions of the Lloyd's policy "that liability shall attach to the Underwriters only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability" [for property damage to the limit of $5,000] and that "Liability under this Insurance shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits", are not completely free of ambiguity and contradiction if applied to the present case. However, construing them most favorably to the insured, we hold that they provide for attachment of liability of Lloyd's when the claims against the assured, the validity of which is shown by admission of the primary insurer or by judgment, exceed the primary limit. The settlement in this case is such admission by Peerless (and by Lloyd's).

[6, 7] A correct and equitable prorating of the property damage under the facts and provisions here involved must give Peerless no benefit of the coverage by Lloyd's which is secondary to it, but must give Continental the benefit of Lloyd's co-liability as to the excess property damage over $5,000. Therefore Peerless must bear its full ⅙ of the property damage as fixed by the trial court

or $1,008.90, of which $175.57 is its proportionate part of the excess over the primary limit which excess totals $1,053.40. The remaining part of this excess or $877.83 must be prorated between Continental and Lloyd's in the ratio of their coverages ($25,000 and $20,000) so that Lloyd's bears 4/9 of $877.83 or $390.15. The remaining part of the property damage or $4,654.35 must be borne by Continental.

Insofar as the judgment appealed from fixes the amount to be paid by Continental for property damage at $5,044.50 and exonerates Lloyd's completely the judgment is reversed with directions to the trial court to amend it in accordance with our above opinion; in all other respects the judgment is affirmed; Lloyd's to pay its own costs; Continental to pay its own costs and those of Peerless.

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141 Cal.App.2d 91

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George BUCHEL, Defendant and Appellant.

Cr. 2665.

District Court of Appeal, Third District, California.

April 24, 1956.

Rehearing Denied May 8, 1956.

Hearing Denied May 23, 1956.

Prosecution for committing lewd acts upon boy under fourteen years of age. In Superior Court, Calaveras County, J. A. Smith, J., defendant was found guilty and he appealed from the judgment and from order denying a motion for new trial. The District Court of Appeal, Schottky, J., held that it was error to admit, in rebuttal of testimony given by defendant's character witnesses, testimony of defendant's two daughters to effect that defendant had committed sexual acts upon them.

Reversed.

1. Witnesses 🔑344(2), 349

In prosecution for committing lewd acts upon boy under fourteen years of age, trial court properly excluded direct testimony, offered to discredit boy, that boy had discussed with playmate unnatural sexual relations and had stated that he had participated in unnatural acts "back east" before time of offense in question, and court properly restricted cross-examination concerning boy having been allegedly disciplined at school for lewd drawings and conversations. West's Ann.Pen.Code, § 288.

2. Witnesses 🔑274(2)

In prosecution for committing lewd acts upon boy under fourteen years of age, questions asking defendant's character witnesses if they had heard reports of certain sex offenses by defendant, were not improper if asked in good faith by district attorney, but should not have been asked unless prosecution intended to call character witnesses in rebuttal to testify to the bad reputation of defendant as to the traits involved. West's Ann.Pen.Code, § 288.

3. Witnesses 🔑274(2)

Though it was proper for district attorney, in prosecution for committing lewd acts upon boy under fourteen years of age, to ask defendant's character witnesses in good faith if they had heard reports of sex offenses by defendant, it was not proper to ask such witnesses the further question whether, if they had heard such reports, their testimony as to his reputation for morality and chastity would be the same. West's Ann.Pen.Code, § 288.

4. Criminal Law 🔑369(1), 1169(11)

In prosecution for committing lewd acts upon boy under fourteen years of age, it was error to admit, in rebuttal of testimony given by defendant's character witnesses, testimony of defendant's two daughters to effect that defendant had committed sexual acts upon them, and the error was prejudicial. West's Ann.Pen.Code, §§ 288, 288a.

5. Criminal Law 🔑369(1), 1169(11)

In a prosecution for committing lewd acts upon child under fourteen years, evidence that defendant has perpetrated similar acts with person or persons other than prosecuting witness is inadmissible and, if received, is prejudicial. West's Ann.Pen. Code, §§ 288, 288a.

6. Criminal Law ⚷768(1)

In prosecution for committing lewd acts upon boy under fourteen years of age, instruction to effect that charge was easily made and difficult to disprove even if defendant was innocent and that, by reason of nature of case, defendant and child usually are only witnesses of their own conduct and that therefore law requires that jury examine testimony of such child with caution, was sufficient as a cautionary instruction. West's Ann.Pen.Code, §§ 288, 288a.

7. Criminal Law ⚷673(5), 1172(2)

In prosecution for committing lewd acts upon boy under fourteen years of age, wherein testimony as to sexual acts committed by defendant upon his daughters was erroneously admitted, instruction regarding limited purpose for which such testimony was admitted merely added to prejudicial effect of the erroneous evidence, and error in receipt of the evidence and in giving the instruction required reversal. West's Ann.Pen.Code, §§ 288, 288a.

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Leonard G. Husar, San Andreas, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier and Harold A. Bailin, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was found guilty by a jury upon an amended information which accused him of a violation of Section 288 of the Penal Code in that he did "wilfully and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of George M. Buchel, a child under the age of fourteen years, to wit, of the age of thirteen years, with the intent of arousing, appealing to, and gratifying the lust, passion and sexual desires of the said defendant". Probation was denied and defendant's motion for a new trial was denied also. Judgment was pronounced and defendant has appealed from the judgment and from the order denying his motion for a new trial.

The record shows that George M. Buchel was the son of appellant and that the parents were divorced in 1948. The wife was granted custody of the three children, George, Dorothy Carleen, and Grace Lee. From time to time thereafter, the children visited the father in California, and he in turn visited the children in Oregon. Later on, the mother returned to California and remarried. The father (defendant) did not remarry. The trial commenced July 20, 1955, and at that time he was 51 years of age. Both daughters were married. For seven months, in 1952, the son, George, lived with his sister Carleen and her husband in Detroit, Michigan. On his return to California, he lived with his mother until early in *1954*, and then with her consent and because father and son were mutually interested in machinery, he went to live with his father in Calaveras County.

Commencing early in 1954, the defendant and his thirteen year old son, George, also known as Butch, lived together during a period of 1954 and 1955 which included the month of April, 1954, at the defendant's cabin at Glencoe in Calaveras County. During the early part of 1954, the defendant and Butch slept together in one bed in the cabin, except when Butch's sister, Gracie, stayed with them for a brief period in May or June. At that time Gracie and Butch slept in a trailer house which had been divided into two rooms by a blanket. After Gracie left in the latter part of June, Butch sometimes slept in the trailer and sometimes in the cabin with the defendant. According to the boy's testimony, the defendant began committing sexual acts upon his son during April of 1954.

In view of the fact that it is not contended that the evidence was insufficient to support the judgment it is unnecessary to detail the sordid and revolting acts of sex perversion which the son testified were committed on numerous occasions from about April 1, 1954 until the son went to live with his mother in April, 1955.

During this period the boy's health began to decline. He began to feel ill and nervous. He was taken to various doctors but his health did not improve until he went to live with his mother. He also failed in school during this time. The boy did not complain to others of these occurrences until about two weeks after he went to live with his mother in Railroad Flat. Report was made to the authorities within three days after he told his mother of these acts. Butch explained that his delay in complaining was because he was "scared". He was afraid that his dad would have to go to jail and that he would hurt him, the boy, when he got out of jail because of a conversation they had when the boy and his father were on the way to see a doctor in Stockton. The incident was related on direct examination as follows:

"Q. What made you think, George, that he might have to go to the penitentiary? A. Well, on the way to the specialist down in Stockton one day he said to tell them somebody back in Detroit did it to me, or otherwise he would have to go to jail."

The incident was amplied during cross-examination to the effect that defendant told the boy to say that some man had done it to him while he was in Detroit. These sexual activities continued more or less regularly from shortly after the boy came to live with the defendant until about two weeks before the boy went to live with his mother. The acts were discontinued only after the boy repeatedly complained that he was sick. After leaving his father, Butch's health and schoolwork considerably improved and he was no longer as nervous.

Defendant took the stand in his own defense and denied that he committed the acts related by his son. Several character witnesses were presented on behalf of the defendant who testified that the defendant's reputation for chastity and morality in the community was good and that the reputation of the boy for truth and veracity was bad.

[1] In rebuttal, the prosecution presented Carleen, defendant's eldest daughter, who testified that defendant had once committed acts of a sexual nature upon her. These acts were characterized as oral copulation. The prosecution also called Grace, the fifteen year old daughter of defendant, who testified that defendant had forcibly had sexual intercourse with her during the summer of 1954 and that on another occasion he had propositioned her by offering her $20 if she would go into his bedroom with him. Grace had attempted to report this incident to her teacher who was also one of defendant's character witnesses. Defense counsel's objection to the indicated rebuttal testimony was overruled. The court refused to admit defense evidence that the boy had discussed unnatural sexual activities with one of his playmates and also cross-examination concerning the boy's having been disciplined at school for lewd and vulgar drawings and conversations with younger students.

In arguing for a reversal of the judgment and order, appellant contends that the court erred, (1) in unduly restricting the cross-examination of the prosecuting witness; (2) in allowing improper cross-examination of appellant's character witnesses; (3) in failing to give a proper cautionary instruction; and, (4) in its instructions with relation to the offenses.

In support of his first contention appellant states:

> "In the present case the court unduly and prejudicially restricted cross-examination by defendant in such respect. He sought by cross-examination to prove or lay the foundation for proving that about two years before the boy alleged his father committed and initiated such acts upon him in California, the boy had become familiar with such acts, actively and passively, in Michigan. In that connection he sought to prove or lay the foundation for proving admissions made by the boy in conversations with another boy at the latter's home, and also in conversations with the mother of this other boy. And in that connection he also sought to prove or lay the foundation for proving that activities pertaining to sex had resulted in the boy being

> disciplined at school. That such evidence, if admitted, would have discredited or tended to discredit the testimony of the boy and demonstrate the falsity of his accusations against his father, is obvious. That it was proper cross-examination, is also obvious. By the rulings of the court excluding such evidence and rejecting offers of proof defendant was deprived of a substantial part of his defense."

The son, George, denied that he had made any such admissions or statements and the court sustained the People's objections to any further questioning as to this. Defense counsel subsequently made an offer of proof to the effect that the two boys, Tommie and the prosecuting witness, had several conversations upon the subject of sex, including discussions of unnatural sexual activities. In particular, counsel offered to prove a conversation which took place in February or March of 1954 at Tommie's home in West Point, in which the prosecuting witness had stated that he had participated in unnatural acts while "back east" and that during these conversations the obscene synonyms for sodomy and oral copulation were used.

We do not believe that the court erred in these rulings, nor do we believe that appellant suffered any prejudice from such rulings. The son George denied any such statements or admissions as to any such occurrences in Michigan, and conversations by the son with a schoolmate as to sex or unnatural sexual activities were not material to the issue here involved and in any event would be more harmful than helpful to appellant's case, because if they did take place they could well be regarded as the result of the acts charged against appellant and testified to by the son.

Appellant next contends that the court erred in permitting certain questions to be asked by the district attorney in his cross-examination of appellant's character witnesses. After two of appellant's witnesses had testified that his reputation for chastity was good, the district attorney was permitted on cross-examination, over appellant's objections, to ask each of them if they had heard defendant accused of immoral conduct with his daughters, and whether, if they had heard of it, it would affect their opinion of appellant.

[2, 3] So far as the questions asking appellant's character witnesses if they had heard reports of any sex offenses by appellant, they would not be improper if asked in good faith by the district attorney, for as stated in People v. McKenna, 11 Cal. 2d 327, at pages 335–336, 79 P.2d 1065, at page 1069:

> "* * * In the absence of a showing of bad faith it is always within the scope of legitimate cross-examination to ask a character witness whether he has heard the person whose reputation is under investigation accused of conduct inconsistent with the character attributed to him by the witness. People v. Stevens, 5 Cal. 2d 92, 99, 53 P.2d 133. The court properly allowed the questions asked by the district attorney."

However, such questions should not be asked of a defendant's character witnesses unless the prosecution intends to call character witnesses in rebuttal to testify as to the bad reputation of defendant as to the traits involved. In the instant case the People called no character witnesses in rebuttal but instead called the two daughters of appellant who, over the vigorous objection of appellant's counsel, testified as to specific acts of appellant committed against them, as hereinbefore set forth. As we shall hereinafter point out, this testimony should not have been admitted, but it indicates that the district attorney was no doubt acting in good faith in asking appellant's witnesses if they had heard reports of sex offenses by appellant. But it was not proper for the district attorney to ask appellant's character witnesses the further question whether, if they had heard reports that defendant was accused of immoral conduct with his daughters, their testimony as to his reputation for morality and chastity would be the same. As stated in People v. Neal, 85 Cal.App.2d 765, at page 771, 194 P.2d 57, at page 60:

> "* * * The cross-examination should have been restricted to ques-

tions which would test the sufficiency of the foundation for the direct testimony, and should not have been extended to include inquiries as to what the witnesses might think defendant's general reputation in the community would be, or what the witnesses individually might think of him, if they had additional information. The misconduct of the district attorney in the present case was a flagrant abuse of such limited privilege of cross-examination of the character witnesses. Unless such misconduct in the cross-examination of character witnesses is discontinued it may become necessary to place further limitations upon cross-examination of such witnesses."

And as stated in People v. Beltran, 94 Cal.App.2d 197, at page 210, 210 P.2d 238. at page 245:

> "The direct examination of respondent's witnesses was limited to his general reputation. The cross-examination should not have been extended to include inquiries as to what the witnesses personally might have thought of his reputation if they had had additional information. People v. Neal, 85 Cal.App.2d 765, 771, 194 P.2d 57."

[4] The most serious error in the instant case, and one which requires the reversal of the judgment and order, was the admission in evidence of the testimony of the two daughters of appellant to the effect that appellant had committed acts of a sexual nature upon them, the oldest daughter testifying to a violation of Section 288a of the Penal Code and the 15 year old testifying to acts of forcible rape.

The Attorney General argues that: "While it is true that evidence of other crimes, excepting felony convictions, is generally inadmissible, evidence which is relevant to the crime charged is admissible despite the fact that it may show other offenses."

We are unable to agree with the Attorney General that the evidence given by the two daughters was properly admissible. For as stated in People v. Asavis, 22 Cal.App.2d 492, at pages 494–495, 71 P.2d 307, at page 309:

> "Not only by the appellate courts of the state of California, but also by many other courts having similar jurisdiction, it has been ruled that upon the trial of a defendant on a charge of the felonious commission by him of a sexual offense, evidence of like commission of other similar acts by the defendant with persons other than the prosecuting witness ordinarily is inadmissible. The case of People v. Anthony, 185 Cal. 152, 196 P. 47, 49, was one in which the defendant therein was charged with the commission by him of an offense of the same character as that here involved. One of the issues that was presented on that appeal related to the admissibility of evidence of the commission of similar acts by the defendant with persons other than the prosecuting witness. The court gave the question full consideration, and, in part, said: 'Our law wholly rejects this character of testimony, not because it does not tend to prove the truth of the charge, but because of a just regard for the rights of the defendant, who, if confronted by such witnesses, instead of being compelled to stand trial on one charge made against him, would be confronted by half a dozen or more charges. Our rule confining the testimony to the crime charged in the information has only been relaxed so far as to permit testimony of similar conduct with the complaining witness.'
>
> [Citing numerous cases.]
>
> "In volume 16 of Corpus Juris, at page 610, the rule is thus stated: 'Evidence of assaults by defendant upon, or acts of intercourse with, persons other than the prosecutrix is not admissible, unless they are parts of the same transaction; or unless statements in respect thereto are so connected in a confession with statements pertaining to the offense charged that it is impossible to exclude part of the confession without excluding all of it; or

> unless, according to some cases, defendant by his own testimony or otherwise claims an innocent intent.' "

[5] While it is true that in this state the trend of decision has been to allow evidence of other crimes generally to show guilty knowledge, motive, intent or a common scheme or plan (8 Cal.Jur. 61), it is also true that in cases involving lewdness, the rule that evidence of other crimes is not admissible has not been relaxed. The rule is clearly stated in People v. Huston, 45 Cal.App.2d 596, at pages 597–598, 114 P.2d 607, as follows:

> "* * * The law is established in California that, in a prosecution for committing lewd and lascivious acts prohibited by section 288 of the Penal Code, evidence that defendant has perpetrated similar acts with a person or persons other than the prosecuting witness is inadmissible and, if received, is prejudicial error. (People v. Rogers, 26 Cal.App.2d 371, 372, 79 P.2d 404; People v. Asavis, 22 Cal.App.2d 492, 494, 71 P.2d 307; * * * 22 C.J.S., Criminal Law (1940) § 691, p. 1178.)
>
> "Applying the rule of law above stated to the facts in the instant case, it is clear that the trial court committed prejudicial error in permitting the prosecution to introduce over objection evidence that on prior occasions defendant with minor female children other than the prosecuting witness had committed or attempted to commit offenses prohibited by section 288 of the Penal Code.
>
> "This court on previous occasions has directed the attention of the profession to the reasons for this rule, which are so aptly stated in the universally acknowledged pronouncement of Lord Chief Justice Hale on the subject of the crime of rape, which also applies to offenses interdicted by section 288 of the Penal Code. It is as follows:
>
> " 'It must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent; (and we should) be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witness.' (1 Hale P. C. (1736) 635, 636.)"

In the case of People v. Boyd, 95 Cal. App.2d 831, 213 P.2d 724, relied upon by respondent, defendant was convicted of a violation of section 288 of the Penal Code, the act charged having been committed upon his 10 year old daughter. The prosecutrix testified that her father committed the act while she and her younger sister were sleeping in the same bed, the sister having been asleep at the time; that about a week later he committed the same act upon her sister, they having exchanged sides of the bed as they frequently did without their parents' knowledge. Defendant contended that admission of testimony as to the offense upon the younger child was prejudicial error. In ruling that the evidence was not inadmissible the court said at pages 832–833 of 95 Cal.App.2d, at page 726 of 213 P.2d:

> "* * * The general rule is that when a person is charged with the felonious commission of a sexual offense evidence of similar acts committed upon persons other than the prosecuting witness is ordinarily inadmissible. People v. Asavis, 22 Cal. App.2d 492, 494, 71 P.2d 307. But there are exceptions to this general rule. The evidence was admissible in the instant case for the purpose of showing defendant's lewd and lascivious intent. People v. Knight, 62 Cal. App. 143, 146, 216 P. 96; People v. Owen, 68 Cal.App.2d 617, 620, 157 P.2d 432, his disposition to commit the act charged and the probability of his having committed it. People v. Jewett, 84 Cal.App.2d 276, 279, 190 P.2d 330, and

> as tending logically and by reasonable inference to prove the commission of the act of which he was accused."

The court stated further at page 833 of 95 Cal.App.2d, at page 726 of 213 P.2d:

> "Defendant relies upon People v. Asavis, supra. In that case the evidence which caused the reversal concerned acts upon other minors out of the presence of the prosecutrix. In the instant case the act occurred one week after the offense charged in the information, and was committed upon the sister of the prosecutrix in the latter's presence under circumstances from which it may be inferred that defendant intended a second offense upon the prosecutrix."

We think it is clear that People v. Boyd does not support respondent's contention that the evidence of appellant's daughters was admissible, because in the Boyd case, as pointed out by the court, the offense upon the sister of the prosecutrix was committed in the presence of the prosecutrix and under circumstances from which it could be inferred that defendant intended a second offense upon the prosecutrix.

[6] There is no merit in appellant's contention that the court failed to give a proper cautionary instruction. The court instructed the jury that:

> "* * * [A] charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the child alleged to have been involved and the defendant, if he was in the child's company at the time in question, usually are the only witnesses of their conduct.
>
> "Therefore, I charge you that the law requires that you examine the testimony of such child with caution."

This was a sufficient cautionary instruction, People v. Romersa, 111 Cal.App.2d 173, 244 P.2d 98; People v. Todd, 91 Cal.App.2d 669, 205 P.2d 453; CALJIC Instruction No. 527 [1953 Pocket Part].

[7] Appellant's final contention is that the court committed prejudicial error in giving the following instruction:

> "Evidence was offered in this case for the purpose of showing that the defendant committed other crimes than the one of which he is accused and for which he is on trial in this action, namely, that the defendant performed certain acts with his daughters, * *. Such evidence was received for a limited purpose only and not to prove distinct offenses or continual criminality but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in this action.
>
> "You are not permitted to consider that offense for any other purpose and as to that purpose you must weigh such evidence as you do all other in the case.
>
> "The value, if any, of such evidence depends on whether or not it tends to rebut evidence offered by the defendant as to his character."

Respondent states that "the significance of this instruction * * * depends on the admissibility of the rebuttal evidence as to the offenses of the defendant".

We have already held that said evidence was erroneously admitted and hence it is clear that said instruction should not have been given and that it added to the prejudicial effect of the evidence that should not have been admitted.

In view of the foregoing we conclude that the errors hereinbefore set forth were highly prejudicial and that the judgment and order must be reversed.

The judgment and order are reversed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

141 Cal.App.2d 6

Louis MANN and Peter S. Wald, Co-partners doing business under fictitious name of T. V. Wire Products, Plaintiffs and Respondents,

v.

Earl A. JACKSON and Carl Reininger, individually and as co-partners doing business under fictitious name of Ability Products Company, Defendants and Appellants.

Civ. 21284.

District Court of Appeal, Second District, Division 1, California.

April 23, 1956.

Hearing Denied June 20, 1956.

Action was brought to recover damages for breach by defendants of written contract to build a certain wire assembling machine for plaintiffs. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain judgment.

Judgment affirmed.

Nourse, J. pro tem, dissented in part.

1. Contracts 🔑350(1)

In action for breach of written contract whereby defendants were to build for plaintiffs a wire assembling machine, evidence sustained judgment for plaintiffs.

2. Trial 🔑395(1)

A finding is sufficient to support a judgment, if its language is clear enough to indicate what the trial court intended.

3. Trial 🔑399

If there are findings sufficient to support judgment, they are not vitiated by unintelligibility of others.

4. Damages 🔑40(1)

Damages may be awarded for loss of profits, if lost profits can be shown with a reasonable degree of certainty, whether the action be for tort or for breach of contract. West's Ann.Civ.Code, §§ 3300, 3301.

5. Damages 🔑40(2)

Loss of profits, either present or future, may be recovered on a breach of a contract if such loss is the direct and natural consequence of the breach, and amount thereof can be shown with sufficient certainty. West's Ann.Civ.Code, §§ 3300, 3301.

6. Damages 🔑40(2)

When defendant, by breaching a contract, renders it impossible for plaintiff to realize profits, the probable profits may be estimated, and an award of damages for loss of prospective profits will be sustained if there is a satisfactory basis for estimating the probable earnings that would have been received, if contract had been performed. West's Ann.Civ.Code, §§ 3300, 3301.

7. Damages 🔑40(2)

Where there is an established business, damages are recoverable for the loss of prospective profits resulting from breach of contract, since the working experience of the business affords a reasonable method of determining the loss, and such damages are therefore not speculative and uncertain. West's Ann.Civ.Code, §§ 3300, 3301.

8. Sales 🔑418(19)

Where plaintiffs manufactured wire by use of their existing manual method at actual cost of $21,536.80, and plaintiffs could have produced the same quantity of wire during the same period of time with automatic machine, which defendants had agreed to furnish plaintiffs, at a cost of $16,078.94, but machine was incapable of producing wire, plaintiffs were entitled to recover $5,457.85 in action for breach of contract.

◆

A. J. O'Connor and George J. Hider, Los Angeles, for appellants.

Felix H. McGinnis, Los Angeles, for respondents.

FOURT, Justice.

Plaintiffs, hereafter referred to as respondents, brought an action to recover damages from the defendants, hereafter referred to as appellants, for the breach of a written contract to build a certain wire assembling machine. Appellants answered by generally denying the material allegations of the complaint and plead four affirmative defenses. The substance of the affirmative defenses were: (1) that the appellants designed, built and delivered to the respondents a machine in accordance with the written contract, but that the parties modified the contract to provide that the respondents were to construct a certain rack on the machine in question, at their own expense and that the failure of the machine to operate properly was due to the respondents' failure to properly design and install the rack; (2) that the respondents, against the advice and without the consent of the appellants, attempted to change the design and installation of certain "take up" reels on the machine and did so improperly; (3) that the parties entered into an oral agreement wherein the appellants were to make certain alterations and additions to the machine, all at the request of the respondents for an agreed added price of $2,500, and that the alterations were made by the appellants; (4) that an agreement was made by the attorneys for the parties wherein it was agreed that all disputes were settled and terminated, excepting that there was to be an arbitration conducted on the amount of money to be paid to the appellants for later repairs to the machine.

Appellants also filed a cross-complaint for breach of the oral contract for alterations which they made to the machine at respondents' request, and for further damages for the added repairs. Respondents answered the cross-complaint, denying the material allegations thereof.

The case was tried by the court, without a jury. Judgment was in favor of the respondents for the sum of $17,749.17, plus costs. Defendants have appealed from the judgment.

By the terms of the written contract, which was dated December 6, 1951, the appellants, in substance, agreed to furnish to respondents within five months a wire machine to produce open line TV transmission wire, as per sample at a minimum rate of 3,000 feet an hour, or more. The machine was to be complete in every detail, mechanically perfect and acceptable to the respondents. The appellants further guaranteed the effective operation of the machine for a six months' period. Respondents were to pay $10,000, for the machine, payable at the rate of substantially one-third of the total purchase price, with the purchase order; one-third during the advanced stages of production, and the balance on delivery. The designs and drawings were to be the property of the respondents, and no other wire machine was to be made for anyone other than the respondents.

There was a sharp conflict in the statements of the witnesses. Taking the testimony most favorable to the respondents, a fair résumé of the evidence is as follows.

For a period of about two years before the contract was entered into, the respondents had been profitably engaged in the manufacture and sale of what was called open line TV wire. Shortly before the execution of the contract, the respondents informed the appellants of their requirements for a machine to produce open line TV wire to the end that their costs would be decreased and their volume increased. Appellants were advised of the nature of respondents' business and the intended ultimate use of the wire. After negotiations and discussions, the form of the contract was dictated and prepared. Apparently, each of the parties was present at the time of the dictating, writing and signing of the contract. The respondents agreed that one of their employees would make a certain rack on the machine for the appellants in accordance with the appellants' specifications. Such a rack was made as agreed.

The machine was delivered to the respondents on April 29, 1952. At that time the machine did not work satisfactorily. It never produced saleable wire. Appellants took repossession of the machine on July 4, 1952, to the end that it would be put in good working order. There was some discussion at or about that time with reference as to what should be done. The respondents directed a letter, dated July 14, 1952, to the appellants, to confirm the understanding arrived at between the parties. The substance of the letter was that the appellants were to repair the machine and get it in working order; the respondents were to pay an added $2,500, approximately three months after the machine was in good running shape, and to pay the balance due on the original contract, as soon as possible. There were set forth in the letter, in itemized form, several of the difficulties which the respondents had encountered with the machine.

Shortly before the 2nd of September, 1952, the respondents brought an action against the appellants to regain possession of the machine, the respondents apparently contending that nothing had been done toward making it workable. While the machine was in the possession of the sheriff, the parties agreed that it should be returned to the appellants for a test run on September 2, 1952, subject to the understanding that appellants would relinquish possession to the respondents following such test. On or about September 2, 1952, the test run was made in appellants' shop. The machine failed to work. On the same day, the respondents paid the final installment of the written contract dated December 6, 1951.

Following the test run, the appellants refused to relinquish possession to the respondents. After some intemperate language between the parties, their attorneys orally agreed to attempt to provide for an arbitration of all claims of the parties. This proposed agreement to arbitrate was to be reduced to writing. Counsel for the appellants thereafter directed a letter to respondents' counsel, stating that it was intended that only the appellants' claims against the respondents would be arbitrated and that respondents were to release appellants of all liability. Respondents' counsel replied to the letter, denying any such understanding and thereupon the proposed arbitration was abandoned.

Shortly after the test run of September 2, 1952, the machine was redelivered to the respondents, who desired to see if it could be made to work. They engaged the services of an engineer who inspected it with the view of ascertaining if there was any possibility of making it operate satisfactorily. The machine was then delivered to the Lynn Manufacturing Company for further investigation. It remained at the latter establishment until about December 17, 1952. Extensive work was done on the machine at the manufacturing plant above named, however, it became evident that even if it could be made to operate, its maximum capacity would be about 400 to 500 feet per hour.

The respondents expended $3,567.56, to others than the appellants, in payment of work and materials in an effort to repair or place the machine in working order. They paid the appellants $10,428.75.

In the period from May 1, 1952, the date the machine was to have been delivered to the respondents, to January 31, 1953, the respondents manufactured 1,875,535 feet of open line TV wire, by use of their existing manual method, at an actual cost of $21,536.80. Respondents could have produced that same quantity of wire during that same period of time with the automatic machine which the appellants agreed to furnish at a cost of $16,078.94. The difference between the actual cost to the respondents of the wire manufactured and sold, and the lesser cost of producing the same quantity of wire by means of an automatic machine was $5,457.86.

The trial court found that the parties had entered into the contract of December 6, 1951; that the respondents had paid appellants the sum of $10,428.75; that the machine was imperfect and incapable of performing as agreed; that the original contract of December 6, 1951, was not modified in any material respect; that from May 1, 1952, to December 31, 1952, the respondents expended $2,612.56, in a reasonable effort to cure the defects of the machine, but to no avail; that the reasonable value of the machine on September 2, 1952, and at the time of trial, was $750; that the respondents, from May 1, 1952, to January 31, 1953, manufactured manually and sold certain wire at a cost of $21,536.80; that said wire could have been manufactured with the automatic machine, if working, for the sum of $16,078.94.

Respondents were awarded judgment against the appellants for $9,678.75, being the difference between $10,428.75, the amount paid to appellants, minus $750, the value of the machine, plus $2,612.50, paid by the respondents to cure the defects in the machine, and the sum of $5,475.86, for profits lost, a total judgment of $17,749.17.

Appellants have set forth, in their brief, their contentions. Under the title "Statement of Facts", appellants have related their view of the evidence, and have largely omitted the evidence which the court found to be true. Thereafter, follows a heading titled, "The Court Erred in Awarding Judgment to Plaintiffs". Under this title, appellants restate some of the conflicting evidence.

[1] There was ample and sufficient testimony in the record which, if believed by the trial court, would suffice to sustain the judgment. As was said in Richter v. Walker, 36 Cal.2d 634, 639, 226 P.2d 593, 596:

> [2, 3] "As to the principles governing appellate courts in considering the adequacy of findings to dispose of issues and support a judgment it is a general rule that 'Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended; and if there are findings sufficient to support the judgment, they are not vitiated by the unintelligibility of others.'"

Under the title heretofore indicated, the appellants also contend that the respondents, by their conduct, prevented the performance of an act upon which the appellants' obligations depended, and thereafter used the non-performance of that act as a basis upon which to seek affirmative relief. There was evidence that the machine not only never did work, but that it was so faulty in the inherent design, that it never could be placed in reasonable working order. As respondents have pointed out, it is difficult to understand how the respondents could be said to have in any way prevented the machine from being placed in a workable condition, when such was inherently impossible.

Appellants' next contention is that the finding that the reasonable value of the machine was only $750, is not supported by the evidence. There was testimony by at least one witness to the effect that the value of the machine was $750, and no more. The trial judge obviously believed such testimony and disbelieved other testimony on the same subject matter. We have heretofore stated the time honored rule in the event of conflicting testimony.

Appellants next assert the court erred in finding that the respondents suffered a loss of profits. The respondents sought damages for the loss of sales because of the respondents' inability to produce sufficient wire to fill the orders, which inability was predicated upon the machine not working. The trial court denied the respondents recovery for such lost profit, if any. The court did grant recovery for the lost profits predicated on the difference between the greater cost of producing by the manual method, the wire which respondents manufactured and sold between May 1, 1952, and January 31, 1953, and what would have been the lesser cost to have produced that same wire with an automatic machine which the appellants agreed to furnish the respondents. The appellants knew, before they started to make the machine, the nature of the respondents' business and of the respondents' desire to have the machine to reduce the cost of manufacturing the wire and to increase the volume. It was contemplated that only one employee would be needed to operate the machine, as opposed to two employees in the manual operations, and further, that the cost of the plastic would be substantially reduced with the machine.

[4, 5] It is well established that damages may be awarded for loss of profits where such profits can be shown with a reasonable degree of certainty, whether the action be for tort or for breach of contract. Loss of profits, either present or future, may be recovered upon a breach of a contract if such loss is the direct and natural consequence of the breach and the amount thereof can be shown with sufficient certainty. Civil Code, §§ 3300 and 3301; Ross v. Frank W. Dunne Co., 119 Cal.App.2d 690, 700–701, 260 P.2d 104; Walpole v. Prefab Mfg. Co., 103 Cal.App.2d 472, 481, 230 P.2d 36.

[6, 7] When the defendant by breaching a contract renders it impossible for plaintiff to realize profits, the probable profits may be estimated and an award of damages for loss of prospective profits will be sustained if there is a satisfactory basis for estimating the probable earnings that would have been received if the contract had been performed. Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087; Hartman v. San Pedro Commercial Co., 66 Cal.App.2d 935, 937, 153 P.2d 212; see also, Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 199, 143 P.2d 12. Where there is an established business, damages are recoverable for the loss of prospective profits resulting from breach of contract since the working experience of the business affords a reasonable method of determining the loss and such damages are therefore not speculative and uncertain. Hoag v. Jenan, 86 Cal.App.2d 556, 563, 195 P.2d 451; Grupe v. Glick, 26 Cal.2d 680, 692, 160 P.2d 832; see also, note in 104 A.L.R. 157.

[8] A careful reading of the record in this case indicates that there was abundant evidence from which the trial court could find as it did. There was no prejudicial error committed by the trial judge.

The judgment is affirmed.

DORAN, Acting P. J., concurs.

NOURSE, Presiding Justice.

I dissent.

I dissent from the majority opinion insofar as it holds that respondents are entitled to damages for loss of profits.

In effect the majority opinion writes into the contract between the parties a warranty that the machine which appellants undertook to manufacture would produce open line wire not only at a cost less than the respondents could produce it under the method they were using and with the machine they were using at the time the contract was entered into, but at a saving of the amount awarded by the trial court as loss of profits.

There is no implied warranty in a contract to manufacture a machine as to what the cost of production by it will be, and the contract here does not contain an express one. The only warranty contained in the contract is one that the machine would produce open line wire at a rate of 3,000 feet an hour or more, and that it would do so for a period of six months.

The damages in question did not arise from the failure of the machine to produce wire at the minimum rate specified in the contract, and in fact the trial court found that respondents did not sustain any damages by reason of its failure so to do.

The damages awarded are based solely upon the difference between plaintiffs' actual cost of producing the wire manufactured by them over a period of nine months and what their witnesses testified that cost would have been if produced by the machine which defendants agreed to manufacture. In other words, the trial court and the majority opinion write into the contract a warranty as to the cost of production by the machine and then find that warranty breached, and award damages because of that breach and not because of the failure of the machine to produce wire at the rate of 3,000 feet or more per hour.

By the other items of damage awarded plaintiffs by the judgment, they were made whole and placed in the same position as they were in before entering into the contract, for the judgment awards them the entire purchase price paid, less the value of the machine, which the plaintiffs chose to retain, plus the amounts that they expended in attempting to remedy the defects in the machine.

The plaintiffs failed to prove that because of the failure of the machine to produce wire at 3,000 feet per hour, or wire at all, that they lost any sales or were prevented from performing any contracts, and the fact that plaintiffs' cost of operation remained the same as it was before they entered into the contract does not constitute any damage flowing from the breach of the contract. This is illustrated by the fact that if the machine had proven capable of producing 3,000 feet of wire per hour *but at a cost per foot equal to or greater than respondents' cost under their* *old method, no breach of the contract could have been claimed, and no damages could have been awarded.*

It is true that there was evidence that before entering into the contract the plaintiffs made known to the defendants their desire to obtain a more economical method of producing wire, but the contract (which was drawn by the plaintiffs) does not contain any warranty as to cost of operation, and such a warranty could not be proven by parol.

Assuming that there was a breach of warranty, loss of profits is not an item of damage in cases such as this. This is firmly established in this state. See California Press Mfg. Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A.L.R. 114; Burrell v. Southern California Canning Co., 35 Cal.App. 162, 169 P. 405; Grupe v. Glick, 26 Cal.2d 680, 693, 160 P.2d 832; see also, Annotation 32 A.L.R. 120–122.

In California Press Mfg. Co. v. Stafford Packing Co., supra, the plaintiff had agreed to manufacture a fishmeal machine for the defendant, which was to have a specified capacity. The plant, when completed, did not have the capacity specified. In an action in claim and delivery brought by the plaintiff, the defendant filed a cross-complaint alleging breach of warranty to furnish a machine of the agreed capacity, and sought damages for loss of profits which would have been realized had the machine been as warranted. In holding that loss of profits was not recoverable, the Supreme Court said at page 485 et seq., of 192 Cal., at page 347 of 221 P.: "The damage to be recovered for not supplying a machine or other article, as agreed, is usually the market value for which another may be procured, and is not to be founded upon the uncertain and speculative basis of the profit which might have been made from its use. [Citation.] The great weight of authority seems to be that the recovery of profits is possible only under exceptional circumstances, unless the engagement by its very terms discloses them to have been in effect, in whole or in part, a subject-matter of the contract. [Citation.] The grounds upon which rest the general rule of excluding profits in estimating damages are concisely stated in Howard v. Stillwell & Bierce Mfg. Co., 139 U.S. 199, 11 S.Ct. 500, 35 L.Ed. 147 [see, also Rose's U. S. Notes], a case almost identical with the one here. Damages were there sought to be recovered for loss of profits due to the failure to construct a flour mill within a certain period and with a given capacity per hour. The court gave three reasons for excluding profits (139 U.S. [at page] 206, 11 S.Ct. 501, (35 L.Ed. 147)): '(1) That in the greater number of cases such expected profits are too dependent upon numerous, uncertain, and changing contingencies to constitute a definite, and trustworthy measure of actual damages; (2) because such loss of profit is ordinarily remote, and not, as a matter of course, the direct and immediate result of the non-fulfilment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms (citing cases).' * * * The subject was reviewed by another court in a case involving a sale of flour mill machinery, the contract for which warranted the machinery to have a capacity of a certain number of barrels per day, and it failed to measure up to the stipulated capacity. Damages were sought for loss of profits 'which might have been made.' The court held it was no part of the contract that the plaintiff should make profits by carrying on a business with the machinery which the defendant agreed to erect. It distinguished the transaction from a sale of chattels or of land in which the possible profit is the very object of the contract and is necessarily in the contemplation of the parties, saying: 'When a machinist furnishes machinery to a mill owner, it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote, and speculative profits which may or may not be made in the business to be done.' [Citation.]" See also, cases cited in annotation 32 A.L.R. 120, 121, 122.

The cases cited by the majority to uphold the proposition that damages may be awarded for loss of profits are entirely distinguishable from the present case upon their facts. Ross v. Frank W. Dunne Co., 119 Cal.App.2d 690, 260 P.2d 104, and Walpole v. Prefab Mfg. Co., 103 Cal.App.2d 472, 230 P.2d 36, were both cases in which the breach of a contract of distributorship was involved and where the profit to be made from the sale of articles furnished by the defendant was the sole object of the contract insofar as the plaintiff was concerned.

In Grupe v. Glick, supra, 26 Cal.2d 680, 160 P.2d 832, the defendant had agreed to sell certain machines to the plaintiff and had expressly warranted that they were suitable for the purpose of refining oil. The contract gave the plaintiff the exclusive selling rights for the device, and it was contemplated by the parties that he would sell them at retail at an increased price over the price which he was obligated to pay to the defendant for them. Here again the object of the contract, so far as the plaintiff was concerned, was the purchase of these machines and the resale of them at a profit.

In Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 143 P.2d 12, the court did not have before it any question as to damages for the breach of a contract. There the court only held that the profits that the plaintiff might have made from the use of land, of which use it had been wrongfully deprived by the defendant, was evidence of the value of that use.

Even if we assume that the plaintiffs were entitled to recover damages of the type which we have been discussing, that is, a loss due to their being unable to reduce their cost of manufacture, then still the damages awarded are beyond those to which they were entitled under the contract. By the express terms of the contract the machine was warranted to operate for a period of only six months, but the damages awarded were based upon the so-called loss of profits over a period of nine months. It is impossible for me to see upon what theory the majority can uphold this award.

I would reverse the judgment with directions to the trial court to enter judgment for the plaintiffs for the sum of $12,291.25, this being the sum of the damages awarded by the trial court as the difference between the value of the machine delivered and the amount paid by the respondents therefor and the moneys expended by respondents to cure the defects in the machine.

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140 Cal.App.2d 962

The PEOPLE of the State of California, Appellant,

v.

Bascom DeVaun RYE, Respondent.

Cr. A. 2568.

Appellate Department, Superior Court, Ventura County, California.

March 16, 1956.

Prosecution of motorist for failure to grant pedestrian the right of way at a crosswalk. The Municipal Court entered a judgment of conviction, but suspended sentence, and the state appealed. The Superior Court, Ventura County, Blackstock, P. J., held that in view of statutes impliedly providing for duration of a probationary period and for a standard of conduct during such probationary period, granting of probation by suspending a sentence was valid and free from fatal uncertainty even though judgment suspending sentence failed to set the term of the probationary period or impose conditions of the probation.

Order affirmed.

1. Criminal Law ⚷1001

Where municipal court entered judgment of conviction against defendant for failure to grant a pedestrian the right of way at a crosswalk, which offense was a misdemeanor, and then ordered the sentence suspended, the effect of such order was to place the defendant on summary probation. Vehicle Code, § 560(a); West's Ann.Pen. Code, §§ 1203.4, 1203a, 1203b.

2. Criminal Law ⚷978

Statute providing that any court having jurisdiction to impose punishment in misdemeanor cases shall have power to suspend the imposing or execution of sentence has not been repealed and remains as an exception to statute generally providing for probation. West's Ann.Pen.Code, §§ 1203.1, 1203a.

3. Criminal Law ⚷982, 1001

Statutory provisions regarding probation and conditions or terms of the probation do not render an order of probation omitting conditions or terms provided for by such statutes invalid or illegal because of such omission. West's Ann.Pen.Code, §§ 1203–1203.4.

4. Criminal Law ⚷982, 1001

Maximum period of probation provided by statute is the full term for which a defendant could be sentenced to imprisonment, and this is so despite the fact that a judge by specific action on his part could continue the period of probation for three years, even though this would be beyond the maximum period of sentence. West's Ann.Pen. Code, §§ 1203.1, 1203a.

5. Criminal Law ⚷982, 1001

An essential part of probation is a standard of conduct which the probationer is required to follow as a condition of his grant of probation. West's Ann.Pen.Code, §§ 1203–1203.4.

6. Criminal Law ⚷982, 1001

Statute giving a court granting probation the right to revoke it if the court shall have reason to believe that a person so placed upon probation is engaging in criminal practices implies that one of the conditions of the granting of probation is that probationer not engage in criminal practices. West's Ann.Pen.Code, § 1203.2.

7. Criminal Law ⚷1001

In view of statutes impliedly providing for duration of a probationary period and for a standard of conduct during such probationary period, granting of probation by suspending a sentence was valid and free from fatal uncertainty even though judgment suspending sentence failed to set the term of the probationary period or impose conditions of the probation. West's Ann.Pen.Code, §§ 1203.1, 1203.2, 1203a.

8. Criminal Law ⚷982, 1001

Statutory reference to directions for time and frequency of reporting to a probation officer or court, provision for fingerprinting of a probationer, presentment of probation papers, and explanation of terms and conditions and rights available to probationer upon successful completion of probation, are directory only and carrying out of those acts is not essential to make an order of probation valid. West's Ann.Pen. Code, §§ 1203–1203.4.

9. Criminal Law ⚷982, 1001

A trial court should advise a probationer that he is on probation and tell him whether or not reports are required and if so the frequency and nature thereof. West's Ann.Pen.Code, §§ 1203–1203.4.

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Roy A. Gustafson, Ventura, for appellant.

M. Arthur Waite, Ventura, for respondent.

Robert B. Maxwell, Oxnard, amicus curiae.

BLACKSTOCK, Presiding Judge.

On the 19th day of January, 1956, in the Municipal Court of Oxnard—Port Hueneme Municipal District of Ventura County, California, the respondent (defendant in the Court below) was convicted of violation of the California Vehicle Code, Section 560(a).

Whereupon, the Court pronounced judgment as follows:

> "The Court orders that defendant is sentenced to pay a fine of ten ($10.-00) dollars and in case all of said fine is not paid forthwith, defendant is to be imprisoned in the Oxnard City Jail for one day for each $5.00 of the fine not paid until the fine is satisfied in full.
>
> "Whereby all of said sentence is hereby suspended."

The People appeal "to the Superior Court of the State of California in and for the County of Ventura, *from the order suspending the execution of the judgment* rendered by said Municipal Court on January 19th, 1956, * * * which said order was rendered subsequent to the pronouncement of said judgment on said date." (Emphasis ours.)

The respondent argues that the people waived the right to appeal at the time the order appealed from was made, but we do not agree with respondent in this respect.

The appellant contends on appeal, "that the order either places said defendant upon probation or is void, and if the effect of the order is to place said defendant upon probation then the order, while not void, is nevertheless erroneous because the trial court failed to follow the statutory procedure to place the defendant upon probation in the following respects: It did not (1) set the term of the probationary period, (2) impose and require conditions of probation, (3) require said defendant to report to the court or to the probation officer during the period of term of his probation, (4) require that the fingerprints of said defendant be taken, (5) furnish defendant with probation papers, and (6) inform defendant of his rights under Section 1203.4 of the Penal Code."

We think the appellant has misconceived the law applicable to this case.

[1] It is conceded on all sides that the Municipal Court judge merely pronounced judgment as above set forth and said nothing whatever about probation. But there is no question in our minds but that the effect of the order as made by the Municipal Court was to place the defendant on summary probation. Section 1203b of the Penal Code is as follows:

> "All courts having jurisdiction to impose punishment *in misdemeanor cases* shall have the power to grant probation summarily *in misdemeanor cases* without referring such cases to the probation officer." (Emphasis ours.)

This section became effective February 4, 1941.

It is provided in effect by section 1203a, Penal Code that any court having jurisdiction to impose punishment in misdemeanor cases shall have the power to suspend the imposing or the execution of the sentence.

[2] Section 1203a, Penal Code was not repealed by section 1203.1 of the same code and remains one of the exceptions provided in the latter section. In re Clausen, 14 Cal.App.2d 246, 247, 57 P.2d 1353.

We have carefully read the briefs of both the appellant and respondent and examined all of the cases cited by either side and we have made some considerable independent research, but we are not convinced that there is any merit in this appeal.

[3] In our opinion, Penal Code sections 1203 to and including section 1203.4 justify us in holding that it cannot be held that an order of probation omitting any expressed conditions or terms of the probation for that reason lacks any of the essential elements of a valid and legal order. People v. Lippner, 219 Cal. 395, 399, 26 P.2d 457.

We believe that the Penal Code sections above referred to are implied provisions of probation. People v. Lippner, supra.

The cases implying probation from an order, "sentence suspended" hold that the implied term was for the maximum possible term of imprisonment. See In re Giannini, 18 Cal.App. 166, at page 169, 122 P. 831; In re Herron, 217 Cal. 400, at page 405, 19 P.2d 4; People v. Wallach, 8 Cal.App.2d 129, at page 132, 47 P.2d 1071.

[4] Since the rendition of the opinions in the cases above cited there have been statute changes. However, we believe that the maximum period of probation provided

by the Penal Code sections where the present law is found, sections 1203.1 and 1203a, is still the full term for which the defendant could be sentenced to imprisonment. This is so despite the fact that the judge, by specific action on his part, could continue the period of probation for three years, even though this was beyond the maximum period of sentence. Penal Code section 1203.1 provides in part that "the * * * judge * * * may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence, except as hereinafter set forth, * * *." Section 1203a, which has been held under proper syntax to be one of the exceptions indicated in section 1203.1, In re Clausen, 14 Cal.App.2d 246, 57 P.2d 1353, provides that any court having jurisdiction to impose punishment in misdemeanor cases "shall have power to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years * * *." However, it is logical to construe the wording above quoted to mean that a continuance of the probation beyond the period otherwise limited to the maximum time of sentence is dependent upon an actual exercise of the "power" to do so given by the code section. Such specific action is lacking where the court grants probation by simply suspending the sentence.

[5, 6] Another essential part of probation is a standard of conduct which the probationer is required to follow as a condition of his grant of probation. The necessary implication of such a standard is made from some of the provisions of section 1203.2. People v. Lippner, 219 Cal. 395, 26 P.2d 457. This section gives the court granting probation the right to revoke it "if the court * * * shall have reason to believe * * * that the person so placed upon probation is * * * engaging in criminal practices, or has become abandoned to improper associates or a vicious life." Clearly, it is to be implied from this wording that one of the conditions of the granting of probation is that the probationer *not* engage in criminal practices or abandon himself to improper associates or a vicious life.

[7, 8] As indicated above, we feel that these implied provisions of a period of probation and a standard of conduct make the granting of probation by suspended sentence valid and free from fatal uncertainty. We also believe that the reference by the relevant Penal Code sections to other factors which would ordinarily be considered and acted upon by the judge such as directions for the time and frequency of reporting to a probation officer or court, provision for fingerprinting, presentment of probation papers, explanation of terms and conditions and rights upon successful completion is directory only and the carrying out of those acts is not essential to make the probation valid.

Of course, the Court should know that the simple suspension of a sentence amounts to granting probation with implied terms and conditions.

[9] We are convinced that it would be good practice for the trial court to at least advise the probationer that he is on probation and to tell him whether or not reports are required and if so the frequency and nature thereof.

While the presiding judge of the appellate department has put this opinion in its final form it is really the collaborative effort of all three judges.

Notwithstanding what we have said in this opinion we do not wish to be understood to have approved the wholesale and indiscriminate suspension of sentences.

The order is affirmed.

REPPY and CHURCHILL, JJ., concur.

141 Cal.App.2d 929

MIDWAY MOTORS, etc., Plaintiff and Appellant,

v.

Paul H. PERNWORTH, Defendant and Respondent.

C. A. 8878.

Appellate Department, Superior Court,
Los Angeles County, California.
April 16, 1956.

Action upon sight draft. From a judgment of the Municipal Court of Compton Judicial District, Donald E. Dunbar, J., the plaintiff appealed. The Superior Court, Appellate Department, Patrosso, J., held that evidence established actual authority or at least ostensible authority on part of an agent to purchase an automobile on behalf of defendant and to issue the draft drawn upon the defendant.

Reversed.

1. Principal and Agent 🔑25(1)

Fact that defendant entertained secret undisclosed intent that automobile purchaser was agent of corporation rather than defendant's agent, or that defendant considered his account in bank on which purchaser was authorized to draw, as a loan to the corporation, did not relieve defendant from liability to those who, in good faith and in ignorance of any limitations or restrictions on the purchaser's authority, dealt with him on basis of his apparent authority to act for defendant.

2. Principal and Agent 🔑123(7, 9)

In action upon sight draft, evidence established actual authority or at least ostensible authority on part of agent to purchase automobiles on behalf of defendant and to issue draft drawn upon defendant through bank in which defendant had an account.

3. Principal and Agent 🔑169(2)

Where principal, when advised that agent had bought automobile on principal's behalf, proceeded to insure automobile in principal's name as owner, he thereby ratified act of agent in purchasing automobile and drawing draft upon defendant in payment therefor.

4. Sales 🔑197

Even if seller intended that, despite delivery of possession of automobile to defendant's agent, title to automobile should not pass to defendant until payment of draft, loss by theft from person entrusted with automobile by defendant's agent would have to be sustained by defendant. West's Ann.Civ.Code, § 1742.

5. Sales 🔑197

Since adoption of Uniform Sales Act, rule formerly obtaining, that loss of subject matter of a sale, without fault of either party, falls upon holder of title thereto, no longer obtains. West's Ann.Civ.Code, § 1742.

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Getz, Aikens & Manning, Los Angeles, for appellant.

Cogen & Landrum, Los Angeles, for respondent.

PATROSSO, Judge.

Action upon a sight draft drawn in favor of plantiff's assignor, Berl Berry, Inc., by one F. H. Bradbury, purporting to act as agent for and in the name of the defendant, issued in payment for an automobile purchased from said assignor. The sole question is whether the trial court was warranted in concluding that Bradbury was not authorized to purchase and accept delivery of the automobile and to execute and deliver the draft upon behalf of the defendant.

Berl Berry, Inc., is a dealer in automobiles with its place of business in Kansas City, Missouri. Defendant is a physician having his office in Compton, California, and also was Secretary of Bradbury Motor Corporation, of which Bradbury was President. Prior to the events with which we are here concerned, the defendant established an account with funds provided by him and in his own name in the Compton National Bank for the purpose of paying for automobiles to be purchased by Bradbury who alone was authorized to draw thereon. The defendant testified that the account was opened for the purpose of providing funds for the purchase of cars by Bradbury Motor Corporation but due to the fact that it was in financial difficulties the account previously mentioned was maintained in defendant's individual name. Following this, Mr. Bradbury, by or with the consent and approval of defendant, was sent to the middle west for the purpose of purchasing automobiles, and at or about the same time as the purchase of the car from the plaintiff's assignor for which the draft here in question was issued, he purchased some seven cars (including one other from plaintiff's assignor) as agent for and in the name of defendant, for which he issued similar sight drafts in payment, which were honored by defendant upon presentation. Conformably to this practice, Bradbury purchased the Pontiac for which the draft in suit was issued from plaintiff's assignor in the defendant's name, and took delivery thereof, whereupon he (Bradbury) entrusted it to a person of his selection for the purpose of driving it to defendant's home in Compton. The car, however, was stolen en route, but by whom does not appear. Upon being apprised by Bradbury of the purchase of the car in question, as in the case of seven others purchased by Bradbury, defendant procured insurance thereon in his name as the insured. Upon presentation of the draft defendant refused to accept the same, and defendant and plaintiff's assignor thereupon agreed that the latter should undertake to locate and recover the automobile, and, if successful, sell the car and retain the proceeds without prejudice to any rights which assignor might have against defendant. The car was later recovered and sold by the assignor for a sum which, after deducting costs incurred, netted $207.79.

Plaintiff contends that the facts related above, if they do not establish actual authority in Bradbury to purchase cars for defendant and issue in payment thereof drafts upon the latter through the Compton National Bank are sufficient as a matter of law to establish that he was clothed with ostensible authority so to do, and, moreover, that when defendant, upon being notified by Bradbury of the purchase of the Pontiac, procured insurance thereon in his name as insured, he thereby ratified Bradbury's actions in so doing. We are in accord with these contentions and accordingly are contrained to reverse the judgment.

[1, 2] The evidence to which we have adverted above leaves no doubt but that Bradbury was authorized by defendant to purchase automobiles in the latter's name and to issue in payment thereof drafts in defendant's name drawn upon the defendant through the Compton National Bank; that Bradbury, pursuant to such authorization, proceeded to purchase automobiles, taking title thereto in the name of defendant and issuing in payment thereof drafts drawn upon the defendant which were accepted by the latter. This, if it does not establish actual authority in Bradbury to bind defendant, establishes that he was clothed with ostensible authority so to do. "Ostensible authority to do a particular act may be established by showing that the principal approved similar acts of the agent." (2 Cal.Jur.2d p. 700, sec. 52.) Nor is it of consequence that defendant testified that he regarded Bradbury as agent of the corporation, or that he considered the account in the Compton National Bank, upon which Bradbury was authorized to draw, as a loan to the corporation. The fact that defendant entertained this secret or undisclosed intent does not relieve him from liability to those who, in good faith and in ignorance of any limitations or restrictions on the agent's authority, dealt with him upon the basis of his apparent authority. (2 Cal.Jur.2d p. 701, sec. 53.)

Accepting as true defendant's statement that the purpose of establishing the account in the name of defendant individually was to permit the corporation to purchase automobiles because of the financial difficulties in which it found itself, it would be a gross fraud upon those who in good faith sold automobiles in the belief that the defendant individually was the purchaser thereof to permit defendant to say after the automobiles were purchased in his name that such cars were in fact purchased for the corporation, for it is only reasonable to assume that under the circumstances they would have refused to do so upon the credit or promise of a financially embarrassed corporation. More important, however, is the fact that, whether the automobiles were purchased for the defendant or the corporation, according to defendant's own testimony Bradbury was authorized to draw drafts on defendant in payment of such cars as he might purchase.

[3] Additionally, as already noted, it appears from defendant's own testimony that when advised by Bradbury that he had purchased the Pontiac automobile in question from the plaintiff's assignor he proceeded to insure the same in his name as owner, thereby ratifying the act of Bradbury in so doing.

[4, 5] The defendant also contends that inasmuch as the car was stolen before its delivery to defendant and the draft was not accepted, title never passed to defendant, and the loss must therefore fall upon the plaintiff. We find no merit to this contention. As we have seen, the automobile was delivered to defendant's agent, Bradbury, who in turn delivered possession thereof to a person, selected by him, to drive the same to Compton. Conceding, without deciding, that it was the intent of the seller (plaintiff's assignor) that, despite the delivery of possession of the automobile to defendant's agent, Bradbury, title thereto should not pass to defendant until the payment of the draft, the loss nevertheless falls upon the defendant. Civil Code, § 1742. The authorities to the contrary cited by defendant were decided prior to the adoption by California, in 1931, of the Uniform Sales Act, of which section 1742 is a part, and as a consequence the rule formerly obtaining that loss of the subject matter of a sale, without fault of either party, falls upon the holder of the title thereto, no longer obtains. Beaudry v. Peterson, 1942, 50 Cal.App.2d 478, 482–484, 123 P.2d 108, 124 P.2d 637. Moreover, here, as in the case last cited, defendant caused the automobile to be insured in his own name, and when the car was stolen, notified the insurance carrier thereof, thus indicating that he recognized the legal obligation imposed by the contract to protect himself against loss. Beaudry v. Peterson, supra, 50 Cal.App.2d at page 484, 123 P.2d 108, 124 P.2d 637.

The judgment is reversed.

BISHOP, P. J., and SWAIN, J., concur.

46 Cal.2d 394

COUNTY OF SAN BERNARDINO, Plaintiff and Respondent,
v.
Ruth SIMMONS, Defendant and Appellant.
L. A. 23973.

Supreme Court of California.
In Bank.
April 27, 1956.
Rehearing Denied May 23, 1956.

Action by county against adult daughter of individual to whom county had paid old age security. The Superior Court, San Bernardino County, Martin J. Coughlin, J., entered judgment for county on basis that county had right of subrogation to parent's right to support from children. Daughter appealed. The Supreme Court, Schauer, J., held that county, which had paid old age security to father could not bring action against adult daughter based on asserted subrogation right of county to right of parent under Civil Code section providing that it shall be the duty of children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability, but rather, the provisions of the Welfare and Institutions Code alone must be looked to to determine liability of a responsible relative to the county for such payments.

Judgment reversed.

Opinion, 287 P.2d 868, vacated.

1. Paupers ⚷37(2)

Statute providing that it is duty of father, mother and children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability authorizes a general action addressed to the equitable powers of the court by the poor person against the relative. West's Ann.Civ.Code, § 206.

2. Social Security and Public Welfare ⚷94

Under the Welfare and Institutions Code the Legislature intended to cover completely the subject of recovery by public agencies of amounts expended for support or aid to indigent, aged, blind, etc., from responsible relatives who failed to fulfill their obligation under provisions of Code to support a particular individual, and the Legislature did not intend by enactment of Civil Code welfare statute to give county a right of recoupment for sums so expended. Welfare and Institutions Code, §§ 2011, 2181, 2224; West's Ann.Civ.Code, § 206.

3. Subrogation ⚷24

County, which paid old age security to father, could not bring action against daughter, based on asserted subrogation of county to parent's right to support from children under Civil Code section to recover payments made, but rather in such a case provisions of Welfare and Institutions Code must alone be looked to in order to measure extent of responsible relative's liability to county for old age security payments made, and old age security payments, which are contingent upon other factors than the recipient being poor and unable to maintain himself by work, could not be considered the performance of duty to support a poor person required by Civil Code section and thus such payments could not be made basis of such a subrogation claim. West's Ann. Civ.Code, § 206; Welfare and Institutions Code, §§ 2001, 2020, 2022, 2163, 2163.1, 2163.2, 2164, 2181, 2224, 2576, 3088, 5077, 5260, 5356, 5402.5, 5404, 5516, 5606, 6650.

◆

James E. Walker, Santa Ana, for appellant.

Albert E. Weller, County Counsel, and J. B. Lawrence, Deputy County Counsel, San Bernardino, for respondent.

SCHAUER, Justice.

Plaintiff county paid old age security to Henry Simmons. It brought this action against his adult daughter to recover a portion of the amount so paid. Its first cause of action is, as stated in section 2224 of the Welfare and Institutions Code, "to recover for said county such portion of the aid granted as said relative is able to pay, and to secure an order requiring the payment of any sums which may become due in the future for which the relative may be liable." Its second cause of action is based on the asserted subrogation of the county to the right of the parent under the provision of section 206 of the Civil Code that "It is the duty of * * * the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

The trial court announced that it sustained an objection to the introduction of evidence as to the first cause of action. Judgment was for plaintiff for $140 upon the second cause of action. Defendant appeals; plaintiff does not.

Since the county does not complain of the ruling as to the first cause of action[1] there is no need to discuss defendant-appellant's arguments as to why she considers that the decision of the trial court as to that cause of action was correct. As to the second cause of action we have concluded that the trial court was mistaken in accepting the county's theory that it could recover derivatively under section 206 of the Civil Code.

[1] *The applicable Sections of the Civil Code and the Welfare and Institutions Code.* Section 206 of the Civil Code provides, as it has since its enactment in 1872, that "It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding." This statute authorizes a "general action addressed to the equitable powers of the court" by the poor person against the relative. (Tuller v. Superior Court (1932), 215 Cal. 352, 355, 10 P.2d 43.)

The Welfare and Institutions Code sets out what appears on the face of that code to be a complete procedure for recovery by the county, when it pays aid to a needy aged person, from a spouse or adult child[2] who is able to support the aged person. At the time here material section 2181 of the Welfare and Institutions Code (as am. Stats. 1st Ex.Sess.1950, ch. 22, § 1, p. 463) provided in material part that on receipt of an application for old age security the board of supervisors shall "determine the ability of responsible relatives to contribute to the support of applicant * * *. The maximum degree of liability of the responsible relative shall be determined by 'Relatives' Contribution Scale.' [The scale is set out in the section.] In determining ability to contribute, the financial circumstances of responsible relatives shall be given due consideration and, in unusual cases, contributions at less than the amount fixed by 'Relatives' Contribution Scale' may be made as the board of supervisors may deem justifiable. A married daughter of the applicant shall not be required to make contributions unless she has income constituting her separate property. * * *"

Section 2224 of the Welfare and Institutions Code (as am. Stats.1945, ch. 1319, § 2, p. 2474) provided, "* * * If the person receiving aid has within the State, a spouse or adult child found by the board of supervisors pecuniarily able to support said person, the board of supervisors shall request the district attorney * * * to proceed against such kindred * * *. [T]he district attorney * * * shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relative * * * to recover for said county such portion of the aid granted as said relative is able to pay * * *."

The Claim of Subrogation. The trial court found the following facts from which it concluded that defendant owed the county the duty to reimburse the county for $140 contributed to the father's support: From December 15, 1952, to July 15, 1953, defendant had property and earning ability sufficient to enable her to pay $20 a month for the support of her father. During this time the father was a poor person unable to maintain himself by work. The father during this time received from the county $80 a month as old age security.

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[1] Respondent states "The decision of the trial Court striking our first cause of action has not been appealed, and our second cause of action stands alone as if the first had never existed."

[2] Apparently the Legislature in adopting the Welfare and Institutions Code thought that the probability of a needy aged person having a surviving parent or a minor child able to contribute to his support was so slight that it did not include provision for recovery from such relatives, although Civil Code, section 206, purports to make them responsible for his support.

Plaintiff's argument is as follows: The obligation of the child to support the poor parent under section 206 of the Civil Code is "preexistent to and independent of the aid granted to the needy aged by public authorities" (quoting from Kelley v. State Board of Social Welfare (1947), 82 Cal.App.2d 627, 632, 186 P.2d 429, a case which contains statements upon which, as will appear, doubt was cast by County of Contra Costa v. Lasky (1954), 43 Cal.2d 506, 509, 275 P.2d 452); the county performed the child's duty under section 206; and the county is therefore subrogated to the parent's right against the child under section 206.

[2] There is nothing in section 206 which suggests an intention to create a liability of the child of poor parents to public agencies which support the parents in accord with their law-imposed duty to pay aid to such parents; the only liability to third persons is in the case of the promise of an adult child expressly referred to in the last sentence of the section. On the other hand, the Welfare and Institutions Code (particularly applicable here are §§ 2181, 2224, hereinabove quoted; see also § 2011) not only purports to state the circumstances in which the named responsible relatives are liable to the county when it has supported or paid aid to indigents, aged, blind, etc.,[3] but also states a procedure by which in proper cases the county can recover from the responsible relatives. It seems apparent, therefore, that the Legislature intended, by the Welfare and Institutions Code, to cover completely the subject of recovery by public agencies from responsible relatives, and that it did not intend to create, and that there is no proper basis for the courts to innovate, a right of recoupment derived from section 206 of the Civil Code.

On this subject it is said in County of Contra Costa v. Lasky (1954), supra, 43 Cal.2d 506, 509, 275 P.2d 453, "There is a conflict in the cases as to whether the basic liability of responsible relatives is section 206 of the Civil Code or the provisions of the Welfare and Institutions Code. It has been held that the latter code provisions are complete in themselves and the liability of responsible relatives to the county is thereby established. (County of Lake v. Forbes [1941], 42 Cal.App.2d 744 [109 P.2d 972]; County of Los Angeles v. Lane [1952], 113 Cal.App.2d 476 [248 P.2d 479]; County of Los Angeles v. La Fuente [1942], 20 Cal.2d 870 [129 P.2d 378].) Seemingly to the contrary are Garcia v. Superior Court [1941], 45 Cal.App.2d 31 [113 P.2d 470], and Kelly v. State Board of Social Welfare [1947], 82 Cal.App.2d 627 [186 P.2d 429]. Although it is not important in this case,[4] we believe the matter is adequately covered by the Welfare and Institutions Code and it is the measure of the extent of the responsible relative's liability to the county. It is to it we must look to ascertain whether the relative is required, in a particular case, to reimburse the county." We reiterate the declaration of the last quoted sentence as a holding, and any inconsistent implications in the Garcia and the Kelly cases are disapproved.

Plaintiff points out that, as stated in Ashland County v. Directors of Richland County Infirmary (1857), 7 Ohio St. 65, 70 Am.Dec. 49, 51, there are decisions in

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3. The Welfare and Institutions Code provides for recovery by the county or state from financially able responsible relatives of persons who have received aid or been maintained not only because they are aged (§§ 2181, 2224) but also because they are indigent (§ 2576), blind (§ 3088), mentally disordered (§§ 5077, 6650), feeble-minded (§ 5260), narcotic drug addicts (§ 5356), inebriates (§§ 5402.5, 5404), sexual psycopaths (§ 5516), or mentally abnormal sex offenders (§ 5606). The system for such recovery from responsible relatives provided in the Welfare and Institutions Code, although not altogether coherent, manifestly purports to cover the entire subject.

4. The matter was "not important in this [Contra Costa] case" because the county did not there insist, as does the county here, that it had a right under section 206 of the Civil Code independent of the Welfare and Institutions Code.

other jurisdictions which "proceed on the principle that the sufferings of paupers and of indigent persons shall be relieved by the townships where they may be found in their destitute conditions, and that advancements made for such purposes are justly chargeable in equity and conscience to the person * * * whose relation towards the pauper or indigent person creates a duty or imposes the necessity or furnishing aid, and that the obligation when neglected or disregarded by those who should perform it may be enforced in favor of whomsoever grants the relief as for money paid out and expended for another's benefit." (County of Jaspar v. Osborn (1882), 59 Iowa 208, 13 N.W. 104; McCook County v. Kammoss (1895), 7 S.D. 558, 64 N.W. 1123, 31 L.R.A. 461; Tryon v. Town of Moyer (1915), 130 Minn. 198, 153 N.W. 307, L.R.A.1915E, 844; Bismarck Hospital v. Harris (1938), 68 N.D. 374, 280 N.W. 423, 116 A.L.R. 1274, 1277.) We do not find the theory of those cases persuasive here, for in none of them, so far as the reports show, was there a statutory system such as that of the Welfare and Institutions Code which purported to set up a system of public agency direct responsibility and to cover the subject of recovery from responsible relatives of aid paid by the political subdivision. (See generally, citing cases from other states with other statutory provisions for recovery of old age assistance, Annotation, 29 A.L.R.2d 731.)

[3] The following argument of defendant furnishes a further reason for holding that there is no right of the county to recover from the child of a poor parent under section 206 of the Civil Code: The county is required by the Welfare and Institutions Code to pay aid to the aged who are "in need" (Welf. & Inst.Code, §§ 2001, 2022). The sections which set out the amount of aid allowed[5] and the resources which an aged person may own without being disqualified from receiving aid,[6] delineate the financial situation of one who is considered "in need." Manifestly, this is not the same as being "poor" and "unable to maintain himself by work" (Civ. Code, § 206). The county is required to pay old age security to persons who, although they are "in need" according to the Welfare and Institutions Code, have considerable income and property, and who may be able to maintain themselves by work. The payment of old age security, therefore, cannot be considered to be the performance of a duty to support a poor person unable to maintain himself by work, and the theory of subrogation (see Sanders v. Magill (1937), 9 Cal.2d 145, 150, 70 P.2d 159; Fireman's Fund Indemnity Co. v. State Comp., etc., Fund (1949), 93 Cal.App. 2d 408, 412, 209 P.2d 55) is inappropriate.

For the reasons above stated, the judgment appealed from is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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[5] Section 2020 of the Welfare and Institutions Code now provides that the amount of aid to which an applicant is entitled is "when added to the income (including the value of currently used resources, but excepting casual income and inconsequential resources) of the applicant from all other sources" $85 a month, or a greater amount if "actual need" is greater.

[6] He may own personal property valued at $1,200 (Welf. & Inst.Code, § 2163) and real property of an assessed value of as much as $3,500 (Welf. & Inst.Code, § 2164). He may own future interests of unlimited value (Welf. & Inst.Code, § 2163.1) and personal effects, clothing, furniture, household equipment, food, fuel, and personal jewelry of unlimited value (Welf. & Inst.Code, § 2163.2).

46 Cal.2d 401

CITY OF OAKLAND, a Municipal Corporation, acting by and through its Board of Port Commissioners, Plaintiff and Appellant,

v.

Frank A. BURNS, Norman C. Thomson et al., Defendants;

Herman Stelzner and Walter R. McCoy, Defendants and Respondents.

S. F. 19137.

Supreme Court of California.
In Bank.
May 1, 1956.

City brought action against operators of limousine and bus service to enjoin them from operating on road within airport owned and operated by city. The Superior Court, Alameda County, Donald K. Quayle, J., entered judgment adverse to city, and city appealed. The Supreme Court, McComb, J., held that city had no power to dedicate by implication any portion of the road to a public use, and that, since the road was not a public street, the Public Utilities Commission had no power of regulation of limousine or bus service over the road.

Judgment reversed with directions.

Carter, J., dissented.

Opinion, 289 P.2d 271, vacated.

1. Municipal Corporations 🔑646

Roadway within airport owned and operated by city in its proprietary capacity was a "private road" and not a "public street."

See publication Words and Phrases, for other judicial constructions and definitions of "Private Road" and "Public Street".

2. Dedication 🔑13

City, which owned and operated an airport in city's proprietary capacity, had no power to dedicate by implication any portion of private road within the airport to a public use.

3. Dedication 🔑13

Generally, a municipal corporation, unless specifically restricted, may as well make an actual offer of dedication of land owned by it as a private owner, and manner in which such offer can be made will be the same in both cases, except insofar as for a municipal corporation, the mode is restricted by law, constitution, or charter.

4. Municipal Corporations 🔑225(5), 722

The Legislature may prescribe the method by which power of city to sell or lease or otherwise dispose of property shall be exercised, and, if applicable, the method as so provided must be substantially followed.

5. Municipal Corporations 🔑226

The mode of contracting, as prescribed by municipal charter, is the measure of the power to contract, and a contract made in disregard of the prescribed mode is unenforceable.

6. Municipal Corporations
🔑293(1), 646, 655, 657(1)

The word "whenever" as used in provision of city charter that "whenever" Board of Port Commissioners of city shall determine that it is necessary to open, close, improve, alter or vacate a public street, or part of a public street within airport area, certified copy of resolution so determining such necessity shall be filed by board in office of city clerk, whereupon city manager and city council shall initiate and carry to completion the proceedings necessary to effect such proposal, indicates that the mode prescribed is exclusive.

See publication Words and Phrases, for other judicial constructions and definitions of "Whenever".

7. Municipal Corporations
🔑293(1), 646, 655, 657(1)

The repeated use of the word "shall" in provision of city charter that whenever Board of Port Commissioners "shall" determine that it is necessary to open, close, improve, alter or vacate a public street, or part of a public street within airport area, certified copy of resolution so determining such necessity "shall" be filed by board in office of city clerk, whereupon city manager and city council "shall" initiate and carry to completion the proceedings necessary to effect the proposal, shows that such method is mandatory.

See publication Words and Phrases, for other judicial constructions and definitions of "Shall".

8. Adverse Possession ⚷8(1)

No title by prescription can be acquired against any municipal corporation or subdivision of the state in land reserved for or devoted to some specific public use. West's Ann.Civ.Code, § 1007.

9. Municipal Corporations ⚷648

The public, by using road within airport owned by city, could not acquire title to the road by prescription. West's Ann. Civ.Code, § 1007; West's Ann.Code Civ. Proc. § 1238, subd. 20.

10. Municipal Corporations ⚷57

When a municipality is authorized to exercise a purely proprietary power, it has full power to perform it in the same efficient manner as a private person would.

11. Adverse Possession ⚷7(1)

Municipal Corporations ⚷646

Fact that municipality acting in a proprietary capacity must be allowed the powers necessary to perform it efficiently and to be free from restrictions which impede its efficiency, does not mean that it must also be free from restricting provisions, which do not impede its specific function, like one restraining the manner in which municipality may open public streets over its lands, or that it cannot rely on rules advantageous to it such as the one protecting it against the acquisition of prescriptive rights by third parties. West's Ann.Civ. Code, § 1007; West's Ann.Code Civ.Proc. § 1238, subd. 20.

12. Automobiles ⚷63

Where road in airport owned and operated by city was a private road and not a public street, the Public Utilities Commission had no jurisdiction or power to regulate limousine or bus service over the road. West's Ann.Const. art. 12, § 23; West's Ann.Public Util.Code, § 1003.

J. Kerwin Rooney, Port Atty., and Edward A. Goggin, Asst. Port Atty., Oakland, for appellant.

Rodney H. Hamblin, Joseph M. Hamblin, Donovan, Stuhr & Martin and Herbert Bartholomew, San Francisco, for respondents.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants Stelzner and McCoy in an action for damages and an injunction to restrain the operation by defendants of limousine or bus service from and on the Oakland Municipal Airport (hereinafter called the airport) and their solicitation on the airport of patronage for said services, allegedly in contravention of certain ordinances and regulations of the city and its Board of Port Commissioners (hereinafter called the board) and of the exclusive license and concession granted by the board for said services at the airport to Fialer's Limousines, Inc. (hereinafter called Fialer's).

Plaintiff owns the airport and operates it through the board in its proprietary capacity. Earhart Road is the principal roadway within the airport passing the main buildings, among which are the International Terminal Building, hangars and installations. Earhart Road has been paved and provided with curbings by the board. Since 1927 the main part of this road has been used generally by the public with the knowledge and without objection from the board, which at no time took any action to terminate such general use.

Earhart Road has not been dedicated to the public use in any formal manner. An unnamed side road of Earhart Road along the southwesterly side of the International Terminal Building and a parking and turning area in back of said building has been used since 1947 for ground transportation service for passengers of nonscheduled airlines, and vehicles transporting these passengers for hire had access to this area only by revocable permits of the board and its agents. This area has not been dedicated to public use either formally or by implication.

An agreement was entered into between plaintiff in its proprietary capacity and Fialer's, granting the latter an exclusive license for certain transportation services for hire commencing November 1, 1951. This agreement the trial court found valid except insofar as it purported to accord Fialer's exclusive rights with respect to the part of Earhart Road found to be a public street.

The following ordinances allegedly violated by defendants were found to be valid ordinances regulating the use of airport property held by plaintiff in its proprietary capacity but not applicable to the public part of Earhart Road:

(a) Port Ordinance No. 641, which, among other things, prohibits the use of the airport as a base for the carrying for hire of passengers or for any other commercial purpose without license from the board or its port manager;

(b) Port Ordinance No. 786 prohibits solicitation of patronage for any taxicab, limousine or airline bus service within the airport or entering the airport for such purpose except when authorized by contract;

(c) Port Ordinance No. 835, which added to Port Ordinance No. 812, section 2.1 prohibiting the operation of any vehicle or bus from the airport unless with the approval of the board and on its conditions and terms.

(d) Section 106 of Council Ordinance No. 3083 C.M.S., which prohibited the operation or leaving of a vehicle on private property without express permission of the owner.

Since November 1, 1951, Fialer's, under agreement with plaintiff, had been the only one entitled to solicit patronage for or to engage in the transportation of persons on or from the airport in airline motor buses, taxicabs or limousines except that defendants might operate on the portion of Earhart Road found by the trial court to be a public street.

Defendant Stelzner provided transportation with one limousine from March 21, 1946, to January 8, 1953. Defendant McCoy provided transportation with one bus from 1947 to January 1953.

Prior to November 1, 1951, defendants used the parking area in back of the International Terminal Building in operating their vehicles. On that date their permits were revoked and thereafter they used only the portion of Earhart Road which the trial court found to be a public street.

Both defendants were duly licensed by the city to operate a limousine carrying passengers for hire on the public streets of the city. On January 23, 1951, defendant McCoy was granted by the Public Utilities Commission a certificate of public convenience and necessity authorizing him to operate a passenger stage service for transportation of nonscheduled airline passengers from the airport to certain points in Oakland, San Francisco and Treasure Island over the most appropriate streets between the points authorized. Defendant McCoy is under a duty to provide ground transportation service in accordance with the certificate obtained.

Within a year prior to the commencement of the action defendants had not committed any of the acts prohibited in the abovementioned ordinances except on the portion of Earhart Road which the trial court determined to be a public street.

[1, 2] Plaintiff contends that no part of Earhart Road is a public street but that in its entirety it is a private road within the airport. This contention is correct. Plaintiff has all power over Earhart Road so far as the same is located on the airport property held by plaintiff in its proprietary capacity. Plaintiff is right in its contention that the plaintiff Board of Port Commissioners lacked power to dedicate by implication any portion of Earhart Road to a public use.

Since the board lacked power to dedicate Earhart Road to a public use in the manner found by the trial court, to-wit, by implication, it is unnecessary to consider here whether an implied dedication could be founded in any case upon evidence showing nothing more than a permissive use of a road by the public for access purposes, which the trial court found "dead-ended" within the premises of the owner.

[3] It is the general rule that a municipal corporation, unless specifically restricted, may as well make an actual offer of dedication of land owned by it as a private owner (19 Cal.Jur. (1925) § 384, p. 23; cf.

City of Oakland v. Oakland Water Front Co., 162 Cal. 675, 680, 124 P. 251) and the manner in which such offer can be made will be the same in both cases (16 Am.Jur. (1938) § 13, p. 356) except insofar as for a municipal corporation, the mode is restricted by law, constitution or charter.

[4, 5] It is likewise the rule that the Legislature may prescribe the method by which the power to sell or lease or otherwise dispose of property shall be exercised and, if applicable, the method so provided must be substantially followed. (Cf. County of San Diego v. California Water, etc., Co., 30 Cal.2d 817, at page 823 [2], 186 P.2d 124, 175 A.L.R. 747; Miller v. McKinnon, 20 Cal.2d 83, at page 88, 124 P.2d 34, 140 A.L.R. 570, where Mr. Justice Carter, in quoting from Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 353, 291 P. 839, 71 A.L.R. 161, said: "It is * * * settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable.") The same principle applies to voluntary dedication of municipal property to be a public street.

In the instant case, an exclusive mode of opening public streets in the port area is prescribed in section 218 of the Oakland City Charter, which reads:

"Sec. 218. Whenever the Board shall determine that it is necessary to open, close, improve, alter or vacate a public street, or part of a public street within the 'Port Area,' a certified copy of the resolution so determining such necessity shall be filed by the Board in the office of the City Clerk, whereupon the City Manager and the City Council shall initiate and carry to completion the proceedings necessary to effect said proposal."

[6, 7] The word "whenever" indicates that the mode prescribed is exclusive, while the repeated use of the word "shall" in describing the procedure shows that such method is mandatory.

Section 217 of plaintiff's charter prevents it or the council from performing any of the acts mentioned in section 218 without the cooperation of the Board of Port Commissioners.

[8, 9] It is undisputed that Earhart Road has not been opened as a public street in the manner prescribed by section 218, supra. If the board should have had the intention and had made the implied offer to dedicate Earhart Road as a public street without substantially following the procedure outlined in section 218 of the charter, such offer would have been invalid and ineffective. Should it be argued that the creation of an easement of a public street by adverse user by the public as mentioned above without an actual intent or offer to dedicate by plaintiff or any of its agents is not the opening of a public street by the board or plaintiff but an adverse imposing of such burden to which section 218 does not apply, the answer is that such rights would be by prescription and that no title by prescription can be acquired against any municipal corporation or subdivision of the state in land reserved for or devoted to some specific public use. (Civ.Code, § 1007*; Henry Cowell Lime & Cement Co. v. State, 18 Cal.2d 169, at page 172 [2], 114 P.2d 331; Bartholomew v. Staheli, 86 Cal. App.2d 844, 857, 195 P.2d 824 [hearing denied by the Supreme Court]; Reclamation Dist. No. 833 v. American F. Co., 209 Cal. 74, at page 81 [6], 285 P. 688.) The use as an airport of the property here involved is a public use, which excludes the acquisition of rights by prescription. This is evidenced by the fact that section 1238 of the Code of Civil Procedure, subdivision 20, lists airports as one of the "public uses" for which the right of eminent domain may be exercised.

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* Section 1007 of the Civil Code reads in part as follows: "* * * but no possession by any person, firm or corporation no matter how long continued of any land, water, water right, easement, or other property whatsoever dedicated to or owned by any county, city and county, city, irrigation district, public or municipal corporation or any department or agency thereof, shall ever ripen into any title, interest or right against such county, city and county, city, public or municipal corporation, irrigation district, or any department or agency thereof or any agency created or authorized by the Constitution or any law of this State for the administration of any State School, college or university."

There is likewise no merit in the contention of defendants that plaintiff cannot rely on the foregoing rules of public law in contesting their right to use Earhart Road as a public street because the municipality defends its right to make the exclusive contract with Fialer's on the ground that it operates the airport in a proprietary and not in a governmental capacity.

[10] The city claims the right to make an exclusive transportation contract at the airport because it appears reasonable that the power to acquire and operate a proprietary function implies all necessary power to operate it efficiently. When a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would. (Ex Parte Houston, 93 Okl.Cr. 26, 224 P.2d 281, at page 292 [4–7]; Miami Beach Airline Service v. Crandon, 159 Fla. 504, 32 So.2d 153, 155, 172 A.L.R. 1425.) In the latter case this principle was used to uphold an exclusive contract of the same kind as that of Fialer's.

[11] However, it does not follow from the recognition of this principle that a municipality acting in a proprietary capacity must be allowed the powers necessary to perform it efficiently and to be free from restrictions which impede its efficiency that that it must also be free from restricting provisions which do not impede its specific function, like the one restricting the manner in which plaintiff may open public Streets over its lands, or that it cannot rely on rules advantageous to it such as the one protecting it against the acquisition of prescriptive rights by third parties.

Section 218 of the Oakland Municipal Charter does not contain any restrictions indicating that it does not apply to opening of streets over lands devoted to a public use of proprietary character, and the rule excluding acquisition of prescriptive rights against municipalities is likewise applicable.

Finally, the certificate of public convenience and necessity of defendant McCoy orders him to conduct his operations "over and along the most appropriate public streets and highways between the points authorized." Defendant McCoy urges the superior jurisdiction of the Public Utilities Commission over the bus and limousine services on Earhart Road (Cal.Const., art. XII, § 23; Pub.Util.Code, § 1003) on the basis only that Earhart Road is a public street.

[12] The certificate does not contain any finding that Earhart Road is a public street or any decision that the authorized service "from the Municipal Airport" must take place over Earhart Road. Defendants do not contend that the Public Utilities Commission has any power of regulation over private roads and no constitutional or code provision gives it such power. (Cf. Kuhn v. Ferry and Hensler, 91 Cal.App.2d 805, 206 P.2d 1 [hearing denied by the Supreme Court].)

People v. County of Marin, 103 Cal. 223, 230, 37 P. 203, 26 L.R.A. 659, is not here in point. In the cited case the county of Marin had accepted an offer to dedicate, and the court held that the acceptance was valid even though the statutory procedure was not followed. (People v. County of Marin, supra, 103 Cal. at page 229, 37 P. 203.) However, in the instant case, our decision does not limit the power of the public or the legislative body to accept an offer to dedicate. It merely holds that in dedicating public property there must be substantial compliance with constitutional, statutory and charter provisions. The decision in People v. County of Marin is not overruled.

The judgment is reversed with directions to the trial court to amend its findings of fact and conclusions of law and to enter a judgment in accordance with the views expressed herein.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion in this case fails to give effect to the rule applicable to common law dedication of public thoroughfares in spite of the numerous authorities announcing it which are controlling here.

Let us look at the facts with regard to Earhart Road as found by the trial court (there is no question of the sufficiency of the evidence to support those findings). The court found: "The Oakland Municipal Airport was first established in the year 1927 upon approximately eight hundred (800) acres of land then constituting a part of the 'Port Area' of the City of Oakland as defined by the Charter of the City of Oakland. The *roadways* [including Earhart Road] and buildings *hereinafter* described were and are all within said eight hundred (800) acres of land. Since the establishment of the Oakland Municipal Airport, *the principal roadway within said airport* commenced at the intersection of Hegenberger Road, a public highway, with the northeasterly boundary of said airport and ran generally southwesterly into said airport and northwesterly past the principal buildings serving air travelers and then past various hangers and other buildings and installations erected thereon for the use of airlines, aircraft companies and other services related to aviation. Said road was extended northwesterly from time to time and always dead-ended within said airport property. In the year 1935 said road *was designated* 'Earhart Road' *by resolution of the Board of Port Commissioners.* In the year 1947, the Board of Port Commissioners by ordinance dedicated to public use as a public street or highway a road now known as Doolittle Drive which was laid out as a state highway and runs generally parallel with Earhart Road in a northwesterly direction from said Hegenberger Road along and outside of the northeasterly boundary of said airport, and to the City of Alameda. Thereafter access roads were established between Earhart Road at and near its northwesterly end and said Doolittle Drive. Said connecting roads were opened at or about the time Doolittle Drive was laid out and dedicated as a public street. *Said Earhart Road is the primary road serving said airport and the buildings and businesses located thereon.* The International Terminal Building (used as a passenger station for nonscheduled airline passengers) fronts on the southwesterly side of Earhart Road and is situated approximately seven hundred eighty (780) feet southwesterly along Earhart Road from its commencement at Hegenberger Road. * * *

"Said Earhart Road * * * [was] paved and said Earhart Road widened by said Board of Port Commissioners and were at all times maintained by said Board. Said Board caused curbings to be erected along the edges of said roadways and delineated said roadways on maps and charts of the Oakland Muncipal Airport kept on file in the office of the Chief Engineer of the Board of Port Commissioners. * * * *Since the year 1927 the portion of Earhart Road hereinafter specifically described has been used generally by the public with the knowledge of and without objection from the Board of Port Commissioners which at no time took any action to terminate such general use.*" (Emphasis added.) Thus everything which is ever necessary to common law dedication has occurred. It would be difficult to conceive of a more plain case for the application of the principles of implied common law dedication, yet the majority opinion, while acknowledging the rule of such dedication, concludes that it did not occur because compliance was not had with sections 217 and 218 of the Oakland Charter. Those sections provide nothing more than that dedication for roads may be initiated by resolution of the Board of Port Commissioners and completed by the city council. Section 217 reads: "No franchise shall be granted, no property shall be acquired or sold, no street shall be opened, altered, closed or abandoned, and no sewer, street, or other public improvement shall be located or constructed in the 'Port Area' by the City of Oakland, or the Council thereof, without the approval of the Board." Section 218 reads: "Whenever the Board shall determine that it is necessary to open, close, improve, alter or vacate a public street, or part of a public street within the 'Port Area,' a certified copy of the resolution so determining such necessity shall be filed by the Board in the office of the City Clerk, whereupon the City Manager and the City Council shall initiate and carry to completion the proceedings necessary to effect said proposal." (Oakland City Charter, §§ 217, 218.)

First, looking at the law on implied dedication we find the following: A municipal corporation may make a common law dedication of its property for a street the same as private owners. It is said: "A municipality may itself dedicate property, unless specially restricted, as may the state. Likewise towns, and school authorities, have been held to have this power." McQuillin, Municipal Corporations (3rd ed.), § 33.14. See, 16 Am.Jur., Dedication, § 13; County of Yolo v. Barney, 79 Cal. 375, 21 P. 833. Here there has been more than a mere offer to dedicate contrary to the intimation of the majority opinion. The dedication is an accomplished fact by reason of the various things found by the trial court. Nor is the part of the rule that a municipality may dedicate its property unless restricted by law, applicable, because the land is of a character which may be dedicated and section 218 is not such a restriction. It only provides one way in which a dedication may be made.

The majority argues, however, that section 218 is the sole method by which there may be a dedication by the city. That section merely says that the board of port commissioners shall determine by resolution when it is necessary to "open" a street and the city council proceeds from there on. There are several reasons why that section does not prevent the instant common law dedication. It does not purport to exclude such dedication and at most is merely one method by which it may be accomplished. It cannot be said to be a limitation on the *power* of a city to dedicate its property, as reasoned by the majority opinion, for the rule that a statute is the measure of the power of a local governmental agency does not apply to chartered cities. "[B]y accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the *clear and explicit* limitations and restrictions contained in the charter. The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the *enumeration of powers does not constitute an exclusion or limitation.* West Coast Advertising Co. v. San Francisco, 14 Cal. 2d 516, 521–522, 525, 95 P.2d 138, and cases cited * * *. As recognized in the West Coast Advertising case, the levy of taxes for city purposes is a municipal affair; the collection, treatment and disposal of city sewage and the making of contracts therefor are likewise municipal affairs, Loop Lumber Co. v. Van Loben Sels, 173 Cal. 228, 232, 159 P. 600, and *neither may be held to be circumscribed except as expressly limited* by the charter provisions. *All rules of statutory construction as applied to charter provisions* * * * are subordinate to this controlling principle. The former guide—that municipalities have only the powers conferred and those necessarily incident thereto * * *. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not *expressly* stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as *clearly and explicitly* curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied." (Emphasis added.) City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 598–599, 212 P.2d 894, 896. Thus in the instant case sections 217 and 218 do not *clearly or explicitly* prohibit the city from making a common law dedication of streets. They deal only with the distribution of powers as between the board of port commissioners and the city council. The board must approve before the council may establish a street. The board may express its approval by resolution but that is only the formal way of expressing it; it does not exclude the informal method embodied in common law dedication which may occur when the requisite conduct on the part of the city occurs as is found here and such dedication may result when the formal proceedings for dedication are defective. As said in People v. County of Marin, 103 Cal. 223, 229, 37 P. 203, 205; "That the general public used the road as a public highway is established by the evidence beyond reasonable doubt. It is said that all of this testimony fails to establish a *statutory* dedication of the highway. This may be conceded, *but 'in many instances a dedication invalid as a statutory one will be a good common-law dedication.'* Elliott, Roads & S., pp. 85, 86." (Emphasis added.) And it is said: "An incomplete or defective statutory dedication or an ineffectual attempt to make a statutory dedication will, when accepted by the public or when rights are acquired under it by third persons, operate as a common-law dedication." (16 Am.Jur., Dedication, § 52.) This is further established by the many cases that hold that although an acceptance of the street by the municipality or other government agency is necessary to complete a dedication, yet this may be shown by conduct by the agency such as was found in this case even though the statutory procedure for acceptance was not followed. People v. County of Marin, supra, 103 Cal. 223, 37 P. 203; McGinn v. State Board of Harbor Com'rs, 113 Cal. App. 695, 703, 704, 299 P. 100; Fitzgerald v. Smith, 94 Cal.App. 480, 271 P. 507; County of Sacramento v. Lauszus, 70 Cal.App.2d 639, 161 P.2d 460; Richardson v. O'Hanrahan, 83 Cal.App. 415, 256 P. 1103; San Francisco Sulphur Co. v. Contra Costa Co., 207 Cal. 1, 6, 276 P. 570; St. John v. King, 130 Cal.App. 356, 20 P.2d 123. It is said in the Marin County case, supra, where the county board of supervisors declared a road to be a public one: "[A]lthough the proceeding *was not accompanied by all the forms required by the statute to constitute it a highway in a statutory sense, still it was evidence of an acceptance by the board for the public as such highway;* which evidence, coupled with its uses for a highway, and its improvement as such by public authority, is ample to support an acceptance." (Emphasis added); People v. County of Marin, supra, 103 Cal. 223, 230, 37 P. 203. In San Francisco Sulphur Co. v. Contra Costa Co., supra, 207 Cal. 1, 5, 276 P. 570, 572, a subdivision map showing streets was recorded by the owner of the property but was not formally accepted by the city, yet the court held that merely ordering improvement work done was sufficient implied acceptance to constitute a dedication, stating: "We next pass to the contention that the improvements were made upon property not in fact public thoroughfares, because not dedicated to the public use. We have no hesitancy whatever in holding that under the allegations of said complaint appellant is in no position to attack the sufficiency of the evidence to sustain the action of the board of supervisors in improving these thoroughfares, as public streets. The contention of appellant is that, as to some of the subdivisions described in the district, the recorded maps of such subdivisions which named streets and thoroughfares were not accepted by the board of supervisors, but, on the contrary, acceptance had been denied, and that, as to others thereof accepted, the acceptance though granted was not indorsed upon the maps. It is plain that the making and recordation of these maps was an offer of dedication to the public of these spaces as thoroughfares and public streets. It is also clear from the complaint that no withdrawal of said offer of dedication has even been made. *The mere ordering of the work 'done' and the completion thereof by the board of supervisors is, therefore, an implied acceptance of the offer of dedication. Neither party* could thereafter successfully contend that the thoroughfares were anything other than public streets. While it is true that the *statutory proceedings* for express dedication *were not literally complied with,* ample appears to show that an implied acceptance of dedication offer was made by the board. Wolfskill v. County of Los Angeles, 86 Cal. 405, 24 P. 1094; People v. County of Marin, 103 Cal. 223, 227, 37 P. 203, 26 L.R.A. 659; Davidow v. Griswold, 23 Cal. App. 188, 137 P. 619." (Emphasis added.) In connection with the cases above quoted from, it should be noted that according to the findings here the board passed a resolution giving Earhart Road its name. Certainly that is substantial compliance with sections 217 and 218 of the charter or at least sufficient to show a common law offer and acceptance of a dedication under the rule stated in the Marin County and San Francisco cases. While words of art, such as that the street is hereby established, were not used, the resolution shows unquestioned approval by the board of Earhart as a public road.

To reach the conclusion arrived at by the majority, the above cited cases must be overruled. They cannot be distinguished.

The rule for which the majority stands may have more serious effects than are present here. Suppose all the things done by the city here are done on a strip of land owned by the city and in reliance thereon millions of dollars of improvements are erected fronting on it. It would seem inconceivable that this court would hold there was no dedication, would permit the city to erect barriers across the street and stop the flow of traffic thereon rendering valueless the investments in the improvements.

I would affirm the judgment.

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141 Cal.App.2d 82

Sarah ABRAHAMER, Plaintiff and Respondent,
v.
Alonzo PARKS and Pauline Parks, Defendants and Appellants.

Civ. 21238.

District Court of Appeal, Second District, Division 3, California.

April 24, 1956.

Rehearing Denied May 21, 1956.

Unlawful detainer proceeding to recover possession of realty purchased by plaintiff at trustee's sale under deed of trust executed by defendants. The Superior Court of Los Angeles County, C. Clinton Clad, J. pro tem., rendered judgment for plaintiff, and from such judgment and an order denying defendants motion for new trial, defendants appealed. The District Court of Appeal, Vallée, J., held that plaintiff, having proved acquisition of title at trustee's sale, was not required to prove more with respect to title, and that whether there had been a default in payments due on note secured by deed of trust, whether plaintiff was a bona fide purchaser and encumbrancer for value without notice, and the effect of a lis pendens filed in another action could not be litigated in unlawful detainer proceeding.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

See also, 296 P.2d 343.

1. Mortgages 🔑372(4)

Where copy of trustee's deed attached to complaint as an exhibit recited that default was made in specified payments due on note secured by deed of trust on realty and complaint alleged that plaintiff was the owner and entitled to possession of such realty, which had been sold to plaintiff under power of sale contained in deed of trust, complaint stated facts sufficient to constitute a cause of action for unlawful detainer against mortgagors. West's Ann.Code Civ. Proc. § 1161a.

2. Mortgages 🔑372(4)

In unlawful detainer proceeding to recover possession of realty purchased by plaintiff at sale under power of sale contained in deed of trust, plaintiff must prove his acquisition of title by purchase at trustee's sale, but only to such limited extent may title to the realty be litigated in such proceeding. West's Ann.Code Civ.Proc. § 1161a.

3. Mortgages 🔑372(4)

In proceeding for unlawful detainer, plaintiff, having proved acquisition of title to realty at trustee's sale under power of sale contained in deed of trust, was not required to prove more with respect to title. West's Ann.Code Civ.Proc. § 1161a.

4. Mortgages 🔑372(3)

In unlawful detainer proceeding by purchaser of realty at trustee's sale under deed of trust, mortgagors were precluded from questioning recitals in trustee's deed as to default, execution and delivery to trustee of written declaration of default and demand for sale, compliance with Civil Code provisions relating to sale under deed of trust, publication and posting of notice of sale, and sale at public auction to highest bidder, where deed of trust under which realty was sold provided that recitals in trustee's deed of any matters or facts should be conclusive. West's Ann.Code Civ.Proc. § 1161a; West's Ann.Civ.Code, §§ 2924, 2924b.

5. Judgment ⚿739

Mortgages ⚿372(4)

Whether there had been a default in payments due on note secured by deed of trust, whether plaintiff was a bona fide purchaser and encumbrancer for value without notice, and effect of a lis pendens filed in another action could not be litigated in unlawful detainer proceeding to recover possession of realty purchased by plaintiff at trustee's sale under deed of trust executed by defendants, and such matters were not concluded by judgment in such summary proceeding. West's Ann.Code Civ.Proc. § 1161a; West's Ann.Civ.Code §§ 2924, 2924b.

6. Forcible Entry and Detainer ⚿43(2)

Order denying motion for new trial after judgment for plaintiff in unlawful detainer proceeding was not an appealable order.

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Roscoe C. Carroll, Los Angeles, for appellants.

R. Leslie Sparks, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff in a proceeding for unlawful detainer.

Defendants, as trustors, executed a deed of trust as security for the payment of a promissory note. They defaulted and the trustee sold the property to plaintiff. Plaintiff gave defendants, who were in possession, a 3-day notice to quit. Defendants refused to quit, hence this proceeding.

[1] The first contention is that the complaint does not state facts sufficient to constitute a cause of action. The argument is that the complaint does not allege ownership and possession at the time of the commencement of the proceeding and that it does not allege a default on the part of the trustors. The complaint alleges that plaintiff "is the owner and entitled to possession of" the property. The allegation is sufficient. Attached to the complaint as an exhibit is a copy of the trustee's deed which recites that default was made in the payments due on the note and obligation secured by the deed of trust, specifying them. The complaint states facts sufficient to constitute a cause of action.

Complaint is made because the court refused to permit defendants to litigate the title to the property and refused to hear evidence as to 1) whether there had been, in fact, a default; 2) whether plaintiff was a bona fide purchaser and encumbrancer for value without notice; and 3) the effect on this action of a *lis pendens* filed in another action. Section 1161a of the Code of Civil Procedure in pertinent part provides:

> "In either of the following cases, a person who holds over and continues in possession of real property, after a three-day written notice to quit the same, shall have been served upon him, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162 of the Code of Civil Procedure, may be removed therefrom as prescribed in this chapter. * * *
>
> "3. Where the property has been duly sold in accordance with Section 2942 of the Civil Code, under a power of sale contained in a deed of trust executed by him, or a person under whom he claims, and the title under the sale has been duly perfected."

[2, 3] Where the purchaser at a trustee's sale proceeds under section 1161a as did plaintiff in this proceeding, he must prove his acquisition of title by purchase at the sale. It is only to this limited extent, as provided by the statute, that the title may be litigated in a proceeding brought under that section. Cheney v. Trauzettel,

9 Cal.2d 158, 159, 69 P.2d 832. Plaintiff proved acquisition of title at the trustee's sale. She was not required to prove more with respect to title.

[4, 5] The deed of trust under which the property was sold contains the usual provision that the recitals in the trustee's deed of any matters or facts shall be conclusive proof of the truthfulness thereof. The trustee's deed recites a default, the execution and delivery to the trustee of a written declaration of default and demand for sale, compliance with sections 2924 and 2924b of the Civil Code, the giving of notice of sale by publication and by posting in 3 public places in Los Angeles and in a conspicuous place on each parcel of the property after not less than 3 months from the date of recording the notice of default, and the sale at public auction to plaintiff, the highest bidder. Defendants were precluded in this proceeding by these recitals. Cobb v. California Bank, 6 Cal.2d 389, 390, 57 P.2d 924. The issues defendants sought to have litigated have no place in this summary proceeding. "[T]he plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." Cheney v. Trauzettel, 9 Cal.2d 158, 160, 69 P.2d 832, 833.

Freeze v. Salot, 122 Cal.App.2d 561, 266 P.2d 140, relied on by defendants, is not analogous. That was a suit for a decree setting aside a trustee's deed, setting aside a deed from the purchaser at the trustee's sale to a third party, and setting aside a judgment of the municipal court in a prior action. It appeared from the allegations of the complaint that the issues sought to be litigated had been determined adversely to the plaintiff by the municipal court judgment in the prior action. Accordingly it was held that the municipal court judgment was *res judicata.* None of the questions presented by the record in the present case was decided in that case. The issues with respect to the validity of the sale which defendants sought to raise in the trial court are not concluded by the judgment in this proceeding.

[6] Defendants appealed also from the order denying their motion for a new trial. Since that order is non-appealable, the appeal therefrom will be dismissed.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

141 Cal.App.2d 85

Sarah ABRAHAMER, Plaintiff and Respondent,

v.

Alonzo PARKS and Pauline Parks, Defendants and Appellants.

Civ. 21246.

District Court of Appeal, Second District, Division 3, California.

April 24, 1956.

Rehearing Denied May 21, 1956.

Unlawful detainer proceeding to recover possession of realty purchased by plaintiff at trustee's sale under deed of trust executed by defendants. The Superior Court of Los Angeles County, Harold C. Shepherd, J., rendered judgment for plaintiff, and from such judgment and an order denying defendants' motion for new trial, defendants appealed. The District Court of Appeal, Vallée, J., held that recital in trustee's deed that trustee sold the realty to highest bidder was conclusive in unlawful detainer proceeding to recover possession of such realty.

Appeal from order denying motion for new trial dismissed and judgment affirmed.

1. Mortgages 🔑372(3)

Recital in trustee's deed that trustee sold realty to the highest bidder was conclusive in unlawful detainer proceeding to recover possession of realty purchased by plaintiff at trustee's sale under deed of trust executed by defendants as against contention that plaintiff was a pledgee and as such could not become owner of pledged property without complying with specified Civil Code sections. West's Ann.Civ.Code, §§ 2872–2913, 2986–3011.

2. Forcible Entry and Detainer 🔑43(2)

Order denying motion for new trial after judgment for plaintiff in unlawful detainer proceeding was not appealable.

Roscoe C. Carroll, Los Angeles, for appellants.

R. Leslie Sparks, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants from a judgment for plaintiff in a proceeding for unlawful detainer.

The facts are the same in this proceeding as in Abrahamer v. Parks, Cal.App., 296 P.2d 341, except that different property and a different sale under another deed of trust are involved. Defendants make the same points on this appeal as on the other with one addition. What we have said in the opinion on that appeal disposes of all of the points except the additional point made here.

[1] The additional point is that plaintiff was a pledgee and that a pledgee does not become the owner of pledged property without complying with sections 2872 to 2913, inclusive, and 2986 to 3011, inclusive, of the Civil Code. There was no question raised by the pleadings and no evidence presented at the trial relative to this question. The trustee's deed recites that the trustee sold the property to plaintiff, the highest bidder therefor. These recitals are conclusive in this proceeding.

[2] Defendants also appealed from the order denying their motion for a new trial. Since that order is nonappealable, the appeal therefrom will be dismissed.

The appeal from the order denying the motion for a new trial is dismissed; the judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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141 Cal.App.2d 1

Augusta DAHLIN, Plaintiff and Appellant,

v.

Orrin C. MOON and Melvina D. Moon, his wife, Defendants and Respondents.

Civ. 16708.

District Court of Appeal, First District,
Division 2, California.
April 23, 1956.

Proceeding wherein the Superior Court, Marin County, Thomas F. Keating, J., set aside a default and default judgment. The plaintiff appealed. The District Court of Appeal, Per Curiam, held that under circumstances shown by the record, the trial court's action in setting aside the default and default judgment, which had been taken contrary to agreement between counsel, was an abuse of discretion.

Affirmed.

1. Appeal and Error 🔑717

Where trial court's minutes showed that trial court on technical grounds and not on merits orally denied, on September 13, 1954, motion to set aside default and default judgment, and written order of trial court, dated September 20, 1954, denied motion and amended motion without adding that denial was on merits, reviewing court could consider minutes in determining basis for trial court's decision. West's Ann.Rules on Appeal, rule 2(b); West's Ann.Code Civ.Proc. § 473.

2. Appeal and Error ⚿717

Though opinion of trial judge cannot be considered by reviewing court for purpose of impeaching findings or judgment it may be considered for purpose of discovering process by which trial judge arrived at his conclusions, or when opinion furnishes basis of court's action in its decision of case.

3. Judgment ⚿399

A court has power in its discretion to permit renewal of motion to vacate judgment, at least when denial was on formal grounds only, without consideration of merits. West's Ann.Code Civ.Proc. § 473.

4. Judgment ⚿174

Under circumstances shown by record on appeal, trial court's action in setting aside default and default judgment, which had been taken contrary to agreement between counsel, was not abuse of discretion, though previous motion for such relief had been denied. West's Ann.Code Civ.Proc. § 473.

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William Berger, San Francisco, for appellant.

Gordon I. Smith, San Rafael, for respondent.

PER CURIAM.

This is an appeal from an order setting aside a default and default judgment.

Defendants had originally noticed a motion to set aside the judgment only. The notice was amended to include the setting aside of the default, the amended notice being served on plaintiff's attorney immediately prior to the hearing with permission of the court. The motion was supported by an affidavit of defendants' attorney, which stated in substance the following:

The judgment was obtained through said defendants' and their counsel's inadvertence, surprise and excusable neglect. The attorneys of the parties had been in extensive correspondence with each other since August 1953 about the dispute involved in the action and its settlement. The parties were in contact for the same purpose. Defendants, who are husband and wife, were served with summons on June 15, 1954, without affiant, their attorney, being informed of that fact. They brought the papers to affiant on June 28 only, because of temporary absence of the husband. Affiant, who was preparing to leave on vacation, telephoned plaintiff's counsel on July 2, 1954, and told him that he was leaving on vacation for one or two weeks and asked for additional time to plead. He then heard that default had been entered on June 29th without any information having been given him. Plaintiff's counsel advised further settlement discussions with defendants. Affiant said he would do so immediately on his return from vacation and requested that until that time no judgment would be taken. Plaintiff's attorney assured him twice that nothing further would be done until affiant contacted him. However, on his return from vacation on July 15, 1954, he found a letter of his opponent dated July 7 in which counsel stated that he would take judgment unless he heard further by July 13. On telephoning plaintiff's counsel he was told that on the 13th judgment had been taken; "his client ordered him to proceed." The judgment had actually been taken on the 15th of July. When the court then asked whether plaintiff's attorney knew whether defendants had had legal advice, he told the court only that an attorney had called on July 2nd and had asked to hold the default, and he introduced a copy of his letter of July 7th stating that he had not had any answer to it. Affiant had informed defendants that they had a good defense and affirmative right in the action. An answer and cross-complaint to be filed was attached to the affidavit.

On the hearing of the motion on September 13, 1954, no counter-affidavit was filed, and there was no sworn denial. Plaintiff's attorney vaguely denied "a great many" of the matters set forth in the affidavit. He stressed technical objections: the lateness of the notice of the amendment, the absence of grounds for the motion in the notice of motion itself, insufficiency of the affidavit of merits. The court stated in substance: no defense on the merits had been put in; the motion would be denied because the notice was faulty in that it did not set forth the grounds on which it was made; as there would be a denial on that ground the affidavit of merits should also be looked into; the motion was denied on only the technical grounds and not on the merits; defendants have six months * * *; the affidavit and prospective answer and cross-complaint filed could be incorporated by reference in a further notice of motion.

The clerk's minutes contain under date of September 13, 1954: "It was by the court ordered motion denied on technical grounds not on its merits." A formal order filed September 20, 1954, denied the motion to set aside and the amended motion to set aside without adding that the denial was not on the merits. No appeal was taken from either order.

After the oral denial stated, defendants filed another notice of motion which contained the grounds previously stated in the affidavit of their counsel, incorporated said affidavit and proposed answer and cross-complaint and added an affidavit of merits and further affidavit of defendants as to their mistake and allegedly excusable neglect as to the papers served on them, stating among other things that because of the long pending negotiations they thought that the matter would be settled and was not urgent. At the hearing of their motion plaintiff again did not file a counter-affidavit or produce any evidence. Her attorney relied on technical grounds, mainly that after the previous denial the court was without power to entertain a motion on the same grounds and he moreover urged that the affidavits in support of the motion did not state facts entitling defendants to relief. The court granted the motion and plaintiff appeals. She repeats on appeal both points urged below. We have concluded that both are without merit.

[1, 2] Appellant contends that the fact that the signed order does not contain a statement that the denial does not go to the merits prevents us from considering the previous statements of the court to that effect, citing cases like Strudthoff v. Yates, 28 Cal.2d 602, 615, 170 P.2d 873 which held that an opinion of the trial court cannot be used to contradict the judgment or findings. It may be doubtful whether the unnecessary written order, the preparation of which was not directed in the minute order, was the effective order, although no time for filing of notice of appeal under Rule 2(b) of the Rules on Appeal was here involved. However, we need not decide this point because there is no conflict between the minute order and the written order. Both deny the motion. The minute order moreover shows the basis of said denial. Even if the written order were the actual decision and the minute order and the oral statements which it reflects stood to it in the relation of an opinion of the trial court, then we still could use them to find the basis of the court's decision. Although the opinion of the trial judge cannot be considered to impeach the findings or judgment it may be considered "for the purpose of discovering the process by which the trial judge arrived at his conclusions, or when the opinion furnishes the basis of the court's action in its decision of the case." Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 750, 47 P.2d 273, 278; see also People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 683, 265 P.2d 176. We accordingly note that the denial was intended to be on technical defects only, with opportunity to renew the motion so as to correct said defects.

[3] It has been held that a court can in its discretion permit the renewal of a motion to vacate, even when the previous motion had been denied on the merits. Hover v. MacKenzie, 122 Cal.App.2d 852, 857, 266 P.2d 60; Harth v. Ten Eyck, 16 Cal.2d 829, 108 P.2d 675. There can be no doubt that it has such power when the denial was on formal grounds only, without consideration of the merits. Compare Andersen v. Superior Court, 187 Cal. 95, 102, 200 P. 963.

[4] With respect to review of the merits it has been said by our Supreme Court:

"The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby. This discretion of the court is best exercised when it tends to bring about a judgment upon the merits of the controversy between the parties. Section 473, Code Civ.Proc., is a remedial provision, and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a substantial defense to the action an opportunity to present it." Nicoll v. Weldon, 130 Cal. 666, 63 P. 63, 64. In this case there is no showing of prejudice to plaintiff. Although some lack of diligence of defendants and their attorney is undisputed the trial court evidently considered it as excusable under the facts of the case, to wit close contact and protracted settlement negotiations between the opposing parties and counsel, which may have lulled defendants and their attorney into a sense of security, Beard v. Beard, 16 Cal.2d 645, 648, 107 P.2d 385, and the taking of the default without any notice to the defendants' attorney. In Farrar v. Steenbergh, 173 Cal. 94, 98, 159 P. 707, 709 it is said, "Attorneys do not usually take defaults against opposing attorneys with whom they are on friendly terms, without giving information thereof. * * * Courts should not encourage the practices here followed * * *." In 2 Witkin California Procedure 1694 this case is cited as authority for the following statement: "There is no statutory or rule requirement that the plaintiff's attorney notify the defendant's attorney (if known) that he intends to take a default. But failure to do so will usually be a sufficient ground for setting the default aside on motion under C.C.P. 473." In this case the undesirable practice was aggravated by the taking of the default judgment contrary to agreement between counsel and the incomplete information given by plaintiff's attorney to the trial court, who questioned him about the representation of defendants. Under the above circumstances we do not consider the court's implied holding that the neglect was an excusable abuse of discretion.

Order affirmed.

141 Cal.App.2d 220

Eileen OTTINGER, Plaintiff and Respondent,

v.

I. M. OTTINGER, Defendant and Appellant.

Civ. 16565.

District Court of Appeal, First District, Division 1, California.

May 2, 1956.

Wife's divorce action charging desertion, wilful neglect, adultery and cruelty. The Superior Court, County of San Mateo, Louis B. Dematteis, J., decreed that, subsequent to entry of valid Nevada decree, parties were tenants in common of certain California property acquired by husband before Nevada decree, and husband appealed. The District Court of Appeal, Peters, P. J., held that even if wife had deserted husband, she was nonetheless entitled to participate in division of community property acquired by husband after separation and prior to entry of valid Nevada divorce decree 16 years later, and that 1955 statute providing that earnings of husband during period of wife's unjustified abandonment are his separate property could not be retroactively applied to divest wife of her vested community property interest.

Judgment affirmed.

1. Divorce ⚷127(4), 133(3)

In wife's divorce action charging desertion, wilful neglect, adultery and cruelty, testimony of wife that husband had left for another state promising to send for wife and children, though he never did, was corroborated by testimony of the children, and, though contradicted, sustained finding that husband had deserted wife and children in 1937, though husband claimed that wife had deserted him.

2. Husband and Wife ⚿272(1)

Even if wife had deserted husband, she was nonetheless entitled to participate in division of community property acquired by husband after separation and prior to entry of valid divorce decree 16 years later. West's Ann.Civ.Code, §§ 161a, 175.

3. Husband and Wife ⚿247

1955 statute providing that earnings of husband during period of wife's unjustified abandonment are his separate property, is not retroactive. West's Ann.Civ.Code, §§ 161a, 175.

4. Divorce ⚿252

Husband and Wife ⚿249, 272(1)

Where husband obtained divorce from wife in Nevada, property husband had acquired in California prior to divorce was community property, and wife, even if she had deserted husband, was entitled to one-half of such property, in California divorce action brought by wife before entry of decree in husband's Nevada proceeding. West's Ann.Civ.Code, §§ 161a, 175.

5. Divorce ⚿321½

Husband and Wife ⚿247

Where husband obtained Nevada divorce from wife in 1953, husband and wife became tenants in common of community property husband had acquired in California before divorce; and, even if wife had deserted husband, 1955 statute providing that earnings of husband during period of unjustified abandonment are his separate property could not be retroactively applied to divest wife of her vested community property interest. West's Ann.Civ.Code, §§ 161a, 175.

6. Divorce ⚿223

Where Nevada divorce decree was not secured by husband until eight days after wife had instituted California divorce action, in which she in good faith contested validity of Nevada decree, allowance of attorney's fees to wife in California action was matter within discretion of court, and, under circumstances, award was not abuse of discretion.

◆

Millington & Dell'Ergo, Redwood City, for appellant.

Thacher, Jones, Casey & Ball, San Francisco, for respondent.

PETERS, Presiding Justice.

The trial court, in this divorce action, decreed that plaintiff and defendant, formerly wife and husband, were tenants in common of certain property in San Mateo County, and that plaintiff-wife was entitled to $250 attorney's fees. The defendant-husband appeals.

The parties were married in April of 1929 in Missouri, and went to live with defendant's parents on a farm near Greenville, Tennessee. The marriage was not a happy one. In January of 1930, plaintiff, after being severely beaten by defendant, left the farm, went to live in Greenville, secured a job, and filed an action for divorce. This action was dismissed when the parties effected a reconciliation. In 1936 plaintiff again left the farm, taking the parties' three living children with her, and proceeded to Greenville. She again filed an action for divorce, but again dismissed the action after a reconciliation. This time, however, plaintiff did not move back to the farm. There is a conflict as to whether the parties cohabited after this 1936 separation. Plaintiff testified that after the reconciliation, the parties lived together, in Greenville, until September of 1937, when the defendant left Tennessee in search of work, telling plaintiff that when he found it he would send for her and the children. Defendant went to West Virginia and sent plaintiff several letters from there, professing his love for the family, and on one occasion enclosed a $10 bill.

The defendant directly contradicted this testimony. He claims that his wife left him in 1936, and that thereafter the parties never again lived together; that he stayed on the farm until the last part of 1937, when he left Tennessee; that at that time his wife was living in Bristol, Virginia.

Two of the children of the parties corroborated their mother, testifying that they lived with their mother and father in Greenville in 1937.

Plaintiff testified that it was not until October of 1937 that she and the children went to Virginia. In 1939 she returned to Greenville and again filed a divorce action, which she again dismissed after entering into an agreement to such effect with her mother-in-law. Then plaintiff moved, with the children, to Oregon. Plaintiff testified that, after her husband left her in 1937, she supported herself and the children. Between 1937 and 1949 she corresponded with her mother-in-law and tried, without success, to find out defendant's address.

Some time after the 1937 separation defendant came to California, arriving here with $5. Between 1940 and 1953, while living in California, he acquired real property appraised at $11,500, and trust deeds totalling $7,864.46.

In 1949 plaintiff found it necessary to secure defendant's signature to a document involving real property acquired by her in Oregon, and finally secured defendant's San Mateo County address from the Chief of Police in Greenville. By correspondence she secured defendant's signature to the document. This was the first time that she knew of defendant's whereabouts since 1937. She did not personally see defendant, however, until 1953, when defendant came to Oregon to try to obtain her consent to an appearance in a divorce action he had filed in Nevada. She refused to sign the papers, and, on July 18, 1953, defendant secured a default decree of divorce in a Nevada court. Defendant had moved to Nevada in 1953, and, at the time of trial (May, 1954), was a registered voter and a resident of that state.

Plaintiff filed the present action on July 10, 1953, in San Mateo County. She secured personal service on defendant in California. The amended complaint charges defendant with desertion, wilful neglect, adultery and cruelty, and alleges that when defendant filed the Nevada action he was, in fact, a resident of California. She asked that the Nevada decree be declared void on the ground of lack of jurisdiction, prayed for a declaration that all of the property owned by defendant in San Mateo County was community property, asked for its division, and also prayed for alimony and separate maintenance, plus attorney's fees. The answer of defendant avers that the separation of the parties was by mutual consent, and sets up the Nevada decree secured on July 18, 1953, as a complete defense.

The trial court found that the defendant had in fact deserted plaintiff in 1937; that defendant was a resident of California between 1940 and 1953, but became a resident of Nevada in May of 1953; that while married to plaintiff and while a resident of California, defendant acquired, from his California earnings, certain real property and certain trust deeds; that in Nevada on July 18, 1953, defendant obtained a valid decree of divorce from plaintiff.

Based on these findings the trial court concluded that the real property and trust deeds in San Mateo County were the community property of the parties, and that by reason of the dissolution of the marriage by divorce the parties became and are tenants in common in equal shares in that property. A judgment so providing and also awarding plaintiff $250 attorney's fees was entered. Defendant appeals from those portions of the judgment decreeing plaintiff to be a tenant in common of the property and awarding plaintiff attorney's fees.

The basic contentions of appellant are that the evidence, as a matter of law, shows that plaintiff deserted defendant, and that under California law a deserting wife is not entitled to share in the husband's earnings during the period of their separation. Both contentions are erroneous.

[1] In the first place, the respondent testified that after the 1936 separation the parties became reconciled and lived together until September, 1937, when appellant left for West Virginia, promising to send for respondent and the children. This he never did. The basic part of this testimony was corroborated by the two children

of the parties. Thus, the finding that appellant in fact deserted respondent in 1937 is supported by substantial, although conflicting, evidence.

In the second place, even if the evidence did show, as a matter of law, desertion by respondent, at the times here relevant it was not the law of California that a deserting wife acquired no interest in the earnings of the husband after separation.

Appellant contends that under the old Spanish and Mexican laws of community property a deserting wife is not entitled to share in property subsequently earned by the husband. There is undoubtedly authority to that effect. The case of Pendleton v. Brown, 25 Ariz. 604, 221 P. 213, cited by appellant, undoubtedly so held. But the rule of that case is not applicable in this state. Randolph v. Randolph, 118 Cal.App. 2d 584, 258 P.2d 547, expressly so held. There the wife deserted her husband in 1928. Twenty-five years later the husband sued for divorce, alleging desertion and cruelty. The trial court awarded the husband a divorce on the ground of desertion, but granted the wife one-half the community property. On appeal the husband urged the precise point here under discussion, namely, that a deserting wife gains no interest in subsequently acquired property of the husband. The court repudiated that contention, and, in doing so, stated, 118 Cal.App.2d at page 585, 258 P.2d at page 548:

> "Appellant's primary contention is that by so abandoning her husband the wife terminated the marital community and thereby lost all benefits incident to her marital status or was estopped from claiming them; he relies mainly on Pendleton v. Brown, 25 Ariz. 604, 221 P. 213. De Funiak (Community Property secs. 189–190) defends this theory in part on the basis of old Spanish law, but the later American cases except the Pendleton case, supra, reject it as not recognized in and not in accord with the statutory provisions as to community property, which give the wife an interest in all such property acquired by either party as is community property according to statute until the marital community is terminated by death or judicial decree. See George v. Reynolds, Tex.Civ.App., 53 S.W.2d 490, 493; Beals v. Ares, 25 N.M. 459, 185 P. 780, 793. Although in California the spouses can change the character of their property from community to separate by their agreement, there is no indication in our code or in our decisions that a deserting wife can be deprived of her community interest against her will. To the contrary section 146, Civil Code, provides that in case a marriage is dissolved by decree of court on any other ground than that of adultery, incurable insanity or extreme cruelty, the community property shall be equally divided between the parties, thus preventing the penalizing of a spouse guilty of desertion only in his or her community property interest. Tipton v. Tipton, 209 Cal. 443, 288 P. 65. It is inconceivable that the legislature should have intended that the courts would have no power to penalize a deserting spouse by taking from him or her any part of the community interest considered to have continued in existence until the decree, but that they would have power to punish him or her by a declaration that he or she had forfeited all of such interest by the act of desertion.
>
> "It may also be pointed out that section 169, Civil Code, provides that when a wife lives separate from her husband her earnings and accumulations are her separate property but that no corresponding provision is made for the protection of a deserted husband. If such a provision would be desirable it would be the task of the legislature to make it. Until this is done the deserted husband can find protection in the diligent institution of a divorce suit only." (The Supreme Court, without a dissenting vote, denied a hearing.)

[2] The principle announced in the Randolph case was not new to the California law. As early as 1897 the Supreme Court in the leading case of Spreckels v.

Spreckels, 116 Cal. 339, 342, 48 P. 228, 229, 36 L.R.A. 497, stated: "If the wife is living separate and apart from the husband, through her own fault, her earnings and accumulations are her own. Yet, if the husband, during the same time, accumulates a fortune, it is community property."

[3] It is true that the Legislature in 1955 changed the rule of the Randolph case by amending section 175 of the Civil Code so as to provide that "the earnings of the husband during the period of unjustified abandonment * * * are his separate property", but, obviously, that section is not retroactive.

[4, 5] When the Nevada decree was granted on July 18, 1953, the appellant and respondent became tenants in common in the community property. Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074. Prior to that date the property was community property in which respondent's interest was "present, existing and equal". Civ.Code, § 161a; Cooke v. Cooke, 65 Cal. App.2d 260, 150 P.2d 514. The rights of the wife were vested. Such vested rights could not, constitutionally, be divested by the passage of section 175. In re Estate of Drishaus, 199 Cal. 369, 249 P. 515; In re Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343.

[6] The contention of appellant that the court was without power to grant attorney's fees to respondent is also without merit. It is true that in Hinson v. Hinson, 100 Cal.App.2d 745, 224 P.2d 405, it was held that if a valid Nevada divorce was secured prior to the filing of the California action, attorney's fees could not be granted the California plaintiff, because a jurisdictional prerequisite for such allowance is the existence of a valid marriage existing when the California action was filed. See also Colbert v. Colbert, 28 Cal.2d 276, 169 P.2d 633; but see Knox v. Knox, 88 Cal. App.2d 666, 199 P.2d 766. But in Baldwin v. Baldwin, 28 Cal.2d 406, 170 P.2d 670, the Supreme Court held that in a proper case the trial court has power to award attorney's fees in a case where, as here, the California action was instituted prior to the Nevada decree, and the funds were necessary for the wife to prosecute an appeal from a judgment holding the Nevada decree valid. The rule of that case is here applicable. Here the California action was commenced on July 10, 1953. At that time the parties were legally married. The Nevada decree was not secured until July 18, 1953. After the Nevada decree was secured, respondent, in good faith, challenged its validity. Under such circumstances it was within the discretion of the trial court to award attorney's fees.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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141 Cal.App.2d 107

The PEOPLE of the State of California ex rel. Carl PENNINGTON and Evelyn E. Pennington, Plaintiffs and Respondents,

v.

CITY OF RICHMOND, a municipal corporation, Clarence D. Erickson, Robert H. Miller, Daniel M. Bradley, William A. Cannon, John J. Sheridan, Gay G. Vargas, Ed J. J. McKeegan, Carl F. Lyford and James P. Kenny, Defendants and Appellants.

Civ. 16811.

District Court of Appeal, First District,
Division 1, California.
April 25, 1956.

Rehearing Denied May 25, 1956.
Hearing Denied June 20, 1956.

Quo warranto proceeding was brought against the City of Richmond, a municipal corporation, and others, to review annexation by city of territory under the Annexation of Uninhabited Territory Act. The Superior Court, County of Contra Costa, Dudley G. McGregor, J., entered judgment adverse to the city and others, and they appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained finding of Superior Court in quo warranto proceeding that lot which was 100 feet wide and about 500 feet deep with dwelling near front of lot, and lot 100 feet wide and about 560 feet deep with dwelling near front of lot, were inhabited, though rear of each lot was thickly covered with willows, brush, and other wild plant growth, and that therefore registered voters residing in the dwellings should be counted in determining whether there were less than 12 registered voters as required by the Annexation of Uninhabited Territory Act in territory, which city proposed to annex, and which included the rear portion of the two lots.

Judgment modified and, as modified, affirmed.

1. Municipal Corporations ⚿63(1)

The expediency of annexation of a particular area to a city is a political and not a judicial question. West's Ann.Government Code, §§ 35000–35011, 35300–35326.

2. Municipal Corporations ⚿29(4)

City, in annexing territory under the Annexation of Uninhabited Territory Act, has right to include less than the whole of lots, but the exercise of such right does not necessarily render uninhabited the portions of the lots taken. West's Ann.Government Code, §§ 35000–35011, 35300–35326.

3. Municipal Corporations ⚿33(6)

Evidence sustained finding of Superior Court that lot which was 100 feet wide and about 500 feet deep with dwelling near front of lot, and lot 100 feet and about 560 feet deep with dwelling near front of lot, were inhabited, though rear of each lot was thickly covered with willows, brush, and other wild plant growth, and that therefore registered voters residing in the dwellings should be counted in determining whether there were less than 12 registered voters as required by the Annexation of Uninhabited Territory Act in territory, which city proposed to annex, and which included the rear portion of the two lots. West's Ann.Government Code, §§ 35000–35011, 35300–35326.

4. Municipal Corporations ⚿34

The drawing of an annexation boundary line across owner's lot, taking in a portion where the owner does not sleep or eat, does not necessarily deprive him of the right to vote on question of annexation of a portion of his lot under the 1913 Annexation of Uninhabited Territory Act.

5. Municipal Corporations ⚿29(4)

The Annexation of Uninhabited Territory Act authorizing annexation of territory by city when less than 12 registered voters reside therein, requires that resident be registered as of the place where he resides on the day of the filing of the petition for annexation, if he is to be counted in determining whether there are 12 registered voters in the territory. West's Ann.Government Code §§ 35000–35011, 35300–35326.

6. Quo Warranto ⚿54

Where allegations by one of the defendants in answer were controverted by relators, they became justiciable issues in the quo warranto proceeding, since quo warranto is a civil action and, as such, is governed by all pertinent procedural and practice provisions of Part II of the Code of Civil Procedure. West's Ann.Code Civ. Proc. §§ 421, 422, 437, 462, 802–811.

7. Appeal and Error ⚿171(1)

Where city, in quo warranto proceeding against it, presented for decision by the Superior Court de novo question whether territory sought to be annexed by city under the Annexation of Uninhabited Territory Act was uninhabited and did not contend that findings of city council that territory was uninhabited were final, and evidence was presented on issue, city, after being confronted with an adverse decision, could not claim on appeal that trial in Superior Court should have been conducted as if it were a mere review of the determination by the city council. West's Ann.Government Code, §§ 35000–35011, 35300–35326.

8. Municipal Corporations ⚿29(4)

Where more than twelve registered voters resided in territory sought to be annexed by city under the Annexation of Uninhabited Territory Act, city was without jurisdiction to proceed under the act. West's Ann.Government Code, §§ 35000–35011, 35300–35326.

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Thomas M. Carlson, City Atty., Richmond, Dana Murdock, Sp. Counsel, Richmond, Robert Eshleman, Martinez, of counsel, for appellants.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., Robert T. Anderson, James P. O'Drain, Robert W. Pelletreau, Berkeley, for respondents.

FRED B. WOOD, Justice.

The city of Richmond has appealed from a judgment that the purported annexation of 10.3 square miles of territory under authority of the Annexation of Uninhabited Territory Act of 1939, Gov.Code, §§ 35300–35326 and §§ 35000–35011, was null and void.[1]

The judgment is based upon findings that at the time of the filing of the petition for annexation (December 22, 1953) eighteen registered voters resided in the territory proposed for annexation. This, exceeding the "less than twelve" specified in section 35303 of the Government Code, characterized the territory as not uninhabited and rendered it unavailable for annexation under the act cited. Richmond challenges this finding, claims there were only 11 resident registered voters in the territory.

The seven challenged resident voters were Edward, Joseph and Mary Aguiar, Edward and Jeanette Campbell, and Chester and Martha Wimberley. We will consider the Aguiars and the Campbells first. They are in a category different from that of the Wimberleys.

The Aguiars resided and were registered as voters residing upon a certain lot that was 100 feet wide and about 500 feet deep. Their dwelling was near the front of the lot. The rear fourth of this lot was included in the territory proposed for annexation.

The same situation obtained as to the Campbells except that their lot was about 560 feet deep.

Each of these lots slopes downward from an elevation of 125 feet at the front to 50 feet at the rear. The last 30 feet of the drop occurs below the annexation boundary line (hence, within the annexation territory) and was quite thickly covered with willows, brush and other wild plant growth. The rear end of each lot lay along the middle of the channel of a creek. The annexation boundary line was more than 300 feet distant from either dwelling house. The portion of each lot thus included within the annexation territory fell wholly within the area of a freeway then planned by the state highway commission. The state had prior to the filing of the petition for annexation commenced negotiations with landowners for acquisition of title to or easements through these and other lands for the freeway but did not acquire title from the Aguiars and the Campbells until deeds were executed some time after the filing of the annexation petition.

Concerning the use made of these lots Mrs. Aguiar testified that the Aguiar property was one undivided parcel of property upon which they had resided continuously since January, 1950; that their whole property was used as their residence; that her husband carried on his contracting business from that location; and that material and equipment used in conjunction with the business were stored on all of the property including the portion that lay within the annexation territory. Mrs. Campbell testified that the Campbell property was one undivided parcel of property upon which they had continuously resided since February, 1950; that they intended to use the entire parcel for their home uses; that they have used all of it in the back and intended to make an orchard out of it; and that her husband used the portion of the property included in the annexation territory all the time for something.

This evidence supports the trial court's findings that the premises upon which the Campbells resided "consisted of a single undivided parcel of land; that prior to, on and after December 22, 1953, all of said premises were used by the said Campbells for residential purposes; * * * that the boundary line of the said territory proposed to be annexed to Richmond was drawn across said parcel in such manner as to include approximately one-fourth thereof within the territory proposed to be annexed; that the dwelling thereon was outside the territory proposed to be annexed; that the said annexation boundary line was drawn in such manner for the purpose of evading and circumventing the requirements of the Annexation Act of 1913; that on December 22, 1953, the said two (2) Campbells were registered voters residing within the said territory proposed to be annexed." The evidence also supports substantially identical findings as to the Aguiars and the premises upon which they resided. Thus, the Campbells brought the number of resident registered voters up to 13; The Aguiars, up to 16. Twelve would characterize the annexation territory as not uninhabited and thus render unavailable the statute under which this proceeding was taken. The legal conclusion would inevitably follow that the entire proceeding was without legal sanction and therefore of no effect.

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[1] Two appeals were taken: one from the judgment as originally rendered; the other, after modification of the findings in certain respects pursuant to section 662, Code of Civil Procedure. The appeal from the judgment first rendered will be dismissed.

[1] Invoking the principle that the expediency of the annexation of a particular area is a political not a judicial question, Johnson v. City of San Pablo, 132 Cal.App.2d 447, 457, 283 P.2d 57, and cases there cited, Richmond claims it had the right to include portions and was not required to include the whole of the Aguiar and the Campbell lots.

[2] That, it would appear, is true, but the exercise of such a right does not necessarily render uninhabited the portion taken. To annex land is one thing; to strip it of its quality of being inhabited is quite another. The state of being inhabited is an attribute, a characteristic, a quality every bit as real as the state of being owned, possessed or farmed. Bisecting a lot by means of an annexation boundary line does not extinguish any of these qualities of the land. Each of the resultant portions continues an integral part of the whole in respect to ownership, possession, occupancy, use, and residency. The power to fix the course of the boundary line does not include the power to strip the land of any of these qualities nor the power to interfere with or to cut down any of the rights or privileges of the owner or of the occupier of the land.

[3] Richmond suggests that the portions of these lots below the annexation line were not inhabited because of the wild, uncultivated state they were in. That was not the view of Mrs. Aguiar or of Mrs. Campbell. Moreover, its wild and uncultivated state would be an attractive and desirable quality to many an owner or tenant for a portion of his residency. Besides, the trier of the facts has drawn the inference and made the finding that the whole of each of these lots was inhabited. In the state of the evidence no reviewing court may disturb that finding.[2]

This concept of "inhabited" finds support in the case law which developed prior to the legislative definition of "uninhabited" which was first made in 1945, and, as modified in 1947, now appears in section 35303 of the Government Code.

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[2] In this connection we note that Richmond predicates error upon the trial court's rejection of its offer to prove by the testimony of its city clerk that on January 24, 1954, Mr. Aguiar, Senior, made a statement to the effect that he never intended to use the lower portion of the Aguiar property for residence purposes and certainly never had such an intention after he learned the state wanted to acquire it for a freeway. An objection that this would be hearsay was sustained.

Plaintiff claims the evidence was admissible upon the asserted ground that Mrs. Aguiar testified concerning her and Mr. Aguiar's use of the property and their intentions in respect thereto.

Mrs. Aguiar merely described the uses made of the property. We have examined all of her testimony and find in it no statement as to the intentions of the Aguiars in relation to the use of this property. In view of this fact and of the facts that none of the Aguiars has been a party to this proceeding and Mr. Aguiar was not a witness, it would appear that the objection was properly sustained.

Even if the questioned ruling were erroneous it could not be prejudicial to Richmond's case because it would leave unaffected the residential status of the Campbells and their property, resulting in at least 13 resident registered voters in the annexation territory, thus exceeding the "less than twelve" specified in section 35303 of the Government Code.

In an early case our Supreme Court sustained a finding of the trial court to the effect that certain territory "taken as a whole, may fairly be said to be inhabited" notwithstanding "the presence of several uninhabited tracts or parcels, each exceeding five acres in area." People v. Town of Ontario, 148 Cal. 625, 641, 84 P. 205, 212; followed and applied in Rogers v. Board of Directors of City of Pasadena, 218 Cal. 221, 223, 22 P.2d 509, and in People ex rel. Strong v. City of Whittier, 133 Cal.App. 316, 320, 321, 24 P.2d 219.

In the course of ascertaining and determining whether certain parcels (some inhabited and some not) constituted a single tract, the court in People v. City of Lemoore, 37 Cal.App. 79, 81, 174 P. 93, 94, observed: "There would be no difference in principle if the tract were composed of 10 acres or of 1 acre. If A owns a farm of 308½ acres composed of one tract and B one of 10 acres and each resides upon his land, it would be just as inapt to say that any part of A's land is uninhabited as to so affirm of B's land. The fact of occupancy is not limited, manifestly, to the space occupied by the building or buildings, but extends to every portion of the single tract of which that space is an undivided part. It may be difficult to formulate a description that can be applied with accuracy to every situation,[3] but to say that any portion of a single and separate tract of land is uninhabited when people actually reside within the boundaries of that tract of land involves a contradiction in terms."

This was the judicially developed concept of "inhabited", presumably known to the Legislature when in 1945 the Annexation of Uninhabited Territory Act was amended to define territory as uninhabited if "less than three qualified electors reside" within it at the time of the filing of the petition. Stats.1945, ch. 506, p. 1006. This narrowed to "qualified electors" the class of resident persons to be considered; quite natural and entirely logical, there being no point in counting a person who because of age or alienage can not cast a vote for or against annexation.

The 1947 amendment increased the number from three to twelve and substituted "registered voter" for "qualified elector." Stats.1947, ch. 107, p. 633; now § 35303, Gov.Code. This change made for greater certainty and ease of ascertainment because the number of resident registered voters can be determined readily from the register of voters kept by the county clerk or by the registrar of voters of the county.[4]

We conclude that the trial judge had the correct concept of the legal significance of the expression "registered voters reside" when he made the questioned findings.

At this point Richmond interposes the argument that none of the Aguiars or of the Campbells could vote at an annexation election if the very territory here involved were proposed for annexation under the Annexation Act of 1913. Gov.Code, §§ 35100–35158 and 35000–35011. That, it is said, renders purposeless and absurd any line of reasoning which supports the view that the northerly portions of their lots were inhabited.

For present purposes we may assume that to vote for or against annexation one would have to be a registered voter residing in the territory to be annexed. Thus, in the Annexation Act of 1913 we find these expressions: "voters within the area", Gov.Code, § 35114; "defeated by the electors of the territory" proposed to be annexed, § 35115; petition signed by "qualified electors residing within the territory, as shown by the county registration of voters" and "submit the question of annexation to the electors residing in the territory", § 35116; the city legislative body "shall call a special election * * * and submit to the electors residing in the territory the question * * *." § 35122. These expressions coincide quite accurately with the expression used in the Annexation of Uninhabited Territory Act of 1939, "registered voters reside within". § 35303.

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[3] By this statement, we infer that the court intended to qualify what otherwise might appear to be too rigid a formula and thus allow the courts in each case to determine whether industrial or other nonresidential use of a distinct portion of a lot or of a ranch pares down the area thereof that properly may be deemed residential.

[4] For the distinction between "qualified elector" and "registered voter," see Minges v. Board of Trustees, 27 Cal.App. 15, 18, 148 P. 816.

[4] But the drawing of an annexation boundary line across a man's lot, taking in a portion where he does not sleep or eat, does not necessarily deprive him of the right to vote on the question of annexation under the 1913 act. He is still registered and the portion is still inhabited by him. He still resides in that portion and, consequently, in the territory proposed for annexation. This is a fact which it would seem reasonable for the city council to take into consideration when discharging its duty of establishing and designating the voting precincts as provided in section 35126. Should not the council so draw the precinct lines as to include the Aguiars and the Campbells? The statute would seem to make that possible. It does not incorporate the provisions of the election laws without qualification. Instead, it says they are applicable "as nearly as possible" and "except as otherwise provided". § 35130.

But even if there were some imperfection in the Annexation Act of 1913 which would stand in the way of the Aguiars and the Campbells casting their notes if the present proceeding had been brought thereunder, that would not make the territory here involved "uninhabited" within the meaning of the 1939 act. The 1939 act merely imposes as a test that not more than eleven registered voters "reside" in the territory. It provides for no election, says nothing about voting. Appellant argues that this analysis is illogical because, assertedly, it creates a "no-man's-land" that could not be annexed under either of these two statutes. Such a situation, if it should occur, would not be a creature of the statutes. It would be the creature of the city council that drew the proposed annexation boundary line in such a fashion.

We should, perhaps, say a word about the city's reductio ad absurdum argument that the concept of "residence" which the trial court applied has no limit; that, logically extended, it would apply to a holding of 1000 acres or more if the occupant is a registered voter and has a dwelling house in one corner of it. There well may be limits to the concept of "residency." If a man has 50,000 acres extending several miles across several watersheds with his dwelling house in one corner of it, some limit doubtless could be found.

The nature of the use of the various parts, if there be parts, of a ranch, an estate, or a town lot, would be a significant factor to consider. Is it residential in character or is it nonresidential, such as industrial, commercial or agricultural? If it is any of the latter, does it pervade the part so used in such a manner and to such an extent as to make it unreasonable to view it also as residential? Conceivably, a person might have a home orchard in his back yard or might conduct on the premises a small business of such a character and in such a manner that it would still be within reason to say that he nevertheless resides upon the entire lot. Then, too, in some cases the existence of a permanent barrier, natural or artificial, would enter into the picture for determination; e. g., a stream, a mountain ridge, a street, or a railroad. There well may be other factors, upon occasion, factors which presently do not occur to us.

The attorney general has been very helpful to us in the analysis of this and related problems. He has suggested a formula for our consideration and promulgation for his guidance and the guidance of city officials and other persons interested. We welcome the suggestion but doubt the wisdom of our undertaking, at least at this time and in this case, to formulate a rule on this subject. It is essentially a factual question, to be specially determined in each case after weighing all of the facets of the relevant evidence produced. Moreover, ours is a relatively simple case, one that does not present any very close questions. Each lot involved is only 100 feet wide and 500 to 560 feet long, and the trial court has found, upon substantial evidence, that each lot is a "single undivided parcel" and that "all" of it was used (on the critical date) "for residential purposes." Hence, we deem the present an inopportune occasion for the formulation of a rule that might serve as a test in determining "residency" under the statute.

[5] The Wimberleys, as we have indicated, are not in the same category as the Campbells and the Aguiars. They moved from Richmond into the annexation territory about three weeks before the filing of the annexation petition but did not transfer their registration from their former residence to the new until 15 or 16 days after the filing. Literally, they were "registered voters" (registered as residents of Richmond) and they did "reside within" the territory (see § 35303) but we deem that not enough. We see no escape from the conclusion that the statute requires one to be registered as of the place where he resides on the crucial day, the day of the filing of the petition. (Probably, also, he should be entitled to vote if an election were held in that area on that date.) To recognize registration in any other precinct would sanction registration in any county in the state and introduce an element of great uncertainty into the administration of the statute.

Richmond claims that in the absence of fraud the findings of the city council (including its finding that the territory was uninhabited) were final; that there was no proof of fraud; hence, it was incompetent for the trial court to make findings contrary to those made by the city council.

This contention necessarily rests upon the assumption that the Legislature by some statute has conferred upon the city power to make such a determination, for the power of annexation is not a power to "make and enforce * * * local, police, sanitary * * * [or] other regulations" conferred by section 11 of Article XI of the Constitution, nor is it a power to make and enforce laws and regulations in respect to "municipal affairs" which Richmond as a chartered city has under sections 6 and 8 of the same article. See cases collected in 18 Cal.Jur. 775–776, Municipal Corporations, § 87, and 736–737, § 45. The city has not directed our attention to any specific statutory provision on this subject. Section 35303 of the Government Code defines "uninhabited" but is silent as to who determines the inhabited or uninhabited character of land proposed for annexation. Section 35313 may by inference confer such a power as an incident to the exercise of the power it gives the local legislative body to "hear and pass upon all protests." Even if so, such a conference of power falls considerably short of the exclusive character of the similar function which was involved in Shepherd v. Board of Supervisors, 137 Cal.App. 421, 30 P.2d 578. There the statute expressly declared that the board "shall hear the * * * protestations, and unless the remonstrances are filed by the owners of more than one-half of the land sought to be annexed, *the decision of said board* * * * upon said protestations *shall be final and conclusive.*" Stats.1899, p. 37, § 1; as amended by Stats. 1929, pp. 800, 801. We are confronted with nothing like that in the statute here involved.

Even if the city had power to decide whether this territory was uninhabited, we must not forget this presents a jurisdictional question, upon which depends the very power of the city to act. A discussion of the judicial nature of an inquiry concerning the existence of facts upon which the jurisdiction, the very capacity of an agency to act depends, will be found in 4 Cal.Jur. 1110–1113, section 71; in 10 Cal.Jur.2d 163–165, section 85; in 5 A.L.R.2d 675; and in cases cited in each.

[6] Finally, the city (as a special defense pleaded in its answer) presented these very questions[5] for decision by the court

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[5] This defense read in part as follows:
"That three registered voters, namely, E. J. Aguiar, J. S. Aguiar and M. Aguiar, reside on acreage commonly known and designated as 3401 San Pablo Dam Road and two registered voters, namely Edward Campbell and Jeanette M. Campbell reside on acreage commonly known and designated as 3411 San Pablo Dam Road. That a small undeveloped portion of the rear acreage belonging to the Aguiars and the Campbells was included in the territory annexed to the City of Richmod pursuant to Ordinance No. 1423 as particularly disclosed on the plat attached hereto, designated Exhibit 'D' and by this reference incorporated herein and made a part hereof and that the dwellings in

de novo, not by way of review of a decision by the city. These allegations, of course, were and are "deemed controverted by the opposite party", § 462, Code Civ.Proc. and thus became justiciable issues in the case, quo warranto being a "civil action", see §§ 802–811, Code Civ.Proc., situate in Part 2 of the code, and as such is governed by all of the pertinent procedural and practice provisions of Part II of the code, including those expressed in sections 421, 422, 437 and 462.

[7] The city then proceeded to and did try these issues on that theory, clear through to the end of the trial, including the arguments of counsel after the taking of the evidence. The parties put in their evidence on these issues just as in any other trial before a court of first instance, just as if there had been no determination by the city or by any other tribunal subordinate to the superior court. It would be strange indeed if a party could thus tender material issues to the superior court, present evidence to that court on those issues and suffer, indeed induce, the opposite party to do likewise, and then, confronted with an adverse decision, claim upon appeal that this was all a mistake, that the entire trial in the superior court should have been conducted as if a mere review of an earlier trial and determination by the city council, a mere agent of the very party defendant who thus tendered these issues to and tried them de novo before the superior court. No one questions the competency of the city thus to ignore the decision of its own agent and relitigate these issues before the superior court, a court of unquestionably competent jurisdiction. (As illustrations of various types of situations in which the submission to the courts of such or similar factual issues has received judicial sanction, the following may be cited: Capuchino Land Co. v. Board of Trustees, 34 Cal.App. 239, 167 P. 178; People v. City of Lemoore, supra, 37 Cal.App. 79, 86, 174 P. 93; People ex rel. City of Pasadena v. City of Monterey Park, 40 Cal.App. 715, 722–723, 181 P. 825; English v. City of Long Beach, 114 Cal.App.2d 311, 315–317, 250 P.2d 298.

The doctrine which requires an appellant to stay with the theory upon which he tried the case, clearly applies here.[6] See 3 Wit-

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which the Aguiars and the Campbells live and actually reside are situated approximately 300 feet easterly from and outside the annexed areas, being and remaining in the unincorporated portions of the County of Contra Costa. That the portion of the acreage belonging to the Aguiars and Campbells, as aforesaid, which was annexed to Richmond was situated entirely within the area which has recently been acquired by the State of California for a proposed freeway; that negotiations for acquisitions of said acreage by the State of California from the Aguiars and Campbells, as aforesaid, was commenced prior to December 22, 1953, the date the annexation petition was filed with the City Council of Richmond and that as to said property neither the Aguiars nor the Campbells after commencement of said negotiations for sale of their respective property to the State of California, as aforesaid, intended to use or make use of any thereof for residence or other purposes."

Exhibit "D", mentioned in the pleadings, depicted the Aguiar and Campbell lots and showed in color the portions thereof which lay in the territory proposed for annexation.

[6] The city puts some reliance upon the fact that in the findings and conclusions first filed there was a conclusion of law that "any defense based upon the finality and conclusiveness of the Richmond City Council's determination that said territory was uninhabited was waived by defendants; that even if there had been no such waiver, such determination by said City Council was not conclusive upon this court in this action."

In the findings, later filed, this conclusion was cut down to read:

"The determination of the Richmond City Council that said territory was uninhabited is not conclusive upon this court in this action."

That, of course, was not a determination by the trial court that the city had not made such a waiver.

We do not know how the question of such a "waiver" came to the attention of the trial court. Nothing in the record upon this appeal that has come to our attention affords any information on that question.

We are not particularly concerned with the question whether there was a technical "waiver" or not. It is a simple case of a party tendering certain issues to and kin, California Procedure 2264–2267. Quite recently, we made similar disposition of a like contention by the City of San Pablo, involving annexation proceedings by that city and the City of Richmond. See Johnson v. City of San Pablo, supra, 132 Cal.App.2d 447, footnote on page 454, 283 P.2d 57.

[8] It necessarily follows that the defendant city was without jurisdiction to proceed under the Annexation of Uninhabited Territory Act and that the judgment must be affirmed.

It, therefore, becomes unnecessary to decide whether the conclusion of law that the boundaries were drawn in such a manner as to exclude the Aguiar and Campbell dwelling houses "for the purpose of evading and circumventing the requirements of the Annexation Act of 1913" finds full support in the evidence and the findings of fact. Concerning the power of the courts to determine factual issues when fraud is involved, see People ex rel. Forde v. Town of Corte Madera, 115 Cal.App.2d 32, 44–45, 251 P.2d 988; City of Anaheim v. City of Fullerton, 102 Cal.App.2d 395, 401–404, 227 P.2d 494. With or without such an intent, the city had no jurisdiction to proceed under the Annexation of Uninhabited Territory Act.

In view of our holding in respect to the Wimberleys, paragraph VII of the findings of fact last filed (clerk's transcript, page 76, lines 4 to 16) should be and it is hereby amended to read as follows:

> "That on December 22, 1953, Chester C. Wimberley and Martha L. Wimberley resided on premises wholly within the territory proposed to be annexed to the City of Richmond, having moved to said premises on December 1, 1953, from their former residence at 434 South 2nd Street, Richmond, California; that on December 22, 1953, the two (2) Wimberleys were registered voters at the said 2nd Street address; that the said 2nd Street residence was not within the territory proposed to be annexed; that the said Wimberleys re-registered at their residence in the territory proposed to be annexed on January 6 and January 7, 1954, respectively; that on December 22, 1953, the said two (2) Wimberleys were not registered voters residing within the said territory proposed to be annexed."

In view of the foregoing amendment paragraph VIII of said findings of fact (clerk's transcript, page 76, lines 18 to 23) should be and it is hereby amended to read as follows:

> "That on December 22, 1953, there were eleven (11) registered voters residing within the said territory proposed to be annexed to Richmond in addition to the three (3) Aguiars, and the two (2) Campbells; that on said December 22, 1953, there were sixteen (16) registered voters residing within the said territory proposed to be annexed to the City of Richmond."

There is one feature of the judgment which requires modification. After declaring this annexation proceeding void, the judgment declares that the territory involved "is not and never has been legally annexed * * * and is not and never has been a part" of the city and "was and is unincorporated territory." That is too broad in its sweep. It impinges upon any other annexation proceeding that may have been initiated concerning this territory or some portion thereof. It should be confined to the proceeding which is the subject of this action.

Accordingly, the two paragraphs of the judgment last filed which begin with the words "It is further ordered, adjudged and decreed that said territory is not and never has been" and end with the words "shall not exercise any jurisdiction or dominion therein or thereover" (clerk's transcript, page 82, lines 1 to 8) should be and they are hereby amended to read as follows:

> "It is further ordered, adjudged and decreed that the proceedings hereby voided and annulled did not cause said territory to be legally annexed nor to become a part of the City of Richmond.
>
> "It is further ordered, adjudged and decreed that the City of Richmond shall

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trying those issues before the superior court de novo, just as if they had for the first time come before a tribunal for determination.

not, based upon the annexation proceedings hereby voided and annulled exercise (1) the franchise of municipal government in or over said territory or (2) any jurisdiction or dominion therein or thereover."

As thus modified the judgment last filed (entered March 29, 1955) is affirmed. The appeal from the judgment first filed (dated February 1 and entered February 2, 1955) is dismissed. The respondents will recover their costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SPENCE, J., dissenting.

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141 Cal.App.2d 204

Lewis J. BERG, Plaintiff, Cross-Defendant and Respondent,

v.

Lawrence SPRINGER, Defendant, Cross-Complainant and Appellant.

Civ. 8876.

District Court of Appeal, Third District, California.

April 30, 1956.

Action on promissory note. The Superior Court, Solano County, Harlow V. Greenwood, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that even if defendant's general denial of allegations of nonpayment were insufficient to raise issue of payment as a defense, defendant should have been permitted to amend so as to raise issue of payment, where it appeared that plaintiff was aware that defendant relied upon defense of payment.

Judgment reversed with instructions.

1. Bills and Notes ⚷487

Even if defendant's general denial, in action on note, of allegations of nonpayment were insufficient to raise issue of payment as a defense, defendant should have been permitted to amend so as to raise issue of payment, where it appeared that plaintiff was aware that defendant relied upon defense of payment.

2. Costs ⚷107

Statute requiring the filing of a bond before issuance of a summons in action for a libel or slander did not apply to a cross-complaint in slander, and lack of bond did not require dismissal of cross-complaint. West's Ann.Code Civ.Proc. § 830.

Cyril Saunders, San Francisco, for appellant.

John R. Aye, Rio Vista, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a money judgment in an action on a promissory note. The complaint contains the usual allegations as to the execution of the note and then in paragraph II alleges: "That the defendant has not paid the same or any part thereof, except the sum of Four Thousand Dollars ($4,000.00) paid on the 15th day of June, 1954." Plaintiff asked judgment for $2,250 unpaid principal, plus accumulated interest and attorney's fees. Defendant's answer admitted the execution of the note and denied "the Plaintiff's allegations set forth in paragraph II * * *." When the case came on for trial plaintiff, as a witness, produced the note. He testified to its execution, to the fact that $4,000 had been paid as alleged, and said that there had been no other payments. Defendant endeavored to prove that another payment had been made upon the note which fully discharged the same, but upon objection of the plaintiff this proof was rejected. The basis of the court's ruling was that payment must have been specially pleaded else no issue thereon was raised; that defendant's general denial of the allegations of paragraph II was insufficient to raise the issue of payment. This ruling having been made, defendant asked leave to amend his answer to specially plead payment and leave was denied. Judgment was thereupon entered as prayed for.

[1] Whether or not a general denial of the negative allegations of nonpayment contained in a complaint such as this sufficiently presents an issue of payment is a matter of considerable confusion in the case law of this and other states. An exhaustive annotation upon the subject is to be found in 100 A.L.R., beginning at page 264, the annotation following the report of Hughes v. Wachter, 61 N.D. 513, 238 N.W. 776, 100 A.L.R. 255. We think it unnecessary to discuss the subject here because even if we should rule that evidence of payment could not be introduced under the pleadings as here made up we would yet be compelled to reverse the judgment appealed from. We hold it was an abuse of discretion on the part of the trial court to refuse, under the circumstances of this case, the request of the defendant for leave to amend his answer in order to present properly the issue of payment. It is apparent from the pleadings filed and from the proceedings in the trial court shown by the settled statement on appeal that plaintiff and his counsel were aware that defendant relied upon the defense of payment and that defendant had at least made an effort, even if an ill-advised one, to raise the issue by denying the plaintiff's allegations of nonpayment. Indeed, respondent in his brief says: "It was obvious that appellant had from the first intended to rely upon payment as a matter of defense." There was no effort to show any detriment to plaintiff through the failure to properly and specially plead the defense of payment. When met with the objection that his pleading was defective, defendant asserted to the court his intention to prove that the note had been fully paid. He ought to have been granted permission to correct his pleading so as to present the issue.

Defendant had pleaded by way of cross-complaint a cause of action in slander, but had not, upon filing the same, filed a bond which Section 830 of the Code of Civil Procedure requires shall be filed "before issuing a summons in an action for libel or slander".

[2] This case was tried March 3, 1955, and apparently the Supreme Court decision in Kennaley v. Superior Court, 43 Cal.2d 512, 275 P.2d 1, handed down in October, 1954, and holding that the code section was not applicable to a cross-complaint, was not drawn to the attention of the court. At the trial plaintiff moved to dismiss the slander count for failure to file the bond and the court granted the motion. It is here conceded that this was error under the ruling in Kennaley v. Superior Court.

The judgment appealed from is reversed with instructions to the trial court to permit defendant to amend his answer to allege payment of the promissory note sued on and further to set aside the court's order dismissing the cross-complaint for failure to file a bond for costs.

PEEK and SCHOTTKY, JJ., concur.

STOCKTON THEATRES, Inc., a corporation, Plaintiff and Appellant,

v.

Emil PALERMO and Forrest E. Macomber, Defendants and Respondents.

STOCKTON THEATRES, Inc., a corporation, Plaintiff and Appellant,

v.

Emil PALERMO and Forrest E. Macomber, Defendants and Respondents. *

Civ. 8796, 8833.

District Court of Appeal, Third District, California.

April 26, 1956.

Rehearing Denied May 18, 1956.

Hearing Granted June 20, 1956.

Plaintiff's appeal, from that portion of an order of the Superior Court, San Joaquin County, Thomas B. Quinn, J., retaxing costs which granted motion of defendant to retax costs on appeal as to premiums on surety bond to preserve an attachment on appeal, was consolidated for hearing and decision with plaintiff's appeal from an order of the same court, George F. Buck, J., that satisfaction of judgment be entered and attachment be released. The District Court of Appeal, Schottky, J., held that quoted phrase, in statute providing that whenever costs are allowed by Code of Civil Procedure or by "other provision of law", they shall include premium on surety bond, includes Rules on Appeal, and bond premiums paid by lessee to preserve its attachment on appeal from judgment in lessee's action against lessor for restitution were recoverable as part of costs on appeal, even though bond was obtained before effective date of the aforementioned statute, where statute was in force at time judgment for costs on appeal was entered.

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* Opinion vacated 304 P.2d 7.

Reversed.

1. Constitutional Law ⚿55
Courts ⚿78

The constitution reserves to the legislature and to the people the primary and higher right to provide rules of procedure for courts of state, with secondary right in judicial council to adopt rules only when and where higher authority of legislature and people has not been exercised; and legislature has power to adopt statutory rule of procedure superseding or amending any judicial council rule in conflict with it. West's Ann.Rules on Appeal, rules 1–55, 26, 53; West's Ann.Code Civ.Proc. § 1035.

2. Statutes ⚿228

When a statute is general in its terms, any exemption or exception from its operation must be specified.

3. Costs ⚿251

Quoted phrase, in statute providing that whenever costs are allowed by Code of Civil Procedure or by "other provision of law", they shall include premium on surety bond, includes Rules on Appeal; and bond premiums paid by lessee to preserve its attachment on appeal from judgment in lessee's action against lessor for restitution were recoverable as part of costs on appeal, even though bond was obtained before effective date of the aforementioned statute, where statute was in force at time judgment for costs on appeal was entered. West's Ann.Rules on Appeal, rules 1–55, 26, 53.

4. Appeal and Error ⚿1177(6)

Where trial court had predicated its denial, of attachment bond premiums as part of costs on appeal, upon an erroneous belief that statute permitting recovery of bond premiums did not relate to costs on appeal, and had made no finding as to whether bond had been necessary, reviewing court would remand for determination of that question. West's Ann.Code Civ. Proc. §§ 1034, 1035.

5. Judgment ⚿894

Satisfaction of judgment is last act and end of proceedings, and no satisfaction can be entered as long as there are unpaid costs in action.

6. Judgment ⚿894

Where final judgment expressly provided that plaintiff was entitled to costs on appeal, those costs were part of judgment and required to be paid before there could be a satisfaction, and it was error to order satisfaction of judgment when plaintiff's appeal from refusal to include attachment bond premiums as part of costs on appeal was pending. West's Ann.Rules on Appeal, rules 1–55, 26, 53.

Freed & Freed, San Francisco, for appellant.

Smith & Zeller, Stockton, for respondents.

SCHOTTKY, Justice.

This proceeding involves two appeals consolidated for hearing and decision.

The first appeal is taken from that portion of an order retaxing costs filed December 17, 1954, which granted the motion of defendant Palermo to retax costs on appeal as to the premiums on a surety bond to preserve an attachment on appeal. The second appeal is taken from a minute order of January 27, 1955, which granted the motion of defendant Palermo to enter satisfaction of judgment and to discharge the liens created by the recording of abstracts of judgment and to release all levies of attachment or execution.

On June 5, 1944 Emil Palermo, the owner of the real property and lessor of the Star Theatre, a motion picture theater in Stockton, brought an action against the lessee, Stockton Theatres, Inc., for declaratory relief to obtain a declaration by the Superior Court of San Joaquin County that the lease was void. On June 11, 1945, a judgment was made in Palermo's favor by the trial court declaring the lease void. Immediately thereafter Palermo brought an action for forcible detainer and a judgment was rendered in his favor, and he obtained possession of the theater in December, 1945, and remained in possession until August 11, 1948. In the meantime, Stockton Theatres, Inc. appealed both judgments and they were reversed. A history of this litigation is set forth in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53 et seq., 195 P.2d 1.

After the reversals of said judgments, Stockton Theatres, Inc. filed this action against Palermo for restitution of the Star Theatre and the benefits which Palermo derived from the operation of the theater. Plaintiff's complaint prayed for judgment against Palermo in the sum of $130,000 and against Forrest E. Macomber for the amount or amounts belonging to Stockton Theatres received by defendant Forrest E. Macomber.

At the trial an accounting was had and the court gave judgment April 24, 1951 that plaintiff should recover from Palermo the sum of $13,658.75. Both parties took an appeal from this judgment. Stockton Theatres' notice of appeal is dated June 7, 1951.

Plaintiff and appellant, Stockton Theatres, Inc., levied attachments concurrently with the filing of the action for restitution. After the judgment against Palermo and before notice of appeal, plaintiff filed an undertaking to preserve the attachments on appeal. Defendant Palermo moved to discharge the attachment on the ground that appellant had not complied with Section 946 of the Code of Civil Procedure. The motion was denied. Stockton Theaters, Inc., v. Palermo, 1952, 109 Cal.App.2d 616, 241 P.2d 54. The appeal of plaintiff and appellant resulted in a modification of the judgment in favor of plaintiff and the judgment against Palermo was accordingly increased to $45,992.19. Stockton Theatres, Inc. v. Palermo, 1953, 121 Cal.App.2d 616, 264 P.2d 74. The interest on the judgment exceeded $9,000.

The decision of this court granted the appellant, Stockton Theatres, Inc., the right to recover its costs on appeal. Upon the coming down of the remittitur from the District Court of Appeal on January 29, 1954, Stockton Theatres, Inc. filed its memorandum of costs and disbursements on appeal. Included was an amount of $6,980.-49 for premiums on the bond to preserve the attachments on appeal. Defendant Palermo thereafter filed a motion to tax costs on appeal, objecting among other things to the inclusion of the bond premiums as a cost. The court granted defendant Palermo's motion to tax costs on appeal as to this item, although his other objections to the cost bill were denied. Costs were taxed at $1,097.37. A certified check for this amount was sent to appellant's attorney which was refused. Although respondents state that there were no strings attached, appellant states that had appellant accepted this offer on the terms enunciated in the letter of transmittal, it would have acknowledged that the judgment is fully satisfied, which is not the case, since the matter of costs has not been finally settled. Respondents state that the check is still available at any time.

Following the granting of Palermo's motion to tax the item covering premiums on the surety bond, Palermo gave notice of a second motion to require Stockton Theatres, Inc. to release all attachments and enter a satisfaction of judgment. This motion was opposed by Stockton Theatres, Inc. on the ground that there was still unpaid interest on the judgment owing to Stockton Theatres, Inc., and on the ground that an appeal from the order retaxing costs had been taken by Stockton Theatres, which was filed on January 4, 1955. The second motion of Palermo came on to be heard on January 25, 1955, and at the hearing $32.78 was paid as owing on interest. On January 27, 1955, while the appeal from the order retaxing costs was pending, defendant's motion that satisfaction of judgment be entered, that the levy of attachment be released, and the liens created by recordation of abstracts of judgment be discharged was granted.

Appellant makes two major contentions:

> "I. The bond premiums paid by Stockton Theatres, Inc., to preserve its attachment on appeal are recoverable as part of costs on appeal under Section 1035 of the Code of Civil Procedure."
>
> "II. It was error to order that satisfaction of judgment be entered and that the judgment lien and levy of attachment be released, since plaintiff's costs on appeal have not been paid and an appeal is pending from the order retaxing costs on appeal."

Appeal from Order Taxing Costs

[1–4] Appellant contends that although, prior to the enactment of Section 1035 of the Code of Civil Procedure in 1951, it had been held that bond premiums were not allowable as part of the costs, that section changed the law. Said section 1035 reads as follows:

> "Whenever in this code or by other provision of law costs are allowed to a party to an action or other proceeding, such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding unless the court determines that the bond was unnecessary."

Appellant argues that the legislature had the power to permit recovery of bond premiums paid to preserve an attachment on appeal and the legislature intended to permit recovery of such premiums. Conceding that Section 961 of the Code of Civil Procedure delegated to the Judicial Council the power to prescribe rules for practice and procedure on appeal, that Section 1034 of the Code of Civil Procedure was amended to provide that costs shall be awarded as provided in rules adopted by the Judicial Council, and Rule 26(c) of the Rules on Appeal adopted by the Judicial Council lists certain items recoverable as costs which do not include bond premiums, nevertheless the appellant contends that the rules of the Judicial Council are subject to the amending power of the legislature, and any rule in conflict with a legislative enactment must give way. Appellant contends that the words "whenever in this code or by *other provision of law* costs are allowed to a party" must refer to the Rules on Appeal, since there is no indication that the legislature intended to permit recovery of bond premiums paid during the trial stage of an action but to deny recovery at the appeal level as the language of the section is plain and without exceptions, and, since there is no reason to make exceptions, Section 1035 in effect amended Rule 26(c) of the Rules on Appeal.

Appellant also contends that although premiums are not recoverable under Section 1035 if the court finds the bond "unnecessary", the court did not base its order on the ground that the bond was unnecessary but on its interpretation of Section 1035, and its failure to so find implies that the bond was necessary. Appellant further urges that the facts demonstrate the necessity for the attachment.

Respondents, in reply, assert that Section 1034 of the Code of Civil Procedure provides that "In appeals from the superior and municipal courts, costs shall be awarded as provided in rules adopted by the Judicial Council", and that Rule 26(c) of the Rules on Appeal specifies the items of costs that may be allowed on appeal and that the cost of surety bond is not one of the items listed. Respondents then argue that the legislature gave the Judicial Council the sole power to regulate the procedure and prescribe the rules on appeal, including costs on appeal, and that Section 1035 was intended to relate solely to proceedings in trial courts.

It is apparent that the trial court agreed with these views of respondents, for the court stated in its memorandum opinion:

> "It would seem in view of the provisions of 1034 CCP that had the Legislature intended to invade the field of costs on appeal the language of Section 1035 CCP would have been somewhat as follows: Whenever in this

code or by other provision of law costs *including costs on appeal* are allowed, et cetera. The insertion of such language as 'including costs on appeal' would have indicated clearly and specifically the legislative intention. The absence of such language in view of the proximity of 1034 CCP and the specific and exclusive treatment of the subject of costs on appeal in the Judicial Council rules seems to require the conclusion that Section 1035 CCP has no reference at all to costs on appeal.

> "* * * [I]s it not reasonable to require the legislative intention to be clearly expressed rather than guess at it under the guise of construction, particularly when substantial rights are involved?"

The argument of respondents is persuasive but unconvincing. Section 1a of Article VI of our State Constitution, which was adopted in 1926, established the Judicial Council, and in enumerating the duties of the council provided in subsection (5) as follows:

> "Adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force; and the council shall submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure."

In the introduction to the Rules on Appeal, published and issued by the Judicial Council, it is stated:

> "* * * Pursuant to this provision the Judicial Council adopted rules for the Supreme Court and District Courts of Appeal which became effective September 1, 1928. (See 204 Cal., p. xxxix.) These rules, as amended (see 18 Cal.2d 1), were in effect until July 1, 1943, and thereafter to a limited extent govern proceedings in appeals pending at that time.
>
> "In 1941 the legislature enacted the following statutes, which were amended by Chap. 4, Stats. of 1943:
>
> "Section 961 of the Code of Civil Procedure, providing:
>
> "'The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State.
>
> "'The Judicial Council shall report the rules prescribed by it to the Legislature on or before March 31, 1943.
>
> "'The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect.'
>
> * * * * * *
>
> "Pursuant to its constitutional authority and the authority given by these statutes, the Rules on Appeal (Rules 1–55) were adopted by the Judicial Council on March 30, 1943, and reported to the Legislature. They became effective July 1, 1943 (see Rule 53), and superseded the prior rules and inconsistent statutes. * * *"

Section 26 of said Rules on Appeal specifies the items of costs on appeal to which the prevailing party shall be entitled, and Section 1034 of the Code of Civil Procedure as amended in 1945, provides that in appeals from the superior and municipal courts costs shall be awarded as provided in the rules adopted by the Judicial Council.

Section 1035 of the Code of Civil Procedure, hereinbefore quoted, was adopted by the legislature in 1951, and we think it is clear that the legislature had the power to adopt it and that it superseded or amended any rule in conflict with it. For, as stated in Lane v. Superior Court, 104 Cal.App. 340, at page 344, 285 P. 860, at page 862:

> "* * * The rule-making power of the Judicial Council would seem to be limited by any existing law, the Constitution reserving to the Legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council, to adopt

> rules only, when and where the higher authority of the Legislature and the people has not been exercised."

Respondents do not contend that the legislature did not have the power to provide in Section 1035 that premiums on a surety bond were not proper costs on appeal, but respondents argue, as did the trial court, that the legislature, in stating that "such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding", intended such language to relate only to costs in the trial court. We are unable to agree with this construction because we believe it is contrary to well-settled rules of statutory construction. It is hardly necessary to cite authorities in support of the rule that when a statute is general in its terms any exemption or exception from its operation must be specified. The rule is stated in 23 California Jurisprudence, p. 743, as follows:

> "As a general rule, a court is not authorized, in the construction of a statute, to create exceptions not specifically made. In other words, if the statute announces a general rule and makes no exception thereto, the courts can make none—at least none which would be contrary to the terms of the act * * *."

There appears to us no good reason why necessary bond premiums should be a proper item of costs in the proceedings in the trial court and not proper items in the proceedings on appeal. If the legislature in adopting Section 1035 in 1951 did not intend it to apply to costs on appeal it could easily have said so, and in view of the fact that the legislature has the benefit of the assistance of a well-trained and highly efficient Legislative Counsel Bureau, we think it a reasonable assumption that if Section 1035 was not intended to relate to costs on appeal, such an exception would have been written into the statute.

Respondents advance the further argument that since the appeal taken by appellant and bond posted was on June 7, 1951, and the effective date of Section 1035 of the Code of Civil Procedure was September, 1951, at the time appellant obtained its bond to continue the attachment, there was no statute in effect permitting the allowance of cost of surety bonds and it was settled that these were not allowable as costs even in a case not governed by the Rules on Appeal. However, we agree with appellant that the fact that the bond was obtained before the effective date of Section 1035 does not bar recovery of the premiums because at the time that the judgment for costs on appeal was entered and appellant's right to costs accrued, Section 1035 had been in force for some time. The judgment for costs would include such items as were allowed by statute or rule at the time the judgment was modified in accordance with the decision of this court upon appeal.

Respondents argue further that the trial court's action in striking the bond premium item from the cost bill was of itself a determination that the bond was unnecessary. But it is clear that the court based its decision upon the ground that Section 1035 did not relate to costs on appeal.

Appellant, in reply to this contention of respondents, states:

> "Section 946 of the Code of Civil Procedure requires that the undertaking for a bond to preserve an attachment on appeal be double the amount of the debt. The amount of the debt in this case was the amount claimed on appeal, $116,341.25, and double this amount is $232,682.50. The bond premium was 1% of this latter sum, amounting to $2,326.83 per year or a total of $6,980.49. (There is a credit against this sum of $791.12 from a recent premium refund.) The final amount recovered by appellant, including principal and interest, but without costs, was about $55,000.00."

The judgment in the trial court was for only $13,658.75.

Appellant argues that in view of the fact that the court did not base its order on the ground that the bond was unnecessary its failure to so find implies that the bond was necessary and that this court under Section 956a of the Code of Civil Procedure should make such a finding.

While we have concluded that the court was in error in determining that Section 1035 did not relate to costs on appeal and that the order must therefore be reversed we do not believe that it can be held upon the limited record before us that the court made any decision upon the question as to whether or not the bond on appeal was necessary.

Appeal from Order Entering Satisfaction of Judgment and Releasing Attachment

[5, 6] Appellant contends that the effect of the order releasing the judgment lien and the levy of the attachment was to deprive plaintiff and appellant of its security for costs on appeal. Appellant points out that its appeal from the order taxing costs is pending and that upon a favorable decision in that appeal it is entitled to rely upon its attachment for security for recovery of the bond premiums amounting to about $7,000. Appellant states that if defendant Palermo wished to have the levy of attachment released, he could have given an undertaking under Section 554 of the Code of Civil Procedure in the amount of the costs demanded by appellant.

We agree with appellant that since the question of costs has not been finally decided, satisfaction of judgment should not have been entered. It is settled by the cases and it is fundamental that a satisfaction of judgment is the last act and end of the proceedings. See Brochier v. Brochier, 1941, 17 Cal.2d 822, 825, 112 P.2d 602; Cason v. Glass Bottle Blowers Ass'n, 1952, 113 Cal.App.2d 263, 247 P.2d 931. The authorities are in accord on the proposition that no satisfaction of judgment can be entered as long as there are unpaid costs in the action. Thus in Volume 2 of Freeman on Judgments, 5th Ed., at page 2329, it is said:

> "Except where a valid release is given, or there is a lawful agreement otherwise providing, a judgment may be satisfied or discharged only by payment in full with accrued interest and costs."

In 49 C.J.S. § 552, p. 1024, it is said:

> "There can be no complete satisfaction of a judgment by payment unless the payment covers interest, if any, and the costs chargeable against defendant, even though the amount of the costs is not inserted in the judgment."

Rule 26(b) of Rules on Appeal provides, in part, as follows:

> "In any case in which the reviewing court directs the manner in which costs shall be awarded or denied, the clerk shall enter on the record and insert in the remittitur a judgment in accordance with such directions."

In this action the final judgment in favor of Stockton Theatres, Inc. expressly provided that appellant was entitled to its costs on appeal. Stockton Theatres, Inc., v. Palermo, 121 Cal.App.2d 616, 264 P.2d 74. These costs are part of the judgment and must be paid before there has been a satisfaction.

We therefore conclude that the court erred in making its order that a satisfaction of judgment be entered and that the attachment be released.

The order in appeal 3 Civil No. 8796 granting defendant Palermo's motion to retax costs is reversed, with directions to the trial court to pass upon the question as to whether the bond in question was unnecessary.

The order in appeal 3 Civil No. 8833 that satisfaction of judgment be entered and the attachment be released is reversed.

Appellant to recover costs on these appeals.

VAN DYKE, P. J., and PEEK, J., concur.

141 Cal.App.2d 226

LEO F. PIAZZA PAVING CO., a corporation, Plaintiff and Appellant,

v.

BEBEK AND BRKICH, a partnership et al., Defendants and Respondents.

Civ. 16608.

District Court of Appeal, First District, Division 1, California.

May 2, 1956.

Breach of contract action. The Superior Court, Santa Clara County, Leonard R. Avilla, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence sustained finding that defendants had not made an offer, or intended to make an offer, to perform pipe line work in connection with road construction project for which plaintiff had submitted bid to state.

Affirmed.

1. Contracts ⚿14

In determining whether there has been a mutual consent to contract, courts are not interested in subjective intent of parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestations of consent. West's Ann.Civ.Code, §§ 1565, 1580.

2. Contracts ⚿28(3)

In breach of contract action, evidence sustained finding that defendants had not made an offer, or intended to make an offer, to perform pipe line work in connection with road construction project for which plaintiff had submitted bid to state.

3. Contracts ⚿15, 338(1), 346(2)

Mutual consent is one of essential elements of a contract and must be pleaded and proved by plaintiff, and lack of intent to contract is not new matter constituting an affirmative defense which must be pleaded.

◆

Bressani & Hansen, San Jose, for appellant.

Miller, Morton & Wright, Charles V. Caillat, Richard W. Morton, San Jose, for respondents.

PETERS, Presiding Justice.

This appeal involves the question as to whether the evidence shows, as a matter of law, that a contract existed between the plaintiff Leo F. Piazza Paving Co., a corporation, and the defendants Bebek and Brkich, operators of a partnership. The trial court found that no contract existed. Plaintiff appeals.

The plaintiff is a general contractor engaged in road construction. The defendants are pipe laying contractors. The State called for bids for the construction of Stevens Creek Road in Santa Clara County, bids to be submitted by September 10, 1952. Plaintiff desired to bid on that project. Before submitting its bid, plaintiff approached several subcontractors, including defendants, to secure bids from them on certain items of the work that plaintiff intended to subcontract. Among other items, the plaintiff intended to subcontract items 1, 4, 5, 21–32 of the general contract relating to the excavation and implacement of reinforced concrete pipes and storm drains.

The first meeting between plaintiff and defendants at which this problem was discussed occurred late in August, 1952, when Leo Piazza, president of plaintiff, and Bebek, Brkich, and Kappetanich, bookkeeper of defendants, met in defendants' office. According to Bebek, at that meeting Piazza simply mentioned the Stevens Creek Road job and told defendants that when he received the plans and specifications he would take them over to look at the job. Babek also testified, via deposition, that about a week later, Piazza again called at defendants' office and brought the specifications with him; that he, Bebek and Piazza went out and looked over the job and also visited the Piazza rock plant; that they returned to defendants' office and discussed the job in the presence of Kappetanich. Then one of the crucial conversations took place. Bebek testified that Piazza said he "wanted a quotation on a storm drain"; that Bebek replied: "According to the plans I don't like the plans. They say that I can't give you exact quotations. These plans are not clear to me, because jetting * is not allowed. They didn't say that jetting will go down below or not." Piazza stated that they could jet, to which Bebek replied: "I am not sure, because I had been working state jobs before, and we always substitute selected material, either sand or tamping." Bedek added: "That is why I couldn't give him the exact quotation." Piazza replied: "I think the job can be jetted, and use the same material back in the ditch, again * * * except the last foot, which the specification calls for should be rock." Bebek replied: "I won't take a chance on it, but if you want to bid that way it is O. K." Bebek added: "* * * The state believes in tamping the ground. That is why I wasn't sure to give him a firm bid on the job." Piazza nevertheless asked for a bid, to which Bebek replied: "I can't give no bid, because I don't trust those 'specs,' but if you want to take a chance to use the same material, dig the ditch, use the same material back, and jet it up to last two feet, quotation can be used about $1.25 a yard for the dirt, using the same dirt back * * * sand or selected material would be $2.00 a yard." Bebek stated that he had to go to Los Angeles, but "I will give you some kind of an idea to use to bid on a job * * * I told him that I give him a bid, but it is O. K. if he wants to use this quotation and it is O. K. if he don't want to use it."

The specifications provide that: "No jetting will be allowed within two feet of the surface of the trench and on that portion of the trench across State Route 114, the entire back fill shall be compacted with pneumatic tampers as well as the final two feet of the trench." Bebek also testified: "Yes, he asked me for a bid. I told him, 'I can't give you no bid, because the "specs" are not clear to me.' "

It is a fair interpretation of this evidence that Bebek did not intend a firm offer by this conversation, although he did know that Piazza was going to submit a bid to the State for this job.

Kappetanich substantially corroborated this testimony. He was quite clear that Piazza had stated that in Santa Clara County jetting could be done, but that Bebek replied: "Well, in that case, we probably can give you a figure, but I'm not sure because we can't give you a bid unless we are sure what is going on." Piazza nevertheless insisted on a bid, to which Bebek replied that he "wasn't sure about the specifications and that is why he couldn't give him the bid." In response to Piazza's insistent request for a bid Bebek stated: "I'll give you a figure so you can use it, that is all," making it clear that such figure would be for jetting.

Thereafter Bebek and Kappetanich prepared detailed quotations for the job and, on September 8th, Piazza again came to defendants' office "and copied quotations that we had prepared," getting the figures from Kappetanich's work sheet which bore on its face the statement: "Flooding with the same excavated material." Kappetanich testified that after Piazza had copied the figures, "We told him that we could not give him a bid because it was in question about the jetting of the material, and I told him that we can give him a figure, * * * so he could bid the job." Kappetanich several times clearly stated that the figure was based on jetting up to two feet of the surface, without select material. Piazza replied: "Well, that is all right. You can do that because it is in Santa Clara County." Kappetanich was positive that at no time was a promise made to do the work at the quoted figure, and that at no time was there delivered to Piazza any written promise to do the job at any figure. Defendants did prepare and deliver to plaintiff a written memorandum setting forth, in some detail, what defendants call their "quotations." This memorandum contains a complete itemization of all items of the contract here involved.

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* "Jetting" is a process of back filling by replacing an excavation with the same material removed from it and soaking the back fill with water, and allowing it to settle. In some cases "tamping" is required. Tamping is to back fill with the same material and then press or tamp it. Tamping is more expensive than jetting. A third method of back filling, and the most expensive, is to use imported material for this purpose.

Thereafter, plaintiff submitted its bid to the State, and it was accepted. Admittedly, plaintiff, in computing its bid, used the figures, as to the items here involved, which it had got from defendants. The figures submitted by defendants were the lowest submitted for the pipe work. Plaintiff notified defendants, first orally and then by letter, that they were the low bidders on the jobs here involved. Defendants refused to perform the contract. Plaintiff resubmitted it to other subcontractors, who agreed to tamp the back fill, and this resulted in a bid totalling $5,586.50 more than the figures suggested by defendants.

This evidence, in many respects, was contradicted by Piazza. He testified that Bebek never told him that the submitted figures were anything but a formal bid, and contended that there was no dispute over the specifications, but admitted that he knew that the State never permitted jetting on its road contracts. Piazza denied making a copy of the figures in defendants' offices, claiming those had been sent to him as an offer to contract.

Plaintiff thereupon filed this suit for breach of contract. Defendants denied that they had offered to enter into a contract, denied that they had breached the contract, and denied the allegations of damage.

The trial court, on this evidence, found that defendants had not made an offer to contract with plaintiff, and that the parties had never entered into a contract for the performance of the work here involved. In reference to the figures submitted by defendants to plaintiff the court specifically found: "That it is true that on or about the 8th day of September, 1952, the defendants gave to the plaintiff a written memorandum containing a certain set of figures referring to the work specified in Paragraph III of these Findings of Fact, that it is true that the said set of figures was not intended by the defendant[s] to be an offer to perform said work and was not received by the plaintiff with the intention that it was an offer to perform said work."

[1] On this appeal both sides agree that for a valid contract to exist the consent of the parties must be free, mutual, and communicated by each to the other, and that consent is not mutual unless all the parties agree upon the same thing in the same sense. §§ 1565, 1580, Civ.Code. Both sides also agree that in determining whether there has been a mutual consent to contract the courts are not interested in the subjective intent of the parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestations of consent. Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Canavan v. College of Osteopathic P. & S., 73 Cal.App.2d 511, 166 P.2d 878.

This general rule, approved in California, is expressed in section 25 of the Restatement of Contracts as follows:

"If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer."

Comment "a" to this section reads:

"It is often difficult to draw an exact line between offers and negotiations preliminary thereto. It is common for one who wishes to make a bargain to try to induce the other party to the intended transaction to make the definite offer, he himself suggesting with more or less definiteness the nature of the contract he is willing to enter into. Besides any direct language indicating an intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered, as well as the usages of business, and indeed all accompanying circumstances." See, generally, Sackett v. Starr, 956 Cal.App.2d 128, 212 P.2d 535.

[2] Thus, the basic question involved, is whether, measured by the objective standard, there is any substantial evidence to support the finding that defendants did not make an offer, or intend to make an offer, to perform the work.

Plaintiff argues that while there was some uncertainty as to the intent of the parties up until the last meeting between Piazza and Bebek, such uncertainty was completely removed when Kappetanich, several days later, knowing that Piazza intended to use them in his bid, handed Piazza plaintiff's Exhibit One containing price quotations on the items requested. It is argued that, tested by the objective standard, this led plaintiff as a reasonable man to believe that defendants were making an offer to contract. Plaintiff also places some reliance on two letters written by defendants in October and November, 1952, telling plaintiff that they could not perform the work due to "pressing difficulties" and "circumstances beyond our control," contending that since such letters did not deny the existence of the contract they amounted to a recognition of its existence.

If these were all of the facts there might be some merit in plaintiff's position. But these are not all of the facts. All of the surrounding circumstances must be considered. When Bebek told Piazza that he would furnish Piazza figures for the bid, he stated: "I can't give no bid, because I don't trust those 'specs,' but if you want to take a chance [of jetting] * * * quotation can be used about $1.25 a yard for the dirt, using the same dirt back * * * sand or selected material would be $2.00 a yard." Bebek made it quite clear that he was not giving a figure at which he would do the job, but merely giving to Piazza "some kind of an idea to use" in making his bid, and he was specific that "but it is O. K. if he wants to use this quotation and it is O. K. if he don't want to use it." This was corroborated by Kappetanich, who also testified that when Piazza later called at defendants' office and copied the work sheet containing a quotation of prices, he, Kappetanich, told Piazza that they could not give him a bid because the jetting was in question, but they would give him a figure so plaintiff could bid on the job. This occurred the very same day the quotation of prices was handed to plaintiff. This quotation of prices contains no promises, and it specifies no place or time of performance. Reasonably interpreted it is what its name implies, a mere quotation of prices given to plaintiff by defendants in fulfillment of Bebek's promise to give Piazza a quotation of prices to aid him in preparing his bid for the State.

Under these circumstances, it is apparent that the trial court was justified in concluding that Bebek actually communicated to Piazza that his intent was not to make an offer, but was to submit a mere quotation of prices. The finding of the trial court to this effect is amply supported.

Nor is there any material significance in the October and November letters relied upon by plaintiff as a recognition of the existence of a contract. Although they do not specifically deny the existence of a contract, it must be remembered that in fact no contract then existed. In these letters defendants declined to do the work, which is compatible with a construction of the letters as a rejection by defendants of plaintiff's offer to contract at the prices quoted by defendants. There is nothing in these letters acknowledging the existence of a contract. In fact, defendants' refusal to do the work can be interpreted as an assertion that there was no binding contract.

[3] Plaintiff next urges that the lack of an intent to contract is new matter constituting an affirmative defense which must be pleaded. The point is without merit. Mutual consent is one of the essential elements of a contract, and must, therefore, be pleaded and proved by the plaintiff. Here plaintiff pleaded an oral offer to do the work at the quoted prices. Defendants denied this allegation. Thus, whether an offer had been made was the vital issue presented. Certainly whether an offer was in fact made in no sense was an affirmative defense.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

141 Cal.App.2d 178

Lucien F. ROSS, Plaintiff and Appellant,
v.
ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, and County of Fresno, Defendants and Respondents.
Civ. 4993.

District Court of Appeal, Fourth District, California.
April 27, 1956.

Action against railroad and county for injuries suffered in crossing collision. The Superior Court of Fresno County, Milo Popovich, J., rendered judgment on a directed verdict for defendants, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that railroad's negligence and motorist's contributory negligence were questions for jury.

Judgment in favor of defendant railroad reversed, and judgment in favor of defendant county affirmed.

1. Appeal and Error 🔑927(7)

In viewing direction of verdict, court is bound by rule respecting nonsuits and must take evidence and reasonable inferences therefrom strongest in favor of plaintiff. West's Ann.Code Civ.Proc. § 630.

2. Trial 🔑139(1), 142

A motion for directed verdict is properly granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference, there is no evidence of sufficient substantiality to support a verdict for plaintiff. West's Ann.Code Civ.Proc. § 630.

3. Negligence 🔑136(9)

If evidence is such that fair-minded men might honestly draw different conclusions as to defendant's negligence and plaintiff's contributory negligence, question is not of law but of fact.

4. Stipulations 🔑13

Refusal to relieve plaintiff of stipulation, made in former trial, that railroad warning sign was in place on date of accident, on ground that counsel believed he had some evidence that sign was not in place at such time, was not an abuse of discretion in absence of showing of fraud.

5. Appeal and Error 🔑1056(1)

In action arising out of railroad crossing collision, exclusion of reports of railroad's inspection committee, making recommendations as to warning signs and lights to be installed at crossing, was not prejudicial error where documents were merely recommendations or opinions with respect to long-range improvement program, without indication of any priority or emergency as to particular crossing.

6. Railroads 🔑347(1)

In action arising out of crossing collision, evidence that defendant railroad and defendant county had available a source of money to pay proportionate share of cost of construction of better crossing signals was properly excluded.

7. Appeal and Error 🔑1046(1)

In action arising out of railroad crossing collision occurring in February, refusal to allow jury to view the premises on ground of difference in conditions at time of trial in November, was not prejudicial error.

8. Railroads 🔑350(7)

In action against railroad and county for injuries suffered in crossing collision, evidence of negligence in failure to blow whistle and ring bell was sufficient to make jury question as to railroad's negligence, though trial court had properly granted new trial in former trial because of disbelief of testimony as to adequacy of warning signals in connection with plaintiff's contributory negligence.

9. Railroads 🔑307(3)

County did not have affirmative duty to paint railroad crossing warning signs on highway in addition to standard crossing signals, and could not be held liable for motorist's injuries in crossing collision, where dangerous condition at crossing was not created by the county. West's Ann. Public Util.Code, § 7604; West's Ann. Vehicle Code, §§ 465(b), 466.

10. Appeal and Error ⚷989

Power of appellate courts begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support a finding with respect to contributory negligence.

11. Railroads ⚷350(13)

Where motorist was approaching crossing at approximately same distance and speed as train, and first possible view was approximately 100 to 150 feet from tracks, and skid marks extended for 96 feet, motorist's contributory negligence was question of fact.

12. Railroads ⚷347(4)

In action arising out of crossing collision, certificate of secretary of Public Utilities Commission that there had been several other accidents at same crossing was properly excluded in absence of showing that other accidents were similar.

13. Railroads ⚷347(1)

In action arising out of railroad crossing collision, resolutions of board of supervisors indicating intention to co-operate with city and proposing removal of tracks in city, but not specifically referring to the crossing involved, were properly excluded.

◆

Quill & Shelton, San Carlos, for appellant.

Robert W. Walker, Richard K. Knowlton, Los Angeles, John A. Willey, Fresno, for respondent Atchison, T. & S. F. Ry. Co.

Hansen, McCormick & Barstow, Maurice E. Smith, Harold V. Thompson, Fresno, for respondent Fresno County.

GRIFFIN, Justice.

This is an action by plaintiff and appellant to recover damages for personal injuries suffered in a collision of his car with a train operated by defendant and respondent Atchison, Topeka & Santa Fe Railroad Co. (hereinafter referred to as Santa Fe), occurring where the main line of the Santa Fe between Fresno and Bakersfield crosses a secondary highway just west of Selma, which highway is maintained by defendant and appellant County of Fresno (hereinafter referred to as the County).

A former trial by jury resulted in a verdict for plaintiff in the sum of $150,000, before another judge, who granted defendants' motion for a new trial on the ground of insufficiency of the evidence. The appeal comes to this court after a second jury trial of the action before another judge, and after a motion by defendants for a directed verdict in their favor was denied resulting in no verdict for either party. After the jury was discharged each defendant moved for a directed verdict under section 630 of the Code of Civil Procedure. The court, after hearing argument, ordered that each defendant have judgment in accordance with its motion for a directed verdict.

The main question before us is whether there is any evidence of sufficient substantiality to support a verdict in favor of plaintiff and, if so, whether there was a failure of plaintiff to exercise the care required of a reasonably prudent person which was a proximate cause of the accident.

[1-3] In discussing the evidence, therefore, we are bound by the time-honored rule respecting nonsuits and must take the evidence and the reasonable inferences therefrom strongest in favor of plaintiff. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. A motion made under section 630, supra, is properly granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference, there is no evidence of sufficient substantiality to support a verdict for plaintiff. If the evidence is such that fair-minded men might honestly draw different conclusions as to the existence of negligence on the part of defendants and of contributory negligence on the part of plaintiff, the question is not one of law but one of fact. Carpenter v. Atchison, Topeka & Santa Fe Ry. Co., 109 Cal.App.2d 18, 240 P.2d 5. In determining these questions the court in Green v. Key System Transit Lines, 116 Cal.App.2d 512, 253 P.2d 780, 783, has given expression to the old rule announced by Mr. Justice Holmes as to the duty of a vehicle driver approaching a railroad crossing to " 'stop, look, and

listen' ", as held in Baltimore & Ohio Ry. Co. v. Goodman, 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, and followed in Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 P. 282, L.R.A.1916A, 842, and which relates that there is a softening of that rule by more modern decisions. It is there stated that:

> "A fair summation of the present rule with reference to the duty of a vehicle driver approaching a railroad crossing is that he is not necessarily required to stop. He is required to look. However, he does not necessarily have to look from the best possible available spot as long as the spot selected gives him a reasonably assuring view of the track. * * * Nor does the fact that his view down the track in the direction from which the train eventually appears, is somewhat obstructed, make him necessarily guilty of contributory negligence as a matter of law."

Our Supreme Court, in 1952, Conner v. Southern Pacific Co., 38 Cal.2d 633, 636, 241 P.2d 535, 537, approved an instruction describing this duty of care as follows:

> " 'A traveler approaching a railway crossing with the intent of crossing thereover on a public highway is required, if he does not stop, to approach the tracks with his vehicle under control so as not to render ineffective other precautions required of him, such as looking and listening for the approach of a train, and so that he may be able to stop or turn aside while still in a position of safety upon ascertaining that a train is approaching which might endanger his passage over said track.' "

In Hildebrand v. Atchison, Topeka & Santa Fe Ry. Co., 44 Cal.2d 196, 281 P.2d 249, it is held:

> "Ordinarily it is not negligence as a matter of law for motorist to drive at such speed that he cannot stop within range of his vision; but it is a factual question; and in action by motorcyclist for injuries resulting from collision of motorcycle with locomotive at crossing, motorcyclist is not guilty of contributory negligence as matter of law where evidence does not disclose facts which would compel conclusion that his speed was excessive or that he was negligent in failing to discover presence of train sooner than he did or in failing to stop after seeing train in time to avoid accident."

[4] With these authorities in mind we will review the facts. Nebraska Avenue (near the settlement of Monmouth) is an oiled, two-lane secondary road running in a general east-west direction, on which plaintiff was driving in a one-half ton Dodge pick-up truck on February 1, 1953, at about 11:55 a. m. It intersects defendant Santa Fe's single track right-of-way which runs generally in a north-south direction. At this intersection, on the northeast and southwest corners were erected the Standard (No. 1) "post and cross-arm" railroad crossing signs. The rise of the rail bed was about two feet above the level of the approaching highway. As one approaches the intersection from the east one's view of a train approaching from the north is obstructed to some extent by the presence of a large industrial structure, including tanks, vats and meshed wire fencing sitting back on the acreage near the northeast corner of the intersection. There is testimony that as one approaches the intersection within about 600 feet from it, the first unobstructed view of the track to the north is about 105 feet from the crossing. A grape vineyard occupies the property southeast of the intersection and somewhat obliterates the view of the rail-bed in that direction. The last 100 feet or so of Nebraska Avenue, as it approaches the tracks, had been covered with a loose oil and gravel substance obliterating the white center line for that distance. No "RXR" sign had been painted on the highway approaching the crossing. There was testimony that Chesnut Avenue intersects Nebraska Avenue about 1,125 feet east of the railroad tracks and along that road from Chesnut Avenue to a point about 600 feet east of the crossing, an approaching southbound train would be visible to a westbound vehicle driver, and that about 400 feet east of the intersection was posted an

"advance warning sign" described in a stipulation in the record as "a white one with black cross-arms" reading "RXR", containing many artificial reflector lights, and *that it was in place on the date of the accident,* on the north side of Nebraska Avenue facing east. During the trial counsel for plaintiff asked to be relieved of this stipulation made in the former trial because he now believed he had some evidence such a sign was not in place at that particular time. No fraud and no sufficient facts were shown to require such relief. The trial court did not abuse its discretion in denying the request. Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 214 P.2d 809; Webster v. Webster, 216 Cal. 485, 14 P.2d 522; Sinnock v. Young, 61 Cal.App.2d 130, 142 P.2d 85. The "RXR" was painted on a round plate about 24 inches in diameter and erected on a post about five feet above the ground. The freight train consisted of 86 cars and a Diesel engine carrying two units. It was traveling in a southerly direction at a speed of between 40 and 45 miles per hour. As the engine passed over the intersection, plaintiff's truck struck the front portion of the first unit back of the Diesel engine (which was about 58 feet from the front of the engine) throwing the engine of the truck back into its seat and resulting in serious injuries to the plaintiff.

The testimony of the witnesses may be summarized as follows: Plaintiff testified he had been employed in that vicinity for more than two weeks and had crossed this intersection on another or other occasions during that period; that he was proceeding westerly on Nebraska Avenue at about 40 to 45 miles per hour; that previously it had been foggy in spots but the fog was lifting and clearing when he reached Selma; that he did not remember any fog "going out that way * * * it might have been a little haze or something * * *"; that he could see "four or five miles down the road"; that he did not see the "advance warning sign", did not hear any bell or whistle from the train, and did not notice the tracks or railroad right of way ahead of him or anything else until about 150 or 100 feet from the tracks, when he first saw the engine of the approaching train to his right; and that he immediately applied his brakes and it was then he first noticed the cross-arm railroad crossing sign, and in a few seconds his truck struck the train as heretofore indicated. Plaintiff was removed to the hospital.

A witness, Janzen, was approaching the same intersection in his car on Nebraska Avenue some distance behind plaintiff's truck. He testified he did not see the accident but did see the box cars and as "he remembered it" he heard no whistle of a locomotive; that upon arriving at the scene he made observations of conditions and summoned aid and identified certain photographs which were in evidence. On cross-examination he testified he did not remember whether he had his car radio on at the time, did not know if the car windows were up or down, and did not remember whether he was engaged in conversation with other passengers just prior to seeing the box cars in the intersection; that he did not remember how far east of the crossing he was when he noticed them; that he was traveling between 55 and 60 miles per hour; that the visibility was good and there was no fog; that he did not see the Diesel engine pass the intersection and did not notice the "advance warning sign"; and that by the time he reached the tracks the railroad man from the caboose, which had passed the intersection, was there at the scene. In his deposition he testified: "We were talking * * * probably" and the car "windows were up" and that plaintiff asked at the time "Which part of the train did I hit? * * * Why didn't I see it?"

The brakeman, called as an adverse witness, testified he was seated in the brakeman's seat between the fireman and the engineer; that the fireman, who was seated on the left-hand side of the train, had stepped back into the motor room to inspect the motors; that the operating rules of the Santa Fe were that a look-out must be kept on the left side of the train at all times; that he did move into that seat; that the first time he saw the truck was when they were approaching the crossing; that he looked to his left, out of the window, and saw the truck approaching at about the same speed as the train was traveling and it looked as though plaintiff was going to stop; that later he looked again after the engine passed the intersection to see if the truck stopped but it did not do so; and that there was no fog but a little haze at a far distance. However, in a previous statement he said it was "pretty foggy * * * it was not so foggy you couldn't see * * see a block and a half or two blocks maybe". He then stated that before the approach to the intersection the whistle on the engine blew "two longs—a short and a long blast, and the bell was ringing."

The engineer testified that they had been in the fog prior to the accident but at this particular time the sun was shining. His report, received in evidence, indicated: "Kind of weather: Fog". He testified that from the train, as it approaches this intersection from the north, the view of approaching vehicles on Nebraska Avenue for about 200 feet, is obstructed by reason of the buildings on the northeast corner until about 200 or 300 feet before reaching the intersection and then one can see east on Nebraska Avenue; that before reaching the buildings there is an unobstructed view of an approaching vehicle across the field toward Nebraska Avenue to the east; that the headlight of the engine was burning at the time, the bell was ringing, and the whistle was blown just prior to the approach to the crossing; that he started the first blast at the whistling post which was about 2,000 feet from the intersection, and the last blast was prolonged until the engine passed across the intersection; that in the Diesel type engine the operator sits up in front and looks through a windshield like the one on a truck; that the train was traveling about 45 miles per hour and he brought it to a stop in about 4,000 feet, and the caboose was about 50 feet south of the crossing.

The fireman testified it was his duty to maintain a lookout from his position in the engine when he was in the cab, but at other times the brakeman often would take his place, but he knew of no rule requiring it; that he was not in his seat at the time of the accident but was back inspecting the engines; and that when the train stopped the weather was clear although he signed a report that it was "Foggy".

A member of the County Board of Supervisors of that district and the County Road Commissioner were called as plaintiff's witnesses under Section 2055 of the Code of Civil Procedure. The Supervisor testified generally that he was familiar with the actual general conditions of the intersection as they existed at the time; that different people had spoken to him about that intersection, and this subject was discussed at a board meeting, but he did not know if any official action had been taken. It appears that the board would not act finally on such matters until they were first referred to the road commissioner for recommendation. The road commissioner testified it was his duty to inspect the roads in the county to see if they had, at least, the minimum requirements of protection to the traveling public required by law; that the symbol "RXR" was not painted on the easterly approach to the railway crossing at this intersection because the county had just completed some work on the pavement and had widened the road crossing, but he believed there never was such a sign on the pavement prior to this time; that two stop signs had been previously erected on Nebraska Avenue between the Selma intersection and the highway crossing and by resolution of the board white "Stop Ahead" signs had been painted on the highway at those places.

[5] The assistant division engineer of the Santa Fe, called as an adverse witness, testified that he had supervision of track maintenance and construction and that he inspected railroad crossings; that reports were made to the company; that the company has an inspection committee consisting of a representative of the Public Utilities Commission, an officer of the particular city or county, and an engineer of the Santa Fe; that he participated as a member of that committee and it made an inspection of the crossing in 1947; that in conjunction with a state-wide railroad crossing survey of the Santa Fe tracks in that year a report was rendered and among the recommended work to be done was a notation: "Install two No. 8 flashing lights" at an

estimated cost of $4,000, and that the County paint an "RR Crossing" sign and stripes on pavement and install two reflectorized advance warning signs. A similar report, dated in 1950, was offered. It was entitled: "Resurvey of Grade Crossings", which made a similar recommendation but suggested that the Santa Fe and County each pay one-half of the cost of flashing lights. The court rejected the offer in evidence of these documents, together with certain work sheets of the company. Plaintiff claims error in this ruling. It appears that these documents were only recommendations or opinions of the company's appointed committee in 1947 and 1950, and were not orders of the Public Utilities Commission, and would not necessarily show any violation of an order of such commission or that it would be negligent for the company to utilize the railroad crossing with the present warning signs. This was a long range improvement program and there was nothing in the report indicating any priority or emergency as to this particular intersection. Upon the showing made, no prejudicial error appears. Moore v. Norwood, 41 Cal.App.2d 359, 106 P.2d 939; Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 62 P.2d 790; Johnson v. County of Fresno, 67 Cal.App.2d 116, 153 P.2d 557.

There was received in evidence (Exhibit 33) general order No. 758 of the Public Utilities Commission, being regulations governing the protection of crossings at grade of roads with railroads in California. Therein contained are diagrams of several signals, including Standard No. 8, an automatic flashing light signal. The purpose of these regulations is stated to formulate uniform standards for grade crossing protection. It provides in Section V(a):

> "Each public crossing at grade of road, highway or street with a track of a railroad * * * shall, unless exemption is provided for herein, be protected by at least one crossing sign; constructed and installed in substantial conformity with the specifications herein illustrated and designated as Standard No. 1, or Standard No. 1–A."

Standard No. 1's were the ones here erected. Option to install Standard No. 8 is authorized by the rules. Plaintiff claims that defendant Santa Fe's failure to erect a Standard No. 8 signal was negligence.

[6] The court sustained an objection to an offer of proof that defendants had available to them a source of money to pay a proportionate share of the cost of its construction. Error is claimed in this respect, citing Crane v. Smith, 23 Cal.2d 288, 298, 144 P.2d 356. Under the circumstances the ruling was proper. As to the Santa Fe, the question of the adequacy of the warning signs at the intersection at the time and under the circumstances is usually a factual question for the jury unless there is a violation of law or rules which makes that question one of law, in which case there still remains the question of proximate cause and contributory negligence of plaintiff.

[7] At the close of plaintiff's evidence he moved that the court allow the jury to view the premises. The motion was denied and the court stated that in November, at the time of trial, there would be no possibility of similarity of conditions as they existed in February. It does appear that the foliage on the trees, which plaintiff claims diffused the view of the crossing signs by reason of the darker background, would probably be different, but no doubt the weather conditions were dissimilar. There is also evidence that there had been some changes made in respect to this crossing subsequent to the time of the accident No prejudicial error resulted in this respect Brown v. Lemon Cove Ditch Co., 36 Cal. App. 94, 171 P. 705; Section 610 Code Civ. Proc. Defendants' motions for nonsuit were denied.

Defense witnesses consisted of a highway patrolman who testified he was at the scene of the accident; that as to the weather conditions, visibility "was good * * * the fog had lifted" although there had been fog earlier; that he could clearly see the crossing, raised railroad bed and crossbucks from Chesnut Avenue; that there were skid marks leading back from the front end of the truck a distance of 96 feet; that the front of the truck was one foot from the rail; that he conversed with plaintiff two hours after the accident in the hospital; that he was conscious and said to the witness that he was driving between 45 and 50 miles per hour and that as he approached the crossing he looked to his left, southward, down the tracks and saw nothing; that he then saw the train coming from the other direction and applied his brakes and tried to swerve to his right; and that he said he almost stopped and then his truck crashed into the train.

The conductor testified he left the caboose and immediately went to the scene; that no other person arrived there until three or four minutes later; that he talked to plaintiff who said he never saw the train or that he didn't see it in time to stop.

Another witness testified she lived at the corner of Chesnut and Nebraska Avenue, about one-fourth mile from the tracks, and that just before the accident she heard the whistle of the train "about twice"; that plaintiff's truck was about opposite the office buildings of the winery on Nebraska Avenue traveling about 50 miles per hour, and that she immediately thereafter saw the train and witnessed the accident.

Another witness living about 900 feet west of the tracks said he saw the train approaching from the north and later heard the whistle; that the weather conditions were clear; that at the scene he heard plaintiff say "Why didn't I see the train? I must have fallen asleep". The fact that the weather was clear and that the whistle was blown by the trainman was corroborated by other witnesses. Photographs were received in evidence, taken 15 minutes after the accident, indicating that the weather was clear and some shadows were being cast by the sun.

After the parties rested each defendant moved for a directed verdict, which was denied.

[8] The claimed negligence of defendant Santa Fe is predicated mainly upon its failure to place adequate warning signals at the crossing, failure to sound bell and blow whistle on train, and give sufficient and timely warning of the approach of the train; and its claimed negligence in approaching this particular intersection under the circumstances related. There is no question about this intersection being a dangerous one, due mainly to the presence of the buildings and tanks which, to a degree, obscured one's vision of an approaching train under the circumstances related. While the great weight of the evidence is that the whistle did blow within the required distance from the intersection and the bell did ring, warning of the approach of the train, there is some evidence which might justify a contrary conclusion. Parker v. Southern Pacific Co., 204 Cal. 609, 614, 269 P. 622. Section 7604 of the Public Utilities Code requires a bell to be rung or an air whistle to be sounded at least 80 rods from the place where the railroad crosses any highway, and to be kept ringing or sounding at intervals until it has crossed the highway. The trial judge, in the first trial, was fully justified in granting a new trial for insufficiency of the evidence to support the jury's verdict in favor of plaintiff, because of his disbelief of plaintiff's testimony in respect to the whistling, blowing or sounding of the bell, and as to the question of adequacy of warning signals when considered in connection with the alleged contributory negligence of plaintiff. Grover v. Sharp & Fellows Contracting Co., 66 Cal.App.2d 736, 153 P.2d 83.

There is no doubt that the installation of a Standard No. 8 automatic flashing signal would have been more adequate than the Standard No. 1 sign erected. Apparently the erection of the Standard No. 1 sign complied with the regulations of the Public Utilities Commission at the time, and no violation of the rules could be claimed because Standard No. 8 was not installed.

In Green v. Southern Pacific Co., 53 Cal. App. 194, 202, 199 P. 1059, it was held that the law does impose upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, and to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. The question as to what is due care, where the view of the tracks is obstructed, is usually left to the jury to say whether, in view of the obstructions, the company has exercised ordinary care with respect to the peculiarly dangerous condition of the crossing; whether ordinarily prudent men would have taken extra precautions and whether such precautions were taken in a particular case. See also Marchetti v. Southern Pacific Co., 204 Cal. 679, 269 P. 529; and Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 137 P.2d 441. It is not clear from the brief of defendant Santa Fe what its position is in respect to the presence of evidence sufficient to support a finding of negligence on its part. It states: "Appellant expends considerable effort in his brief to establish railway negligence. Solely for the purpose of this respondent's brief the question of this negligence will be left to the province of the jury." We conclude that there is sufficient evidence to support a finding of negligence as to defendant Santa Fe.

As to defendant County, plaintiff relies upon the claim that a county also has the duty to install adequate warning devices, citing section 465(b) of the Vehicle Code, which provides:

> "Local authorities in their respective jursdictions shall place and maintain or cause to be placed and maintained such traffic signs * * * upon streets and highways * * * as *may be necessary* * * * to indicate and to carry out the provisions of this code or local traffic ordinances or to warn or guide traffic." (Italics ours.)

Section 466 of the Vehicle Code provides that no local authority shall erect any stop sign in such a manner as to require the traffic on any state highway to stop before entering or crossing any intersecting highway or any railroad grade crossing. It was stipulated that the County had erected an "advance warning sign", and it is conceded it had covered the approach to the tracks with oiled gravel, and no "RXR" sign had ever been painted on the highway indicating the approach to such a crossing.

Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365, involved only a rough condition of the street, which condition had been created by the city. It was there held that the city was not relieved of the duty to give adequate warning to those lawfully using the street; and that a dangerous or defective condition of its public streets existed.

The question of the liability of a city or county under Section 465, subdivision (b), supra, is fully discussed in the late decision of Perry v. City of Santa Monica, 130 Cal. App.2d 370, 279 P.2d 92, hearing denied by the Supreme Court. There the city had knowledge that a certain intersection was dangerous because it was a blind one. No traffic signs or stop signs had been erected. Plaintiff collided with another car in that blind intersection. After the accident the city installed stop signs. Plaintiff brought an action under the Public Liability Act of 1923 (now Government Code §§ 53050 and 53051). The court held that such injuries must result from the dangerous or defective condition of "public property"; that governmental immunity which a city enjoys as a state agency can be taken away only by legislative enactment; that the Public Liability Act was not enacted for the purpose of protecting those who come upon city streets, but only those who sustain injuries by reason of a "dangerous or defective," condition; that a city is not an insurer of the safety of its travelers; that it is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them; and that there was no allegation in the complaint that irregularities, defects or obstructions existed in the streets themselves; and that accordingly plaintiff failed to state a cause of action against the city for personal injuries, citing cases. Plaintiffs there contended that the city, under the Vehicle Code section here involved, had the affirmative duty to erect boulevard stop signs at the intersection. The court held that the section (on which plaintiff here relies) "does not compel local authorities to place signs or signals at a particular intersection. They are directed to place them upon streets and highways 'as may be necessary.' Clearly the local authorities are to determine when a sign or signal is necessary at a particular intersection."

Bradshaw v. City of Seattle, 43 Wash. 2d 766, 264 P.2d 265, 42 A.L.R.2d 800, is there cited as analogous. A similar statute was there construed and it was said, 264 P.2d at page 271:

> "In the absence of an express statute, a municipality cannot be held liable for failure to erect warning signs or barriers to apprise travelers of extraordinary or unusual conditions unless the danger existed in the highway itself."

[9] It must be concluded from the Perry case that the burden is on the plaintiff to show an actionable wrong; and to hold that the county had the additional affirmative duty to paint "RXR" signs on the highway in addition to the other signs in question would unduly extend the scope of the Public Liability Law and go far toward establishing the rule that a county is an insurer. We are unable to distinguish the Perry case from the facts and the law relied upon in the instant case. See also Campbell v. City of Santa Monica, 51 Cal. App.2d 626, 125 P.2d 561.

It is true that a defective or dangerous condition can be created by use or general plan of operation of government operated property as well as by structural defect, and it has been held that where a city makes a certain street a through highway, it is incumbent upon it to erect and maintain a "stop sign" at an intersecting street. Irvin v. Padelford, 127 Cal.App.2d 135, 273 P.2d 539. There, a stop sign had been erected but was taken down by a city employee. Here, no sign "RXR" Crossing had ever been painted on the highway and the Board of Supervisors had never found, in addition to the signs already erected, that it was necessary. The dangerous condition existing at this crossing was not created by the county but by the building of the winery and the plant at the site indicated. Under the facts related, it appears to us that the granting of a verdict in favor of the county was justified.

[10] The remaining question as to the defendant Santa Fe, is whether it can be held, as a matter of law, that plaintiff was guilty of contributory negligence. On a trial by a jury or the court, either would have been justified in finding there was negligence on the part of the plaintiff contributing to his injuries and that he probably would not have seen any signs or warning had they been present, since there is testimony that plaintiff admitted he did not see those that were there and said "I must have falled asleep". However, on this appeal it is an elementary principle of law that the power of the appellate courts begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support a finding in support of plaintiff in this respect.

In Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 852, in reversing a judgment of nonsuit the court said:

> "* * * the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law." And on page 361 of 24 Cal.2d, on page 852 of 149 P.2d: "'* * * where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury.'"

[11] Here, the view of the approaching train was obstructed for a considerable distance and it was a dangerous crossing for a vehicle approaching from the east. It cannot be said, from plaintiff's position, that the approach of the train was reasonably apparent. His first possible view of it, as he thus approached, was approximately 150–100 feet from the tracks. He testified he then looked and saw the train approach-

ing. The skid marks extended for a distance of 96 feet, which might well indicate that plaintiff must have looked shortly prior to that point and first saw the train but was unable to bring the truck to a stop in time to avoid the collision. The vehicle and the train were traveling at approximately the same speed. This could fairly fix the position of the engine when plaintiff first observed it. Although the question is a close one, Kilgore v. Southern Pacific Company, 9 Cal.App.2d 506, 509, 50 P.2d 116, and cases cited; and Heintz v. Southern Pacific Company, 63 Cal.App.2d 699, 147 P.2d 621, we feel bound by the general rule that the circumstances admit of a reasonable doubt as to whether the questioned conduct of the plaintiff falls within or without the bounds of ordinary care. Accordingly, it must be resolved as a matter of fact rather than of law. Startup v. Pacific Electric Railway Company, 29 Cal. 2d 866, 871, 180 P.2d 896.

[12, 13] It is lastly contended by plaintiff that the trial court erred in refusing to receive in evidence certain documents including a certificate of the Secretary of the Public Utilities Commission certifying that since August 31, 1946, there had been several other accidents at this same intersection. There is no indication that they were similar in character and happened under like circumstances. Other exhibits offered were two resolutions of the Board of Supervisors indicating an intention of the county to cooperate with the City in the proposed removal of the Santa Fe tracks in Fresno, and have no specific reference to the intersection here involved. The trial court was justified in refusing them. Thompson v. Buffums', Inc., 17 Cal.App.2d 401, 62 P.2d 171.

Judgment in favor of the Santa Fe reversed. Judgment in favor of the County affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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141 Cal.App.2d 74

Samuel L. SIMON, Ralph Simon, Willard M. Marks and Edward M. Marks, co-partners, doing business as Commercial Steel Co., a copartnership, Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES and City of Los Angeles, Defendants.

County of Los Angeles, Appellant.

Civ. 21252, 21253.

District Court of Appeal, Second District, Division 2, California.

April 24, 1956.

Taxpayers brought action against the County of Los Angeles and the City of Los Angeles to recover taxes paid under protest to the county. The Superior Court of Los Angeles County, William J. Palmer, J., entered judgments adverse to the county, and the county appealed. The District Court of Appeal, Ashburn, J., held that where taxpayers were in the business of importing building materials and supplies from Europe and selling them locally at wholesale or retail, and taxpayers imported from England nails, in kegs and gunny sacks, each having net weight of 100 pounds and the kegs and gunny sacks, without being opened, were stored in warehouse, they were in their "original packages" and were not subject to taxation by the county.

Judgments affirmed.

1. Commerce 🔑77

Section of the federal Constitution providing that no state shall, without consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, applies to foreign commerce. U.S.C.A.Const. art. 1, § 10, cl. 2.

2. Commerce 🔑5

Section of the federal Constitution providing that Congress shall have power to regulate commerce with foreign nations, and among several states, and with Indian Tribes, is applicable to interstate transactions. U.S.C.A.Const. art. 1, § 8, cl. 3.

3. Commerce ⚷41(1)

Goods in interstate commerce are taxable locally when they have "come to rest" in the state, regardless of the original package rule. U.S.C.A.Const. art. 1, § 10, cl. 2.

4. Commerce ⚷41(1)

The mere size of container is not the criterion of an "original package" which is not subject to taxation by the state. U.S.C.A.Const. art. 1, § 10, cl. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Original Package".

5. Commerce ⚷41(1)

The presumption that goods, which remain in packages in which they were imported, are in their "original packages" so as to be exempt from state taxation, attaches only when the importation is made in the usual manner prevalent among honest dealers, and in bona fide package of a particular size. U.S.C.A.Const. art. 1, § 10, cl. 2.

6. Commerce ⚷41(1)

Where taxpayers were in the business of importing building materials and supplies from Europe and selling them locally at wholesale or retail, and taxpayers imported from England nails, in kegs and gunny sacks, each having net weight of 100 pounds, and the kegs and gunny sacks, without being opened, were stored in warehouse, they were in their "original packages" and were not subject to taxation by county. U.S.C.A. Const. art. 1, § 10, cl. 2.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, Los Angeles, for appellant.

George I. Devor, Paul P. Selvin, Los Angeles, for respondents.

ASHBURN, Justice.

[1, 2] Plaintiffs, a partnership known as Commercial Steel Co., brought two actions (consolidated for purposes of appeal) to recover taxes paid under protest to defendant County of Los Angeles for the years 1952 and 1953, respectively. The taxes were levied upon imported articles. The question is whether Article I, § 10, clause 2 of the United States Constitution was violated.[1] That section applies to foreign commerce, while interstate transactions fall within Article I, § 8, clause 3.[2] Plaintiffs prevailed in both actions and the county appeals.

A determination of what constitutes, within the doctrine of Brown v. State of Maryland, 12 Wheat. 419, at page 441, 6 L.Ed. 678, "the original form or package in which * * * imported", must control the ruling herein.

The trial court held to be taxable by the county all articles whose containers had been opened for any reason and ruled that those goods whose containers or fasteners had not been opened or removed were still in the status of imports and not locally taxable. Our discussion is therefore confined to the latter type of merchandise.

Plaintiffs are in the business of importing from Europe building materials and supplies, mostly nails, and selling them locally at wholesale or retail. About 90 per cent of the property which the county attempted to tax consisted of nails imported from England in kegs and gunny sacks, each having net weight of 100 pounds. Such sacks or bags contained cement-coated nails and are the "customary package in Europe. They ship nails all over the world in bags." Other items subjected to the tax came as follows: Hardware cloth in rolls; foundation bolts and washers in sacks; chain in barrels; harrow disks in crates; reinforcing rods in long-ton bundles tied securely; bale ties in bundles tied with wire and wrapped with burlap; barbed wire in rolls or coils; miscellaneous hardware in wooden boxes. On arrival the shipment containing all or any of these commodities was classified at the dock and then transported by public carrier to plaintiffs' warehouse. The kegs and bags of nails were placed on wooden pallets (about 20 to a pallet), thus lifted onto and off the truck and into the warehouse where they were piled, pallet on pallet, from floor to ceiling or a lesser height. The rolls of hardware cloth were stacked on end in the truck and in the warehouse. All of the above articles were stored as convenience dictated in the warehouse and none of the kegs, bags, sacks, barrels, bundles, rolls, crates or boxes had been opened prior to the assessment date. Plaintiffs would receive one to three shipments a month, containing from 500 to 2000 bags and kegs of nails. No effort was made to segregate one shipment from another, and plaintiffs could not tell in any way the particular cargo from which any given keg, box or other container had come; the new goods would be placed on top or in front of the old; a new load might be put on top of half of an earlier one; sales were made as items were needed and without reference to separate shipments; thus the articles received in an earlier cargo might be on hand for months before that particular shipment would be exhausted. While batches of goods were not separately identifiable, each container such as keg or bag would carry the order number, size of nail, name of shipper and of buyer; also "made in England" or other country of origin.

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[1] "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

[2] "The Congress shall have Power * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Respondents argue and the trial judge ruled that each unopened container, such as a keg or bag or box or roll or bundle, was an original package and not locally taxable. Appellant argues that each shipment in the aggregate was the package, or its legal equivalent, relying upon E. J. Stanton & Sons v. County of Los Angeles, 78 Cal.App.2d 181, 177 P.2d 804.

The original package doctrine was announced by Chief Justice John Marshall, in Brown v. State of Maryland, supra, 12 Wheat. 419, at page 441, 6 L.Ed. 678, in these words: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." The proliferation of that concept has yielded many complexities such as the problem presented in the Stanton case, namely, what constitutes original package in a case where the goods are not susceptible of packaging.

[3] The exact phrase used by Chief Justice Marshall is: "the original form or package in which it was imported."[3] In West Virginia & Maryland Gas Co. v. Towers, 134 Md. 137, 106 A. 265, at page 268, the court had the task of applying the rule to the transportation of natural gas and said: "The term 'original package,' when used in these cases, means the form or physical condition of the article of commerce in which it is transported in its interstate movement.

"In Brown v. [State of] Maryland, 12 Wheat. 419, 6 L.Ed. 678, Chief Justice Marshall uses the expression 'original form or package' in referring to the article in that case. In using the word 'package' he was no doubt influenced by the nature of the article therein referred to, which was a package of dry goods. By the decision in that case, as well as the many other cases that have followed, it was not intended that by the use of such word the principle enunciated in relation to the time at which an article of commerce ceases to be a thing of interstate commerce should be limited to those articles that are capable of being put in the form of a package in the generally accepted meaning of that word, but it was likewise to apply to other articles incapable of assuming the form of a package, literally speaking, by reason of their physical properties, and to which the expression is less appropriate, such as the article in the case before us."

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[3] The opinion suggests that § 10, clause 2 of Article I would apply to interstate transactions, but that view was soon rejected. See Woodruff v. Parham, 8 Wall. 123, 19 L.Ed. 382; Sonneborn Bros. v. Cureton, 262 U.S. 506, 43 S.Ct. 643, 67 L.Ed. 1095, 1098. Goods in interstate commerce are taxable locally when they have "'come to rest'" in the state, regardless of the original package rule. See Parrott & Co. v. City and County of San Francisco, 131 Cal.App.2d 332, 341, 280 P.2d 881, 887.

Mr. Justice Cardozo, also dealing with distribution of natural gas, made the following observations in In re Pennsylvania Gas Co., 225 N.Y. 397, 122 N.E. 260, at page 261: "But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests. * * * The essential unity of the transaction remains the final test." Again, in Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497, 502, 79 L.Ed. 1032, 1040, the distinguished Justice said: "In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. v. Public Service Commission, 225 N.Y. 397, 403, 122 N.E. 260. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement."

When the penumbral case of E. J. Stanton & Sons v. County of Los Angeles, supra, 78 Cal.App.2d 181, 177 P.2d 804 arose, it became necessary for this court to apply the Brown v. State of Maryland rule to an import that essentially was not capable of packaging in any sense. That case dealt with importations of lumber which were not fastened together in any way. The pieces were stacked in the importer's yard and the lumber contained in each shipment was kept separate from other cargoes. Only the broken lots remaining after sales had been made from a given shipment were taxed. The court recognized, with Mr. Chief Justice Stone, that "the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter." Hooven & Allison Co. v. Evatt, 324 U.S. 652, 65 S.Ct. 870, 878, 89 L.Ed. 1252, 1265. The problem was stated thus at page 184 of 78 Cal.App.2d, at page 805 of 177 P.2d: "The controversy revolves about the question whether upon the sale of a portion of a shipment the remainder becomes subject to taxation. Respondent contends that so long as any parcel of the entire lot remains in the possession of the importer it is not subject to state taxation prior to sale; that each parcel or board is marked so as to distinguish it from all others and is therefore in itself an original package. Appellants argue that by the sorting, segregating and tallying of the timbers, and by virtue of sales from the cargoes received, the remainder being offered for sale becomes a part of the mass of property in the county and subject to taxation." And the court further said: "The meaning of his phrase 'original form or package' is determinative of the instant contest. [78 Cal.App.2d at page 184, 177 P.2d at page 806.] * * * The legal concept of 'original package' is an aggregation of articles imported. * * * Indeed such articles of commerce as steel beams, threshing machines, telegraph poles and many others might be cited as illustrative of classes of imports that are incapable of being wrapped in cellophane or encased in wooden or steel crates. Although they might arrive at the dock without cover, nevertheless a shipment of such articles constitutes the original form or the original package. Such articles as those last mentioned, or lumber as in the instant case, require neither bundling to facilitate their handling nor wrappers to protect them from the elements. Indeed, to bundle timbers would impair the facility of handling a shipment. The phrase 'original package' refers to the unit transported by the shipper and delivered in the exact condition in which it was shipped. * * * It is an aggregation of goods put up in whatever form and as a unit transported from a foreign land to our shores, or from one state to another. * * * From the authorities above quoted the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. * * * A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber." 78 Cal.App.2d at pages 186–188, 177 P.2d at page 807.

The power of the county to tax was thus upheld upon the theory that the "aggregation of articles imported" constituted in legal concept an original package which was broken when some of the parts of the "aggregation" were sold locally. The case undoubtedly represents the law applicable to a situation where packaging is inherently impossible or impracticable. Our Supreme Court refused a hearing and the United States Supreme Court denied certiorari. 332 U.S. 766, 68 S.Ct. 75, 92 L.Ed. 352. But the Stanton case does not control imports which actually are in packages. In such instances the question is what is the original form or package.

This question received attention in Austin v. State of Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224. The State of Tennessee had enacted a statute making it unlawful to bring into the state for sale or other disposition any cigarettes or cigarette papers. An enterprising citizen of North Carolina had cigarettes put in pasteboard boxes three inches long and one and one-half inches wide, containing 10 cigarettes. Those boxes were separately stamped and labeled and dumped on the floor of the manufacturer's warehouse. The express company was notified to get them and its agent took them from the floor, placed them in an open basket belonging to the express company and in that container transported them to defendant in the State of Tennessee. At defendant's place of business the basket was emptied upon the counter and taken away. Defendant sold one of these packages without breaking it and was indicted for violation of the local statute. The Supreme Court first upheld the validity of the law and then discussed the question of whether the sale in question was valid because it was an interstate shipment in an original package. After quoting Brown v. State of Maryland (as we have done above) the court said, 179 U.S. at page 351, 21 S.Ct. at page 135, 45 L.Ed. at page 229: "This sentence contains in a nutshell the whole doctrine upon the subject of original packages, upon which so formidable a structure has been attempted to be erected in subsequent cases. Whether the decision would have been the same if the original packages in that case, instead of being bales of dry goods or hogsheads, barrels or tierces of liquors, had been so minute in size as to permit of their sale directly to consumers, may admit of considerable doubt. Obviously the doctrine of the case is directly applicable only to those large packages in which from time immemorial it has been customary to import goods from foreign countries. It is safe to assume that it did not occur to the Chief Justice that, by a skilful alteration of the size of the packages, the decision might be used to force upon a reluctant people the use of articles denounced as noxious by the legislatures of the several states." And at page 359 of 179 U.S., at page 138 of 21 S.Ct., at page 232 of 45 L.Ed.: "The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time immemorial, foreign goods have been brought into the country. * * * Without undertaking to determine what is the proper size of an original package in each case, evidently the doctrine has no application where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee." The claim of original package was rejected because the normal practices of the trade had been abandoned and the packages were not such as were ordinarily used in that type of commerce. The contrary appears from the uncontradicted evidence at bar, for the packages involved were those customarily used in Europe for shipment throughout the world; there was no attempt to avoid the effect of any statute or decision and was no departure from conduct of normal foreign trade.

[4] Mere size of the container is not the criterion of an original package,—as witness these cases in which the original package contention was upheld: Imperial Development Co. v. City of Calexico, 47 Cal. App. 666, 668, 670, 191 P. 50 (separate bales of cotton); Leisy v. Hardin, 135 U.S. 100, 124, 10 S.Ct. 681, 34 L.Ed. 128, 138 (kegs and cases of beer); Schollenberger v. Commonwealth of Pennsylvania, 171 U.S. 1, 24, 18 S.Ct. 757, 43 L.Ed. 49, 58 (10 lb. package of oleomargarine); United States v. Sixty-Five Casks Liquid Extracts, D.C., 170 F. 449, 454 (cask holding 50 gals. of liquid extract); Anglo-Chilean Nitrate Sales Corp. v. State of Alabama, 288 U.S. 218, 225, 53 S.Ct. 373, 77 L.Ed. 710, 714 (nitrate in bags containing 100 lbs. each); Re Taxes Pacific Guano & Fertilizer Co., 32 Haw. 431, 441 (nitrate of soda in bags); Southern Pac. Co. v. City of Calexico, D.C., 288 F. 634 (bale of cotton).

[5, 6] This court quoted with approval in the Stanton case, supra, 78 Cal.App.2d at page 192, 177 P.2d at page 810, the following language of Austin v. State of Tennessee, 179 U.S. 343, 21 S.Ct. 132, 45 L.Ed. 224: "'No doubt the fact that cigarettes are actually imported in a certain package is strong evidence that they are original packages within the meaning of the law; but this presumption attaches only when the importation is made in the usual manner prevalent among honest dealers, and in a bona fide package of a particular size.'" The presumption applies here for the importation was made in the usual manner prevalent among honest dealers, in a bona fide package of a customary size. The record shows no departure from normal trade practices tending to offset the presumption. The ruling of the trial court in these cases is not inconsistent with the Stanton decision, or otherwise erroneous.

Judgment in each case affirmed.

MOORE, P. J., and FOX, J., concur.

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141 Cal.App.2d 121

George S. COLEMAN, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, a corporation, Defendant and Respondent.

Civ. 16621.

District Court of Appeal, First District, Division 2, California.

April 25, 1956.

Rehearing Denied May 25, 1956.

Hearing Denied June 20, 1956.

Action by fireman against railroad for second back injury, sustained after settlement of claim for first back injury and fireman's return to work. The Superior Court of the City and County of San Francisco, Edward Molkenbuhr, J., rendered judgment on a verdict for defendant, and plaintiff appealed. The District Court of Appeal held that instructions authorizing jury to consider effect of fireman's settlement of claim for first back injury, which had been based on possibility of permanence of such injury, were prejudicially erroneous.

Reversed.

1. Estoppel ⚷68(1)

Estoppel against assuming inconsistent positions in judicial proceeding cannot be invoked where the position first assumed was taken as a result of ignorance or mistake.

2. Estoppel ⚷68(2)

Position taken in judicial proceeding must be clearly inconsistent with position taken in later proceeding, so that one necessarily excludes the other, in order to result in estoppel.

3. Compromise and Settlement ⚷15(1)
Estoppel ⚷68(2)

Where fireman settled his claim against railroad for 1950 back injury for $40,000, at a time when permanent disability seemed probable, the railroad being fully informed as to medical facts, but employee's condition improved and he returned to work, and suffered another back injury in 1953, claim for 1953 injury was not so inconsistent with basis of the previous settlement as to create an estoppel, and instruction that fireman could not recover for subsequent injury if prior settlement was based on permanent disability was erroneous.

4. Estoppel ⚷85

Future disability is as a rule not a fact of which one can have knowledge of his own or which he can be considered to warrant, as basis for estoppel.

5. Estoppel ⚷68(2)

Statements by attorney in action for injuries, that he would show "without too much doubt" that plaintiff would be permanently disabled, could not be considered basis of estoppel against assuming inconsistent position.

6. Estoppel ⚷68(1)

The requirement of reliance does not apply to estoppel by inconsistent positions in judicial proceeding, but it is enough that claimant plays fast and loose with court by intentional self-contradiction as a means of obtaining unfair advantage.

7. Damages ⚷214

In fireman's action against railroad for back injury, sustained after fireman had settled claim for previous back injury on basis of possibility that such previous injury would be permanent, but had unexpectedly improved and returned to work, instructions on damages authorizing jury to consider whether plaintiff had already been compensated for permanently disabling back injury were erroneous. Boiler Inspection Act, § 1 et seq., 45 U.S.C.A. § 22 et seq.; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.

8. Appeal and Error ⚷1170(9)
Damages ⚷185(1)

In action against railroad for injuries to fireman for second back injury, evidence would support finding that back was injured a second time in second accident, and hence errors in instructions as to effect of settlement of claim for first back injury were not harmless. Boiler Inspection Act, § 1 et seq., 45 U.S.C.A. § 22 et seq.; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; West's Ann.Const. art. 6, § 4½.

9. Appeal and Error ⚷1170(9)

In fireman's action against railroad for second back injury, fact that verdict was for railroad generally did not render errors in instructions as to effect of settlement of claim for first injury harmless. Boiler Inspection Act, § 1 et seq., 45 U.S.C.A. § 22 et seq.; Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq.; West's Ann.Const. art. 6, § 4½.

10. Appeal and Error ⚷1170(9)

The prejudicial effect of an instruction is not necessarily restricted to its exact subject-matter. West's Ann.Const. art. 6, § 4½.

11. Trial ⚷296(11)

Error in instruction which made verdict for defendant dependent on absence of aggravation of pre-existing conditions only, thereby excluding consideration of other form of injury, was not prejudicial where other instructions clearly stated that defendant was liable for any injuries suffered by plaintiff.

12. Trial ⚷295(1)

Reviewing court must consider instructions as a whole and from standpoint of their probable effect on jury.

13. Damages ⚷182
Trial ⚷207

In fireman's action against railroad for second back injury, evidence of amount of settlement of claim against railroad for previous back injury would be of so little materiality as showing extent of prior injury that exclusion might be required, though matter would be largely in trial judge's discretion, and if evidence were admitted, plaintiff would be entitled to a clear instruction restricting its competency to the extent of prior injury.

14. Witnesses ⚷344(1)

Specific bad acts or specific instances of untruthfulness cannot be shown for purpose of impeaching a witness.

15. Witnesses ⚷344(5)

In fireman's action against railroad for second back injury, evidence of settlement of fireman's claim against railroad for first back injury was not admissible for purpose of impeaching plaintiff by showing aptitude to make extravagant claims and unsupported complaints.

Ryan & Ryan, Herbert Chamberlin, San Francisco, for appellant.

Arthur B. Dunne, R. Mitchell S. Boyd, G. Blandin Colburn, Jr., Dunne, Dunne & Phelps, San Francisco, for respondent.

PER CURIAM.

Plaintiff, an employee of defendant company, appeals from a judgment on a verdict for defendant in his personal injury action based on the Federal Boiler Inspection Act, 45 U.S.C.A. § 22 et seq., which declares unlawful the use of unsafe locomotives and appurtenances and thereby supplements the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. He urges mainly that he was deprived of a fair trial because of the reference by defendant before the jury to a previous action by plaintiff against defendant under the same statutes, to the attitude of plaintiff in said action, and to a compromise reached therein; by the introduction over plaintiff's objection of evidence relating to these points and by erroneous instructions relating to the possible effect of said prior circumstances in restricting the injury for which appellant might be entitled to recover in the present action. Insufficiency of the evidence to support the verdict is not a basis of the appeal. We have concluded that appellant's contentions must be sustained.

At the time at which appellant allegedly suffered said two accidents he was in the service of respondent as a fireman. He was first employed in May, 1943. The first accident happened on February 12, 1950, when he slipped on oil in a roundhouse of respondent injuring his back, for which injury he filed action on April 7, 1950. After several months of conservative treatment in the Southern Pacific Hospital in San Francisco a fusion operation on appellant's lumbar spine was performed there on August 8, 1950. Appellant was in a cast for three months and thereafter wore a back brace. It was the opinion of the surgeons in charge of appellant's case in respondent's hospital based on x-ray pictures showing displacements, that no fusion in the area between the second and third lumbar vertebrae was obtained and that a second operation would probably be required because plaintiff at the time had pain in his back over that area. (It was shown at the trial that the head roentgenologist of the hospital was of the opinion that fusion between the second and third vertebrae was obtained but the surgeons disagreed with this opinion.) Appellant, who in his original complaint had prayed for $75,000 damages based on complete disability for an indefinite period, on June 11, 1951, asked leave to amend by increasing the prayer to $150,000 on the ground that he originally did not know that the operation would not cause a successful fusion and that the injuries would prevent him from working again as a railroad man. During the trial of the action a compromise was reached by which appellant received $40,000 in a check dated August 13, 1951, in full settlement of all claims for injuries allegedly suffered in said accident of February 12, 1950. Dismissal of the action with prejudice was filed August 17, 1951. When late in September, 1951, appellant returned from leave of absence from the hospital, he reported definite improvement in the last six to eight weeks. The improvement continued. The pain disappeared. The reoperation was not performed. In December, 1951, appellant was discharged from the hospital to return to duty January 5, 1952. He actually worked again as a fireman for respondent from January 7, 1952, until after the second accident in August, 1953. He left off his back brace two months after he returned to work. The improvement which permitted appellant to return to work, notwithstanding the failure—according to the surgeons in respondent's hospital—of the fusion in the area between the second and third lumbar vertebrae, was at the trial in the present action explained by Dr. Flinn, one of said surgeons, as a "fibrous stability," the formation of enough scar tissue between the area to prevent excessive motion; the weak part in the arch of the back is "held together, undoubtedly, by fibrous tissue; and unless there's something that disrupts that then you don't get the shift in the body of the vertebra." It was the opinion of Dr. Flinn that when appellant was released to go to work (December, 1951) there was such fibrous union, and that if he had had no other injury to his back he probably could have continued to work as a fireman during his life expectancy.

On August 23, 1953, the steam locomotive on which appellant was working as a fireman broke a rod when it was going at a speed of 70 miles an hour, causing a breakdown of said locomotive, accompanied by violent jolting and swaying which threw the engineer to the deck and appellant, according to his testimony, first against an armrest and thereafter with his back and the back of head and neck against a windbreaker. After having taken safety measures both jumped from the locomotive when it was still going. Appellant at the time of the accident did not think he was hurt and made statements accordingly, but three quarters of an hour later he complained to the engineer that his back felt funny and asked him to bring him his flashlight from the engine as he did not want to climb the ladder to it. He, however, worked on the relief engine and continued his work as a fireman until August 28, 1953. He testified that he ascribed certain troubles he felt and of which he complained to his wife to nerves. On August 29, he consulted a Southern Pacific Doctor at Phoenix, who referred him to the Southern Pacific Hospital in San Francisco. He was treated by the doctors there and between September 10, 1953, and July 9, 1954, was in and out of the hospital seven or eight times. During this period his symptoms became worse. On July 16, 1954, Dr. Flinn who had taken part in appellant's first fusion operation as junior surgeon performed a refusion operation. Dr. Flinn testified that during the second operation he found movement and no fusion the same as after the first operation. There was still tissue in between the area, but the fibrous union was stretched. Such could have occurred in an accident as described by plaintiff and could cause recurrence of pain. At the time of the trial (September, October, 1954) appellant was still in a cast and it was too early for Dr. Flinn to give a definite prognosis.

The complaint in this action, filed October 2, 1953, alleged the accident of August 23, 1953, violation by defendant of the Federal statutes stated before, and the following injuries suffered by plaintiff as a result thereof:

1. A fracture of a previous spinal graft with fragmentation.
2. A possible ruptured intervertebral disc.

Defendant conceded below, as on appeal, that the liability under the Federal Boiler Inspection Act, supra, is absolute, Urie v. Thompson, 337 U.S. 163, 188, 69 S.Ct. 1018, 93 L.Ed. 1282, and that defendant would be liable for any injury which had been caused to plaintiff by the alleged accident, but it was denied that plaintiff had suffered any injury as a result of said accident.

The evidence was in conflict. Appellant's earlier denials of injury and later complaints were brought out. Dr. Charmack, an orthopedic surgeon testifying for plaintiff, gave as his opinion on the basis of the hospital record and later x-rays and examinations that the first operation resulted in a fusion and that the upper portion of the graft was broken in the accident of August 23, 1953. The evidence of Dr. Flinn has already been stated.

During defendant's opening statement, in which extensive references were made to plaintiff's previous action, his contentions in said action and the settlement made therein, with a promise to prove "that all these claims that are made here in the contention of permanent disability were made in the past, was settled and disposed of completely," plaintiff protested the injection of any such matter in the case and moved for a mistrial, which motion was denied. The following instruction, given by the court on its own motion and numbered 37 shows most clearly the position of the court in that respect to which appellant objects on appeal and to which he objected below from the beginning:

"You are instructed that it has been proven in this case that plaintiff was previously in another accident while in the employ of the defendant, in which he received an injury to his lumbar spine; that he and the defendant agreed in 1951 as to what amount of damages he was to be paid, and that payment of the agreed upon sum was paid by the defendant to plaintiff.

"You are instructed that if you find that at the time of said settlement in 1951 plaintiff appeared and claimed to be suffering from a permanent injury to his back which disabled and prevented him, in the exercise of ordinary care, from thereafter performing a substantial part of his work with reasonable continuity in his customary occupation with the defendant, namely, a fireman or in any other occupation in which he might then reasonably have been expected to engage in in view of his station in life and physical and mental capacity, and that they settled the matter on that basis, then plaintiff may not in this action recover damages for any permanent injury to his back allegedly caused in the accident of August, 1953. And this is so even though the condition in the back was thereafter discovered not to be permanently disabling to the plaintiff in the performance of his occupation with the defendant."

Respondent urges that this instruction correctly states the law, and moreover that, even if such was not the law, the instruction cannot have caused a miscarriage of justice or any prejudicial effect.

Respondent primarily contends that all this instruction told the jury was that plaintiff could not claim to be compensated twice for the same thing. The problem on which the jury was herein instructed is not so simple. It is: If an injured person has received compensation under the cited Federal statutes on the basis of a certain probability of permanent disability, he has thereafter recovered to such extent that he is not anymore disabled but has resumed his former occupation and he has then suffered a new injury to exactly the same part of the body as the former one, which again causes probability of permanent disability, can he under said statutes recover for the latter probable permanent disability or not? Nobody would deny the victim's right of recovery if the second injury and disability was caused by another responsible person than the first one. This illustrates the evident fact that the second disability caused after a recovery is not "the same thing" as the first one. Respondent and the court below in its first ruling relied on language in Brooks v. Rochester R. Co., 156 N.Y. 244, 50 N.E. 945 to the effect that a person who obtained a general verdict in a personal injury action in which she had alleged among other damage permanent disability to exercise a certain profession, could not in a new personal injury action based on injury in a later accident claim that it caused disability to exercise the same profession. (The defendant in both actions was the same street railway company.) Although the case dates from 1898 it has never been cited for said rule and we doubt whether it is correct in its generality. It may be noted that in that case the two accidents were not fully five months apart. The same physician testified for plaintiff in both cases. At the first trial she testified that the injuries were likely to be permanent, at the second that plaintiff was gradually recovering from the effects of the first accident but that her injuries in the second accident were likely to be permanent. It was held reversible error to sustain objection to her being cross-examined at the second trial as to her stated testimony at the first trial. The holding was based both on the above stated rule and on the right to impeach the witness. The generality of the rule was restricted by the court's statement "The two accidents and the two trials were so connected by the proofs on the part of the plaintiff that the defendant had the right to eliminate from the case all claims which entered into the first recovery." Moreover the Federal statutes here governing were not involved in the case.

[1, 2] If in some cases such right of the defendant to rely on recovery in a prior action is recognized then it is based on some form of estoppel, which prevents a party who has assumed a particular position in a judicial proceeding to assume an inconsistent position to the prejudice of the adverse party in a subsequent proceeding involving the same parties and questions. This form of estoppel "has been said to be one of vague application, and in many cases it has been held inoperative, or has not been applied". 31 C.J.S., Estoppel, § 117, p. 373. It cannot be invoked where the position first assumed was taken as a result of ignorance or mistake. 31 C.J.S., Estoppel, § 117, p. 372. The position must be clearly inconsistent so that one necessarily excludes the other. The application has also sometimes been limited by the requirement that to permit one party to change must be unjust to the other party. 19 Am.Jur. 710. See as to this form of estoppel and the many contradictions and uncertainties in its application in general 31 C.J.S., Estoppel, §§ 117–124, pp. 372–393; 19 Am.Jur. 704–730. Respondent relies with respect to this doctrine of estoppel primarily on Scarano v. Central R. Co. of New Jersey, 3 Cir., 203 F.2d 510, 513, in which case it was held that a railroad employee who had in an injury suit under the Federal Employers' Liability Act asserted and introduced evidence to prove damage consisting in lost ability to earn wages and had obtained $27,750 in a settlement was estopped to bring, about one month thereafter, an action for damages for the employer's refusal to reinstate him as rehabilitated under the provisions of a collective bargaining agreement. The case states that with respect to such estoppel "'each case must be decided upon its own particular facts and circumstances.'" We see significant distinctions between the Scarano case and the one before us. The most important is that in the Scarano case the employer refused to reinstate the employee, and held him to his claimed disability, whereas in the present case respondent reinstated appellant, thereby not only acknowledging that he was no longer disabled but also cooperating in subjecting him again to risks of the employment for which Federal statutes made the employer absolutely liable. If it be assumed for the purpose of argument that the claim of damages because of permanent disability caused by the second accident was in principle inconsistent with the basis of the settlement previously made, then it is still a serious objection to respondent's reliance on such inconsistency that respondent itself sanctioned the same inconsistency in reinstating appellant and thereby subjecting him to new risks. If respondent had made with appellant an express agreement containing the partial exclusion of liability which respondent claims in these proceedings, such agreement would probably be void under the provision of section 5 of the Federal Employers' Liability Act, 45 U.S.C.A. § 55, which avoids any contract or device which enables a common carrier to exempt himself from any liability of the kind. The point does not need decision because no such express agreement is claimed but it throws serious doubt on the contention that respondent is exempted to said extent as a matter of law.

[3] Irrespective of said statutory provisions, the inconsistency between the positions taken by appellant is not sufficiently clear. At the time of the first trial and the settlement a refusion operation was contemplated. In how far that operation would succeed and in how far appellant would be disabled after such operation could evidently not be predicted with certainty. Respondent in whose hospital and by whose physicians appellant has all the

time been treated was fully informed as to the medical facts. The sum paid by settlement was far less than the present value of appellant's prospective loss of income during his life expectancy in case of permanent total disability. Although the amount of $40,000 clearly showed that permanent disability was to some extent contemplated, the settlement, like most settlements, must have been based on an element of chance: if appellant would prove to be permanently disabled the amount would be low, if the disability would prove to be short the amount would be high. It seems contrary to the chance character of such settlement to hold that any claim based on termination of the disability sooner than was considered probable was inconsistent with the basis of such settlement.

[4–6] The instruction refers to appellant's claim of disability as basis for the settlement and respondent points out allegations and statements of appellant's attorney as showing such claim. Future disability is as a rule not a fact of which one can have knowledge of his own or which he can be considered to warrant. It is symptomatic that one of the statements on which respondent relies is that appellant's attorney urged in his opening statement that he would show "without too much doubt" that if the refusion operation would be successful appellant's back would be stiff so that he would not be able to work as a fireman. Such allegations or statements alone should not be considered a basis of estoppel. This is not only because they are not intended to be relied upon and are not relied upon. Although there is much uncertainty as to the extent to which the required elements of equitable estoppel apply to the form of estoppel here under discussion the Scarano case holds that the requirement of reliance does not apply. It is enough that the claimant plays "fast and loose with the courts" by "intentional self-contradiction * * * as a means of obtaining unfair advantage." The unconscionable character according to that case required to cause an estoppel under the above rule (at least where there is no real estoppel in pais), is absent in this case. For the reasons stated the instruction based on such estoppel seems erroneous in this case.

[7] The same applies to part of instruction 40 given on the court's own motion in which, among the items to be considered in assessing damages is mentioned: "the question of whether he has already been compensated for a permanent disabling back injury" and to a clause inserted by the court in instruction 39 requested by plaintiff as to compensation for loss of earning power reading "unless you find that he has already been compensated by the defendant for those particular losses." The question remains however whether these errors were prejudicial and reversible.

[8] Respondent contends that the concededly correctly admitted evidence, (including certain evidence to impeach the veracity of plaintiff not here stated) so overwhelmingly shows that plaintiff was not injured in the last accident, that possible errors in admission of evidence or in instruction cannot have resulted in a miscarriage of justice. Art. VI, § 4½ of the California Constitution. The contention is without merit. There is much testimony in the record, both medical and lay, which if believed would substantially support appellant's claim that in the second accident his spine was again injured either by stretching of the fibrous union developed after the first fusion operation or by fracture of the spinal graft made in said first operation. The credibility of said testimony was for the jury only, and even if we were fully convinced that it did not deserve belief—which is not the case—we could not on that ground hold that the result reached was the only possible correct one.

[9, 10] However, respondent also urges that the fact that the verdict was for defendant generally shows that the jury did not reach the question of damages to which the defective instructions according to respondent solely relate. Respondent relies on the rule that if a jury under otherwise correct instructions returns a general verdict for defendant in a negligence action, error may not be predicated upon the giving

of erroneous instructions relative to the issue of damages. Church v. Payne, 36 Cal. App.2d 382, 401, 97 P.2d 819; Hurd v. City and County of San Francisco, 49 Cal.App. 361, 363, 193 P. 507; Cook v. Los Angeles R. Corp., 169 Cal. 113, 115, 145 P. 1013. The rule is not in point here. The action is not based on negligence denied by defendant but on absolute liability conceded in principle. The instructions do not relate to measure of damages only but to the possible exclusion of recovery for certain stated injury on the ground of prior compensation. It is true that there is here in so far an analogy with the situation in the above negligence cases, that a correct application of the erroneous instructions could not have resulted in the denial of all compensation, including compensation for physical and mental suffering caused by the second accident and the ensuing operation. However, it cannot be said as a general rule, that the misleading and prejudicial effect of an instruction is necessarily restricted to its exact subject matter. So it is generally held that instructions relating to matters not in issue or in evidence may be misleading and reversibly prejudicial. Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal.2d 365, 380, 159 P.2d 1; Ketchum v. Pattee, 37 Cal.App.2d 122, 132, 98 P.2d 1051; Strandt v. Cannon, 29 Cal.App.2d 509, 513, 85 P.2d 160; Buttrick v. Pacific Electric R. Co., 86 Cal.App. 136, 139–140, 260 P. 588; Gregg v. McDonald, 73 Cal.App. 748, 758, 239 P. 373. The above stated rule of the negligence cases is justified because there is so little connection between the question of negligence and the one of damages that an erroneous instruction as to damages cannot be expected to influence the jury as to the question of liability for negligence. Here, however, there is not such a clear disconnection and the erroneous injection of the question of previous compensation for the main injury into the trial and into the instructions may well have confused the jury and led it to consideration of the question not submitted to it whether the amount of $40,000 received was sufficient to compensate appellant for his injuries in both accidents. This explanation of the result reached seems at least as probable as the one given by respondent, to wit that the jury believed that appellant was not at all injured in the second accident and that he subjected himself to the suffering of the second operation for the purpose of compensation only. Under these circumstances the error found must lead to reversal.

[11, 12] Appellant also complains of an instruction of a different kind. Instruction 44 given at the request of defendant as one of several instructions on aggravation of a pre-existing condition contains the following sentence: "If the plaintiff was suffering from a pre-existing condition and he did not receive any injury which aggravated it, the defendant is entitled to your verdict." The error in the sentence is that it makes a verdict for defendant dependent on absence of aggravation of pre-existing conditions only, thereby excluding from consideration any other form of injury. However, this sentence was part of an instruction on aggravation of pre-existing condition only. There were other instructions, which clearly said that defendant was "liable for any injury suffered by plaintiff" resulting from violation of the Boiler Inspection Act (18) or "for the injuries, loss or detriment sustained by him" (28). Considering as we must the instructions as a whole and from the standpoint of their probable effect on the jury, Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, we must conclude that in itself this defect would not be prejudicial or justify reversal. At most it may have added to the confusion caused by the repeated injection of the question of previous compensation into the case.

Appellant contends that the introduction of the evidence complained of was justified for other purposes than the one stated in the instructions, which we have found erroneous. We have decided that the introduction of the evidence combined with the opening statement and said instructions was prejudicial to appellant and requires reversal. The question of the admissibility of the evidence for certain other purposes may however be of importance for a retrial of the case.

[13] It is said that the amount of the prior settlement was admissible to show the seriousness of the prior injury, citing Le Blanc v. Browne, 78 Cal.App.2d 63, 75, 177 P.2d 347, 354. In that personal injury case, where the plaintiff denied that she had trouble with her right eye prior to the accident, evidence that some years previously she had sued a doctor for injury to that eye was held correctly admitted with an instruction to disregard it "'except in so far as it goes to the injury of this plaintiff and the condition of her eyesight.'" In this case appellant does not deny his prior injury, and a physician of respondent who took part in the treatment and operation of appellant after each of the accidents testified in detail as to the condition of plaintiff observed at all times involved. Under these circumstances the amount of the prior settlement is of so little materiality for the purpose of showing the extent of the prior injury that this ground must be considered fictitious and it is so prejudicial in confusing the issues that exclusion may well be required. It is said in Adkins v. Brett, 184 Cal. 252, 258–259, 193 P. 251, 254: "If the point to prove which the evidence is competent can just as well be proven by other evidence, or if it is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points." See also the following statement in 31 C.J.S., Evidence, § 159, p. 869: "Evidence, although logically relevant, may and should be excluded where it will have an undue tendency to confuse or mislead the jury, * * * as where it would draw into the case issues foreign to the litigation * *." However, the matter is largely in the discretion of the trial judge, and the possibility that the evidence on retrial may differ from that received at this trial prevents us from expressing our opinion more definitely. If the court should find reason to permit the introduction of said evidence, plaintiff would at any rate be entitled to protection against misuse of it by a clear instruction restricting its competency to the extent of the prior injury. Adkins v. Brett, supra, 184 Cal. at page 258, 193 P. 251.

[14, 15] It is urged that evidence of prior proceedings and settlement were admissible to show that plaintiff was apt to make extravagant claims and unsupported complaints of pain in the same situation when such was to his financial advantage. In this manner the evidence would in essence be used for the impeachment of appellant by the showing of one purported instance of untruthfulness. "Specific bad acts, or specific instances of untruthfulness, cannot be shown for the purpose of impeaching a witness". People v. Arrighini, 122 Cal. 121, 126, 54 P. 591, 593; Code of Civ.Proc. § 2051. The evidence is the more objectionable for said purpose because there is no proof, but only an imputation by respondent of untruthfulness of appellant in the first proceedings. According to the evidence of respondent's surgeon Dr. Flinn the improvement and deterioration which appellant stated and on which he based his conduct could be medically explained. As said before, the injuries in the first and in the second accident are different matters and future disability is not a subject on which a layman like appellant can have knowledge of his own so that impeachment by inconsistent statements is not involved. The fact that appellant was not only a witness but also the plaintiff in the action does not change the exclusionary rule. The cases relating to actions of fraud on which respondent relies are wholly inapplicable. They are exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. Atkins Corporation v. Tourny, 6 Cal.2d 206, 215, 57 P.2d 480. In our case no issue of fraud was joined and no other fraudulent misrepresentations were involved. We hold that evidence of the prior proceedings and settlement and of appellant's contentions in that respect was not admissible for the purpose last stated.

The judgment is reversed.

141 Cal.App.2d 23

INTERNATIONAL SOUND TECHNICIANS OF THE MOTION PICTURE BROADCAST AND AMUSEMENT INDUSTRIES LOCAL 695 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, Petitioner,

v.

SUPERIOR COURT IN AND FOR COUNTY of LOS ANGELES, State of California, James Fullerton, Respondents.

Civ. 21673.

District Court of Appeal, Second District, Division 1, California.

April 23, 1956.

Rehearing Denied May 14, 1956.

Hearing Denied June 20, 1956.

Original proceeding in prohibition, brought by labor union, to prevent the Superior Court, in and for the County of Los Angeles, from proceeding with action brought therein against union by worker contending that he lost employment because of union's denial of membership to him. The District Court of Appeal, Nourse, J. pro tem., held that first cause of action seeking mandatory injunction requiring petitioner to admit worker into membership in union plead matter within exclusive jurisdiction of National Labor Relations Board but that other causes of action seeking damages against union for loss of employment caused by its alleged acts of causing employers to discriminate against worker because of its denial of membership could be brought.

Writ of prohibition granted with respect to one cause of action and denied with respect to five causes of action.

1. Labor Relations ⚷510

Prohibition ⚷10(2)

Action seeking mandatory injunction requiring defendant labor union to admit plaintiff to membership therein and alleging that its refusal to do so prevented plaintiff from securing employment, sought to present unfair labor practice, and sought relief which was, under statute, within jurisdiction of National Labor Relations Board to grant so that board had exclusive jurisdiction over matter, and prohibition would issue to prevent state court from entertaining action. National Labor Relations Act, §§ 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 157, 158(a) (3), (b) (1, 2), 160.

2. Labor Relations ⚷510

Jurisdiction of National Labor Relations Board to prevent unfair labor practice on behalf of union in denying applicant membership so that he is precluded from taking second employment is exclusive, and court cannot act to enjoin such unfair labor practice unless board declines jurisdiction. National Labor Relations Act, §§ 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 157, 158(a) (3), (b) (1, 2), 160.

3. Labor Relations ⚷511

One complaining that union illegally denied him membership and he was thereby precluded from certain employment could not vest court with jurisdiction over complaint to obtain mandatory injunction requiring union to admit him to membership merely by failing to pursue administrative remedy by timely filing complaint with National Labor Relations Board. National Labor Relations Act, §§ 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 157, 158 (a) (3), (b) (1, 2), 160.

4. Constitutional Law ⚷88

A person's right to work is right guaranteed him by Federal Constitution as well as by California Constitution. National Labor Relations Act, §§ 1 et seq., 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(a) (3), (b) (1, 2), 160; U.S.C.A.Const. Amend. 14; West's Ann. Const. art. 1, §§ 1, 13.

5. Constitutional Law ⚷88

Labor Relations ⚷251, 759

Constitutional right to work is not an absolute right but may be limited by agreement between union, acting as bargaining agents for all employees, and employer, that membership in union be condition of employment, but if the union, by such agreement, procures closed shop and at same time maintains a closed union, and thereby deprives a person of employment, it commits an actionable wrong against him. National Labor Relations Act, §§ 1 et seq., 7, 8(a)

(3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(a) (3), (b) (1, 2), 160; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 1, 13.

6. Labor Relations ⚿759

The right of action of worker denied employment in union shop because of inability to gain membership in union against union for loss of employment is not based upon federal statute making it unfair labor practice for union to cause employer to discriminate against worker because of nonmembership in union where such membership has been denied him, but is based upon tortious act of union in depriving him of fundamental right to work. National Labor Relations Act, §§ 1 et seq., 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(a) (3), (b) (1, 2), 160; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, §§ 1, 13.

7. Labor Relations ⚿630

The power of the National Labor Relations Board to order reinstatement of discharged employee and to order payment of back wages for period during which he has been deprived of employment by unfair labor practice committed by either union or employer is supplementary to and in aid of preventive power exercised through a cease-and-desist order and cannot be exercised unless Board is called upon to exercise its preventive powers. National Labor Relations Act, §§ 1 et seq., 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(a) (3), (b) (1, 2), 160; U.S.C.A. Const. Amend. 14; West's Ann.Const. art. 1, §§ 1, 13.

8. Labor Relations ⚿764, 768

The measure of damages to which worker was entitled if union caused his discharge from employment by denying him membership in union was loss of wages, and where he pled such in his common-law action against union, as evidentiary facts, rather than pleading ultimate facts, his action was not thereby defeated under claimed infirmity of showing cause exclusive jurisdiction over which was in National Labor Relations Board. National Labor Relations Act, §§ 1 et seq., 7, 8(a) (3), (b) (1, 2), 10 as amended 29 U.S.C.A. §§ 151 et seq., 157, 158(a) (3), (b) (1, 2), 160; U.S.C.A.Const. Amend. 14; West's Ann. Const. art. 1, §§ 1, 13.

◆

Algerdas N. Cheleden, Los Angeles, for petitioner.

John R. Inderrieden, Los Angeles, for respondent Fullerton.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to prevent the respondent court from proceeding in an action brought against it and others by one Fullerton.

The first amended complaint in the action brought by Fullerton contains six counts. By the first count Fullerton seeks (1) a mandatory injunction requiring petitioner to admit him to membership in petitioner Union; (2) to enjoin petitioner and the other defendants, who are employers of labor and with whom petitioner has a collective bargaining agreement as the bargaining agent for the employees of said employer-defendants, from requiring Fullerton to be a member of the Union as a condition to being employed by said employer-defendants so long as petitioner denies him membership in the Union.

By each of the remaining five causes of action the plaintiff seeks damages against the Union, and one or more of the other defendants named, because of his having been discharged by the employing defendant named, at the demand of the Union, and thus deprived of his means of livelihood.

The facts as alleged in the complaint in the action brought by Fullerton and shown by the petition filed here are:

The plaintiff is and for many years last past has been a sound technician, commonly known as a mixer;

The Union is a corporation organized under the laws of the state of California for the purpose of representing as a collective bargaining agent persons engaged as sound technicians in the motion picture and amusement industry with respect to the working conditions in their employment by persons, firms and corporations engaged in the production of motion and television pictures;

That the defendants named in the complaint as being engaged in the production of motion pictures and television pictures distribute and exhibit those pictures in interstate commerce, and in producing such pictures employ sound technicians, commonly known as mixers;

That an agreement has been entered into between petitioner (hereinafter called the Union) as the bargaining agent of sound technicians, including mixers, and the producers of motion pictures and television pictures, including the defendants named as producers and employers, fixing the terms and the conditions of employment of said sound technicians; and that by the terms of said agreement every employee hired by such employers is required to be and remain a member in good standing in the Union on and after the 30th day following the beginning of his employment in the motion picture industry;

That petitioner has on numerous dates commencing in February, 1952, and ending on August 19, 1955, applied to the Union for membership and offered to pay to the Union all application and initiation fees and dues required by it as a condition to membership in the Union, and has offered to meet and comply with all rules and regulations of the constitution and by-laws of the Union;

That the Union has refused to admit plaintiff as a member of the Union and has returned to him his application and his tendered fees and dues;

That by reason of the failure and refusal of the Union to accept Fullerton as a member, the employers named as defendants, and all employers who are parties to the collective bargaining agreement with the Union, have denied him employment as a mixer and he has thus been deprived of his right to work.

The facts just stated are the substance of those alleged in the First Cause of Action. In each of the remaining causes of action Fullerton alleges that on or about a certain date he accepted employment as a mixer with a named employer and sought but was refused membership in the Union, and that the Union, acting through its agents and officers, caused that employer to discharge him under threat that if it failed so to do the Union would refuse to allow its members to work on the same job as Fullerton; that as a result of said action on the part of the Union he was discharged and damaged in the amount of $250 to $400 per week for each week that he was so deprived of his right to work.

From the petition filed here it further appears that shortly after his discharge on August 29, 1955, by the employer named in his second alleged cause of action, Fullerton filed with the National Labor Relations Board a "charge" against the Union charging it with engaging in unfair labor practices within the meaning of section 8(b), subsections (1) (A) and (2) of the National Labor Relations Act[1] (hereinafter called the Taft-Hartley Act) in that the Union had, by requests, demands and threats, caused Visual Drama, Inc., to discriminate against him in regard to his tenure of employment and the terms and conditions of his employment, in violation of section 8(a) (3) of the Act, and had restrained and coerced him in the exercise of the rights guaranteed him by section 7 of the Act[2]. It further appears that on January 25, 1956, the National Labor Relations Board's Regional Director permitted Fullerton to withdraw his charge against the Union without prejudice.

It does not appear that the National Labor Relations Board issued a complaint against the Union or that the Board either expressly rejected or accepted jurisdiction of the charge made by Fullerton, nor does it appear whether the Board had, at the time it permitted Fullerton to withdraw his charges, commenced an investigation of those charges.

It is petitioner's contention that the respondent court does not have jurisdiction of any of the causes of action set forth in Fullerton's complaint, but that exclusive jurisdiction, to grant either the equitable relief sought by the First Cause of Action or the damages sought by the remaining causes of action, is vested in the National Labor Relations Board.

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[1] Section 158, U.S.C.A., title 29.

[2] Section 157, U.S.C.A., title 29.

We have come to the conclusion that the respondent court does not have jurisdiction to proceed with the trial of the action insofar as the First Cause of Action set forth in Fullerton's complaint is concerned, but that it does have jurisdiction to proceed insofar as, by that complaint, Fullerton seeks damages against the Union for wrongfully preventing him from earning his livelihood through employment as a sound technician.

By section 7 of the Taft-Hartley Act employees are given the right of self-organization, to form or join labor organizations, and also the right to refrain from so doing except as that right may be affected by a collective bargaining agreement as a condition of employment under the provisions of section 8 of the Act.

By subsection (a) (3) of section 8 of the Act, it is made an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any terms or conditions of employment, or to encourage or discourage membership in any labor organization except that an employer may enter into an agreement with a labor organization which is the collective bargaining agent of its employees by which membership in the Union, on and after the 30th day of employment, shall be a condition of employment.

By subsection (b) (1) of section 8 of the Act it is made an unfair labor practice for a labor organization to restrain or coerce an employee in the exercise of the rights guaranteed him by section 7 of the Act, and by subsection (b) (2) it is made an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee to whom membership in the union has been denied on grounds other than failure to tender periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership.

[1] There can be no doubt that the facts alleged in the First Cause of Action of Fullerton's complaint, if proven, would establish an unfair labor practice on the part of the Union in that it has, while denying Fullerton membership in the Union, prevented him from securing employment because of his nonmembership in the Union; and it is also clear that the relief which Fullerton seeks by his First Cause of Action is the same relief which the National Labor Relations Board is empowered to give by section 10 of the Act.[3]

The complaint seeks to prevent the Union from engaging in an unfair labor practice, but the prevention of such acts is the exact matter which Congress has placed within the jurisdiction of the National Labor Relations Board. The first sentence of section 10 of the Act reads: "The Board is empowered, as hereinafter provided, *to prevent* any person from engaging in any unfair labor practice (listed in section 158 [sec. 8 of the Act] of this title) affecting commerce." [Emphasis added.] Under section 10 of the Act, the Board, if it accepts jurisdiction of a charge filed, *may* issue a complaint and, after hearing, order the person charged with an unfair labor practice to cease and desist, and enforce its order by petition to a proper court of the United States.

[2] The Board's jurisdiction to prevent unfair labor practices of the kind involved here is exclusive, Garner v. Teamsters, Chauffeurs & Helpers Local Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, and a state court cannot act to enjoin such unfair labor practices unless the Board declines jurisdiction. Garmon v. San Diego Bldg. Trades Council, 45 Cal.2d 657, 291 P.2d 1. The complaint in question here does not allege that the National Labor Relations Board has expressly refused to assume jurisdiction of the unfair labor practice charged in the complaint, or any facts from which the court below could find that it would refuse jurisdiction if a charge against the Union were filed with it by Fullerton.

[3] Respondent Fullerton (as real party in interest) contends, however, that the superior court may now act because the unfair labor practices charged by Count I of the complaint occurred more than six months ago and that therefore the Board would be precluded from issuing a complaint upon any charge filed by him with the

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[3] Section 160, U.S.C.A., title 29.

Board. There is no merit in this contention insofar as the injunctive relief sought by the first count of the complaint is concerned. Fullerton was authorized by the Act to file with the Board a charge against the Union within six months after the occurrence of each of the unfair labor practices against him and he cannot, by failing to pursue this administrative remedy, vest jurisdiction in the courts of this state to grant him preventive relief. Gerry of California v. Superior Court, 32 Cal.2d 119, 194 P.2d 689.

Nor, would it seem, is he now precluded from filing a charge against the Union for its alleged unfair labor practice; for the practice is alleged to be a continuing one, and he need only, in order to lay the basis for a charge, again seek employment and membership in the Union; and if both be refused, he may then prosecute his administrative remedy.

It follows from what we have said that the respondent court is without jurisdiction to take any further proceedings in the action before it insofar as the preventive relief sought under the First Cause of Action set forth in the first amended complaint is concerned.

We think, however, that the remaining causes of action present a different question. By them, Fullerton seeks damages for the wrongful act of the defendant Union in depriving him of his means of livelihood. He does not seek preventive relief but only redress for a wrong done him in depriving him of his common-law and constitutional right to pursue his chosen occupation and thus gain his livelihood.

[4] Fullerton's right to work is a right guaranteed him by the federal Constitution as well as by the Constitution of this state. 14th Amendment, U.S.Const.; Cal.Const., art. I, §§ 1 and 13; Bautista v. Jones, 25 Cal.2d 746, 749, 155 P.2d 343; James v. Marinship Corp., 25 Cal.2d 721, 731, 733, 155 P.2d 329, 160 A.L.R. 900.

[5] This right to work is not an absolute one but may be limited by an agreement between a union, acting as bargaining agent for all employees, and the employer, that membership in the union be a condition to employment. The union, however, cannot, by such an agreement, effect a closed shop and at the same time maintain a closed union. Bautista v. Jones, supra; James v. Marinship Corp., supra. If it attempts so to do and thus deprives a person of employment, it commits an actionable wrong against him, Restatement, Torts, sec. 810.

[6] It is true that under the Taft-Hartley Act it is now an unfair labor practice for a union to wrong a person who seeks employment by causing an employer to discriminate against him because of non-membership in the union, where such membership has been denied him. That person's cause of action, however, is not founded upon the fact that the Act makes the wrong done him an unfair labor practice, but it arises from the tortious act of the union in depriving him of his fundamental right to work. Bautista v. Jones, supra; James v. Marinship Corp., supra.

The powers given the National Labor Relations Board by section 10 of the Taft-Hartley Act are preventive rather than remedial in character. Congress, by the Act, made certain wrongs unfair labor practices and, through the administrative procedures before the Board, provided a means of preventing them. It did not attempt to provide any remedy by which a person in Fullerton's situation may recover damages for a wrong done him, and who does not seek the preventive relief provided for by the Act. United Const. Workers Affiliated with United Mine Workers of America v. Laburnum Const. Corp., 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025, 1031.

[7] The Act does grant to the Board the power to order the reinstatement of a discharged employee and order the payment of back wages for the period during which he has been deprived of employment by an unfair labor practice, committed either by the union or the employer. But this power of the Board is supplementary to and in aid of its preventive power exercised through the means of a cease-and-desist order. United Const. Workers Affiliated with United Mine Workers of America v. Laburnum Const. Corp., supra, 347 U.S. at pages 665–667, 74 S.Ct. at pages 838–839, 98 L.Ed. at page 1032. It cannot exercise this power unless

it is called upon to exercise its preventive powers.

There is nothing in the Act which compels a person who has a common-law right of action against a union for damages, to invoke the preventive powers of the Board. One in the situation that Fullerton is in here is not required to challenge the validity of his discharge from employment, and seek an order requiring the union and the employer to cease and desist from unfair labor practices together with an order reinstating him with back pay. Such a person may forgo his rights under the Act and prosecute his action for damages, which is founded not upon the unfair labor practice as such but upon the violation of his fundamental and constitutional right to work. Moore v. Illinois Cent. R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089; Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 70 S.Ct. 577, 94 L.Ed. 795, 800; Kuzma v. Millinery Workers Union, 27 N.J.Super. 579, 99 A.2d 833; Charles H. Benton, Inc., v. Painters Local Union, 45 Cal.2d 677, 291 P.2d 13.

In Slocum v. Delaware, L. & W. R. Co., supra, the Supreme Court of the United States, in holding that the National Railroad Adjustment Board had exclusive jurisdiction to interpret bargaining agreements between railroads and the unions representing their employees, distinguished the case of Moore v. Illinois Cent. R. Co., supra, in which that court had upheld the right of a railway employee to sue at law for damages sustained by reason of his being discharged in the violation of the terms of such an agreement, and in so doing, said [339 U.S. 239, 70 S.Ct. 580]:

> "Our holding here is not inconsistent with our holding in Moore v. Illinois Cent. R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

[8] Petitioner emphasizes the fact that by the last five causes of action in his complaint Fullerton seeks to recover back wages, and asserts that by so doing he has attempted to have the state court provide him a remedy of which the National Labor Relations Board is given exclusive jurisdiction. Loss of wages is the measure of Fullerton's damage for the wrong done him, and the fact that he pleads the evidentiary facts by which his loss may be determined, rather than the ultimate fact of the amount of his loss, does not change the nature of the right which, by these causes of action, he asserts.

It is apparent that Fullerton has abandoned any right to invoke the preventive power of the Board as to the instances of unfair labor practice described in the last five causes of action of his complaint by failing to file and maintain charges with the Board within six months after the occurrence of the unfair labor practice. If Fullerton should hereafter file charges with the Board based upon a repetition of the wrongful acts which are alleged in the last five causes of action of his complaint, the Board would be without power to grant him compensation for the wrongs alleged in the complaint, for it cannot issue a complaint as to any wrong occurring more than six months before the service and filing of a charge. Therefore the prosecution of this action, insofar as the last five counts of the complaint are concerned, will in nowise hinder or impede the Board in the exercise of its jurisdiction over any charge that may be hereafter filed with it.

Let a peremptory writ of prohibition issue, enjoining the Superior Court of the State of California, in and for the County of

Los Angeles, from taking any proceedings, pursuant to the First Cause of Action set forth in the first amended complaint in Action No. 648,972 in said Court, granting to the plaintiff any relief by way of an injunction, mandatory or prohibitory, pertaining to the acts of the defendants as alleged in said First Cause of Action.

The petition for a writ of prohibition as to the Second, Third, Fourth, Fifth, and Sixth Causes of Action is denied

WHITE, P. J., and FOURT, J., concur.

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Fred PODESTA and Adeline Podesta, his wife, Plaintiffs, Respondents and Cross-Appellants,

v.

LINDEN IRRIGATION DISTRICT, a public corporation, Defendant and Cross-Respondent,

and

The Stockton and East San Joaquin Water Conservation District, a public corporation, Defendant and Appellant.

Civ. 8788.

District Court of Appeal. Third District. California.

April 23, 1956.

Rehearing Denied May 16, 1956.

Hearing Denied June 20, 1956.

Landowners' action against water conservation district and irrigation district for alleged taking or damaging of private property for public use. In Superior Court, San Joaquin County, George F. Buck, J., judgment was rendered in favor of the landowners as against the water conservation district and in favor of the irrigation district as against the landowners. Appeals were taken by the water conservation district and the landowners. The District Court of Appeal, Van Dyke, P. J., held that although a dry channel through which water had previously passed and through which flood waters passed during spring flood and freshets was a natural watercourse, the water conservation district had no right to create a continuous flow of water through the channel, which the landowners had been using, except by condemnation or by leave of the landowners.

Affirmed.

Peck, J., dissented.

1. Eminent Domain 🔑**270**

Whenever private property has been taken or damaged for public use without just compensation, constitutional section prohibiting taking of private property or damaging for public use without payment of just compensation, affords basis for action by injured party to recover, in a suit often called a "suit in inverse condemnation," the just compensation which ought to have been paid before taking or damaging occurred. West's Ann.Code. Civ.Proc. § 1264.7; West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Suit in Inverse Condemnation".

2. Waters and Water Courses 🔑**38, 40**

Dry channel through which water had previously flowed and through which flood waters passed during spring floods and freshets was "natural watercourse" and land through which channel passed was accordingly burdened with that servitude. Water Code, § 1201.

See publication Words and Phrases, for other judicial constructions and definitions of "Natural Watercourse".

3. Waters and Water Courses 🔑**40**

Burden of service owed by land through which there is a natural watercourse is largely determined, not by fact that it is a natural watercourse, but by factual conditions which measure nature and extent of the servitude. Water Code, § 1201.

4. Waters and Water Courses 🔑**96**

Though dry channel through which water had previously passed and through which flood waters passed during spring floods and freshets was natural watercourse, water conservation district had no right to create continuous flow through the dry channel, which was being used by landowners, unless by condemnation or by leave of landowners. West's Ann.Const. art. 1, § 14.

5. Eminent Domain ⚷98

Where irrigation district had oral permission from landowners to cause continuous flow of water through ordinarily dry channel which landowners had been using, permission being conditioned upon district's construction and maintenance of bridges across channel, and channel later reverted again to dry channel and district leased to water conservation district which later caused another continuous flow through channel, and bridges became unusable and landowners served notice of termination of permission, water conservation district's use of channel constituted "taking" and "damaging" of private property for public use, and water conservation district was liable for compensation. West's Ann.Const. art. 1, § 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Damaging" and "Taking".

6. Eminent Domain ⚷2(10)

Water conservation district's action in making excavations in dry channel so as to cause continuous flow of water in dry channel which landowner had been using could not be justified under police power, in absence of emergency, and district was liable for compensation. West's Ann.Const. art. 1, § 14.

7. Limitation of Actions ⚷19(2)

Water conservation district's action in making excavations in channel so as to cause continuous flow of water in ordinarily dry channel which landowners had been using was not mere "trespass" to which three-year statute of limitations would be applicable, and landowners could commence suit in inverse condemnation within five-year period necessary for acquisition of title by adverse possession. West's Ann.Code Civ.Proc. §§ 318, 338, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Trespass".

8. Eminent Domain ⚷300

In landowners' action against water conservation district for compensation for alleged taking and damaging of private property for public use, evidence sustained trial court's finding that district's defense of laches was not made out. West's Ann. Const. art. 1, § 14.

9. Eminent Domain ⚷303

In landowners' action against water conservation district for alleged taking and damaging of private property for public use, evidence sustained trial court's finding that district had, by its taking, diminished value of plaintiffs' property in amount of $77,000. West's Ann.Const. art. 1, § 14.

10. Appeal and Error ⚷1033(4)

Water conservation district could not complain on appeal that no proof had been made, in landowners' action against district for taking and damaging of private property for public use, of value of rights and easements taken, where proof of severance damage was given. West's Ann.Code Civ. Proc. §§ 1248–1253; West's Ann.Const. art. 1, § 14.

11. Eminent Domain ⚷297

In landowners' action against water conservation district for alleged taking and damaging of private property for public use, it was permissible to show severance damage by showing market value before and after taking or damaging. West's Ann. Code Civ.Proc. §§ 1248–1253; West's Ann. Const. art. 1, § 14.

12. Eminent Domain ⚷146

The "benefits" referred to in statute relating to assessment of damages for taking or damaging of private property for public use are special benefits as contrasted with general benefits common to community. West's Ann.Code Civ.Proc. §§ 1248–1253.

See publication Words and Phrases, for other judicial constructions and definitions of "Benefits".

13. Eminent Domain ⚷146

In landowners' action against water conservation district for damages for alleged taking or damaging of private property for public use, trial court properly refused to offset benefits against compensation, the benefits to landowners being common with many users of water and therefore being "general benefits" rather than "special benefits". West's Ann.Code Civ. Proc. §§ 1248–1253.

See publication Words and Phrases, for other judicial constructions and definitions of "General Benefits" and "Special Benefits".

14. Eminent Domain ⟹121

Irrigation district which leased head gates to water conservation district could assume that latter would obey law, and was not obliged to anticipate such that latter would put leased head gates to wrongful use and was not liable to landowners for water conservation district's taking or damaging of private property for public use. West's Ann.Const. art. 1, § 14.

◆

Jones, Lane, Weaver & Daley, Stockton, for plaintiffs, respondents and cross-appellants.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for defendant-appellant and defendant and cross-respondent.

VAN DYKE, Presiding Justice.

This action was brought by plaintiffs and respondents, Fred and Adeline Podesta, against two public agencies, one a water conservation district, the other an irrigation district. By their complaint, plaintiffs sought damages claimed to have been suffered by them as landowners when the two agencies took a part of their property for public use without having paid compensation therefor. A general statement of the case is to be found in Podesta v. Linden Irrigation Dist., 132 Cal.App.2d 250, 281 P.2d 905.

The trial court made the following findings of fact: In 1926, the plaintiffs purchased and since have been owners in fee of a parcel of real property referred to in the findings as parcel one, which lies south of the natural watercourse known as the North Slough of the Calaveras River. In 1931, the plaintiffs purchased and have since owned a second parcel lying to the north of said watercourse. In 1935, plaintiffs purchased and have since owned a third parcel, lying partly north and partly south of said slough, and contiguous to the first two parcels. Prior to 1860, North Slough carried a relatively large amount of the water of the Calaveras River. After the year 1860, the mouth of the slough slowly filled with sand as a result of natural processes. The filling of the mouth caused the flow in North Slough to diminish gradually until the greater portion of the water that had formerly entered it was caused to flow into another fork of the river known as Mormon Slough. Mormon Slough branches off from North Slough approximately one mile to the east and upstream from plaintiffs' land. Since about 1900, and until the diversions made by the defendants, North Slough carried only freshets or flood waters in the channel across plaintiffs' land and that only for about four days in any one year. These freshets and flood waters originated in the natural watershed of the Calaveras River. For the rest of the time of each year there was no water in North Slough. Plaintiffs' land is devoted to the extensive culture and growth of fruit and row crops and comprises an area of 610.55 acres. At the height of the fruit-packing season, about 600 men are employed thereon. Except for short periods in the winter months, constant movement of men and equipment across the channel of North Slough is and was required to carry out plaintiffs' farming practices. There is no other reasonable means of access from the south to the land lying north of the channel of North Slough where extensive buildings are located. Prior to the year 1934, it was the custom and the practice of plaintiffs and of their predecessors in interest to use the dry bed of North Slough as a means of passage for horses, persons and farm equipment from one side of the channel to the other, except during the short periods when water was running therein. Three roadways across the bed of the channel were used for this purpose. The channel of North Slough runs one and one-half miles through and across plaintiffs' land. On December 7, 1933, the Linden Irrigation District, hereinafter called irrigation district, commenced work on a project to deepen the mouth and channel of North Slough for the purpose of diverting thereto the water then flowing in Mormon Slough. In order to accomplish this, the irrigation district deepened the mouth of North Slough 9.8 feet so that the elevation of the bottom of North Slough was identical with the elevation of the bottom of Mormon Slough at their point of juncture. The irrigation district also constructed a floodgate in the channel of North Slough about three-fourths of a mile upstream and to the east of plaintiffs' land. As a necessary part of its project, said defendant also entered the land of plaintiffs and excavated the channel of North Slough through said land. The extreme depth of the excavation on plaintiffs' land was 13 feet; the weighted average of the excavation as it existed and now exists along the channel across the land of plaintiffs was 4.9 feet. The excavation was completed about May 24, 1934. Some time in the winter of 1933 or the early months of 1934, plaintiffs, and their predecessors in interest in the parcel last acquired, orally and without consideration consented to the deepening of said channel and the increase of the natural flow therein, so long as the irrigation district built and maintained three bridges across the channel. During the year 1934, said defendant district constructed two bridges for plaintiffs and one bridge for plaintiffs' said predecessors in interest. These bridges were designated as Podesta Number 1, Podesta Number 2, and the Lewis Bridge. The Lewis Bridge is located on the land of plaintiffs last acquired. From the year 1934 until the year 1936 the irrigation district diverted water for public use from Mormon Slough into North Slough and down the channel thereof through plaintiffs' land. The district maintained the three bridges from 1934 until 1936; but in the year 1936, it ceased operations and no longer diverted water through plaintiffs' land. From the year 1936 until the year 1949, the mouth of the channel of North Slough again filled up with sand due to natural processes, and the channel returned to its former intermittent flow when freshets or flood waters were carried about four days a year. Plaintiffs resumed their former practice of using the dry stream bed for passage across their land. In the year 1936, the irrigation district ceased to repair and maintain the bridges. Through the years ensuing after the year 1936, these bridges gradually became dilapidated. In 1948, defendant Stockton and East San Joaquin Water Conservation District, hereinafter called the appellant district, was formed. One of its purposes was the resumption of the project of the irrigation district. Appellant district leased the works and head gates of the irrigation district for a term of ten years by a written lease agreement executed December 1, 1948. The lease provided that the appellant district assumed such "purely legal liability" as the irrigation district had to repair the three bridges located on plaintiffs' land. On or about January 1, 1949, the appellant district again deepened the mouth of North Slough and again excavated the channel through plaintiffs' land; and also at that time constructed a weir in Mormon Slough about one-half mile downstream from North Slough. The weir decreased the flow of water in Mormon Slough and increased the flow of water in North Slough. The weir, the head gates, the deepened mouth of North Slough and the deepened channel through plaintiffs' land were all integral parts of the same project to increase the flow in North Slough for public use, and the project would not otherwise be effective. The effect of the entire project since January 1, 1949, has been to cause water to flow from the main channel of the Calaveras River into North Slough for public use almost continuously throughout the year. Were it not for the completion and maintenance of said diversion project, all of said continuous flow in North Slough as it has existed since January 1, 1949, except for the intermittent freshets and flood flows hereinbefore referred to, would flow in Mormon Slough and not in North Slough. Since January 1, 1949, the appellant district has furnished irrigation water from North Slough without cost to numerous landowners within its boundaries whose lands adjoin North Slough. Plaintiffs' lands are within said district. Plaintiffs, from time to time, have pumped an undetermined amount of water from North Slough. Although the three bridges depreciated and became dilapidated after they ceased to be maintained by the appellant district, they were still capable in some degree of safe use by plaintiffs until May 31, 1953. Since that date, the direct effect of said continuous flow of water through the excavated channel on plaintiffs' land has been to sever the land of the plaintiffs into two separate parcels.

On January 1, 1949, plaintiffs notified both defendant districts that the appellant district would obtain plaintiffs' permission to use said channel to conduct the flow of said increased water only upon the condition that said defendants would build and maintain said three bridges, and on the further condition that the agreement of appellant district to so maintain and repair be put in writing. The defendant districts, however, failed to repair or maintain the bridges after said notice and failed to make or execute any agreement in writing. On April 16, 1949, plaintiffs notified defendant districts that unless the three bridges were repaired and maintained, and unless the written agreement to repair and maintain was executed by appellant district, all permission to use said excavated channel through plaintiffs' land was revoked as of the first day of May, 1949. Both of said districts have failed to make any repairs on the three bridges, have failed to maintain them, and have failed to enter into any agreement so to do. The land of plaintiffs is now severed as aforesaid and has continued to be severed since on or about May 31, 1953. The value of the plaintiffs' land in an unsevered condition on May 1, 1949, and also at the date of trial was the sum of $840,000. Due to the severance, the value of their land on said dates was reduced in the amount of $77,000. To repair the severance, it is necessary to construct and maintain three bridges and thereby replace and restore the present dilapidated structures. The cost of the three bridges which includes first construction, replacement at the end of 20 years capitalized at 5%, maintenance at 1% per year and insurance, totals $77,364. The reasonable value of the use of said excavated channel and the severance of plaintiffs' land from the 31st day of May, 1953, to the date of trial is a sum equivalent to $77,000 at 7% interest for said period.

From the foregoing findings of fact, the trial court drew the following conclusions: The channel of North Slough of the Calaveras River where it flows through the land of the plaintiffs is a natural watercourse, but since the year 1900, the natural flow of said channel has been limited to freshets and flood flows for about four days a year. The transaction between the irrigation district and the plaintiffs in 1933 and 1934, whereby the plaintiffs and plaintiffs' predecessors in interest granted permission to said defendant to excavate the channel and increase the flow of water through plaintiffs' land so long as the said defendant maintained three bridges across the channel, was not a bilateral contract binding upon the irrigation district to repair and maintain the bridges at all times. Since the irrigation district has not diverted water through said channel since the year 1936, it owes no duty and is under no liability to plaintiffs to repair and maintain said bridges. The appellant district has no right to sever the land of the plaintiffs by diverting water through the excavated channel of North Slough, and plaintiffs' consent for such diversion was terminated as to both defendant districts on May 1, 1949. The continued diversion by the appellant district since said first of May, 1949, and the severance of plaintiffs' land since May 31, 1953, constitutes a taking and damaging of property for public use without just compensation having first been made to the owners. As a direct result of said continued diversion and the resulting severance, a detriment has been suffered by plaintiffs and a benefit conferred upon appellant district. Plaintiffs have not been guilty of laches and no applicable statute of limitations or prescriptive period has run so as to bar their right to bring this action. Any benefit that the plaintiffs may have received from pumping an undetermined amount of water introduced by said appellant district into North Slough was a general and not a special benefit and would not bar this action nor constitute an equitable defense against said plaintiffs. The damage to plaintiffs for the permanent severance of their lands by the intentional acts of appellant district is the sum of $77,000 with interest thereon at the legal rate of 7% per annum from the 31st of May, 1953. On the payment of said sum and interest to plaintiffs, the appellant district is entitled to a grant of easement from plaintiffs, permitting it to divert said increased flow of water through the excavated channel on plaintiffs' land in perpetuity and without any liability for severance damages. Until the payment of said sum with interest as provided, appellant district should be enjoined from introducing water into said North Slough of the Calaveras River in the channel through plaintiffs' land in excess of the natural flow of said channel as it has existed since the year 1900.

Judgment pursuant to the findings of fact and conclusions of law was entered, and it contained provisions as follows: That plaintiffs have judgment against the appellant district in the sum of $77,000 with interest thereon at the rate of 7% per annum from May 31, 1953; that said sum must be paid to plaintiffs within thirty days after final judgment herein as the term "final judgment" is defined in California Code of Civil Procedure, § 1264.7; that if appellant district file an affidavit in the cause that its bonds must be issued and sold in order to provide the money necessary to pay any portion of said judgment, then such portion may be paid at any time within one year from the date of such final judgment, with the further provision that if the sale of any such bonds cannot be had by reason of litigation affecting the validity thereof, then the time during which such litigation is pending shall not be considered a part of the one year's time in which such payments must be made. Upon the payment of said sum, plaintiffs shall execute a grant of easement to appellant district, granting it the right to divert the increased flow of water through the excavated channel on plaintiffs' land in perpetuity, together with the right of reasonable ingress and egress to maintain and safeguard such channel, but the burden of the easement shall be limited to the capacity of the excavated channel as it now exists. Until the acquisition of the right-of-way through the channel by appellant district, it is enjoined from introducing water into North Slough in the excavated channel through plaintiffs' land in excess of the natural flow of said channel as it has existed since the year 1900, which natural flow consists of freshets or flood water flowing in said channel for four days a year. Appellant district is given thirty days after final judgment is rendered in the matter to file with the court its written election to abandon its project of increasing the flow of water through the excavated channel on the land of the plaintiffs, and in the event said written election is so filed and said project is so abandoned within said period the amount of damages awarded to plaintiffs against appellant district shall be reduced by a sum of money equal to interest on $77,000 from May 31, 1953 to the date of filing said election at the rate of 7% per annum for said period. In the event of the filing of such election, the injunction provided for shall remain in full force and effect. It was further adjudged that plaintiffs take nothing against the irrigation district.

The appellant district appeals from the judgment rendered against it. The plaintiffs appeal from the judgment rendered against them and in favor of the irrigation district.

It was the basic theory of plaintiffs that the defendant districts in charge of public use and possessed with the power of eminent domain have taken property of plaintiffs for such public use without paying compensation therefor and that plaintiffs were, under article I, section 14, of the California Constitution, entitled to recover the damages they had suffered. While not denying that it has gone upon plaintiffs' land and has excavated the existing channel of North Slough therein, or that it is sending a large volume of water across the land, using the excavated channel as the conduit therefor, or that the preexisting condition of those lands with respect to the water flowing in said channel has been materially altered, and while not denying that it intends to continue such acts, the appellant district, nevertheless, for various reasons, insists that it has the right to do what it has done and is doing. It asserts that it is not liable to plaintiffs under said article and section of the Constitution because it has in fact neither taken nor damaged the private property of plaintiffs, or if there has been such a taking or damaging, that it resulted wholly from the lawful exercise of the police power; that it has done no more to or upon the land of plaintiffs than to inflict such injury as a private landowner down the stream below plaintiffs' land would have the right to inflict. In addition, appellant district claims the trial court committed reversible errors as follows: (1) failing to find that plaintiffs' cause of action, if any, was barred by the statute of limitations and by laches; (2) that if not liable to plaintiffs as upon a basis of taking and damaging their property without compensation, the trial court could not assess liability upon it on any principle of unjust enrichment; (3) that the court erred in assessing damages without a finding on benefits which plaintiffs may have received by the flowing of water through their land and without a finding that plaintiffs had suffered damages therefrom, appellant district asserting that neither the one finding nor the other could be supported in the record had the same been made and that, therefore, plaintiffs made out no cause against it; (4) that the trial court erred in awarding severance damages to plaintiffs and also in rejecting evidence of special offsetting benefits if severance damages were to be awarded; (5) finally, it asserts in the field of reversible error the trial court applied the wrong measure of damages.

[1] Article I, section 14, of the Constitution reads in part: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * *." Whenever private property has been taken or damaged for public use without compensation this section of the Constitution, which has been held to be self-executing, affords a basis for an action by the injured party to recover in a suit, often called a suit in inverse condemnation, the just compensation which ought to have been paid before the taking or damaging occurred. Smith v. City of Los Angeles, 66 Cal.App.2d 562, 573, 153 P.2d 69; Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 P. 899.

[2–4] The findings made by the trial court graphically picture the situation existing when the irrigation district, with the leave and license of plaintiffs, in 1934 excavated the upper reaches of the channel of North Slough from the point where it branched off the Calaveras River to and through plaintiffs' land. For more than 30 years that part of the channel of North Slough, while formerly carrying the greater burden of the water of the Calaveras River had almost completely ceased to receive any water therefrom. The trial court found that through that long period of time the only waters entering North Slough from the Calaveras River were occasional freshet waters when the river was at crest. This occurred an average of four times a year for a single day at a time. The mouth of the slough had been almost completely sealed off from the river by the deposit of silt and soil washed into the channel by the river. The head of the slough was nearly ten feet above the level of the river which from that point downstream was known as Mormon Slough. To be sure, the court found that notwithstanding this altered condition North Slough was a natural watercourse. Our attention is repeatedly directed to this finding by the appellant district, and upon that finding it lays great stress. The finding is of little moment in this case and its significance rests entirely in the detailed findings as to the condition of the channel and as to the paucity of stream flow entering the same from the river. Of course it is a watercourse and the complete sealing of its mouth would not destroy its nature as a watercourse since it would still serve to drain surface waters and other accumulating ground waters, and the land through which it passed would be burdened by that servitude. Haun v. De Vaurs, 97 Cal.App.2d 841, 843, 218 P.2d 996; see also Water Code, § 1201; Cederburg v. Dutra, 3 Cal.App. 572, 575, 86 P. 838, and Smith v. City of Los Angeles, supra, 66 Cal.App.2d at pages 578–579, 153 P.2d 69. But the burden of service owed by land through which there is a natural watercourse is largely determined, not by the fact that it is a natural watercourse, but by the factual conditions which measure the nature and the extent of the servitude. The trial court found that by slow and natural processes North Slough had been so filled with detritus that it had been for about 30 years all but completely sealed off from the parent river; that only occasionally would water flow from the river therein and then for negligible periods of time; that as this condition progressed, plaintiffs and others above and below them upon the stream had adapted their farming operations to the changing condition of the stream and had for years passed freely over it at most points for most of the year, including all of that part of the year devoted to farming activities; that the ordinary farming operations encompassed the constant and free use of the dry channel as a part of integrated farming operations on all of plaintiffs' land. It is these findings which measure and fix the servitude of plaintiffs' land to the natural watercourse and not the mere fact that it still constituted a natural watercourse. When, therefore, the irrigation district in 1934, by leave and license of plaintiffs and not under claim of a right to do so, entered upon plaintiffs' land and made in the channel of North Slough the extensive excavations which the court found had been necessary to the utilization of the channel for the district's purpose, it did that which it could not rightfully have done except in one of two ways—either by condemning the necessary rights through plaintiffs' land along the channel or by exercising such rights under the leave and license of plaintiffs.

[5] The irrigation district elected to take nothing from plaintiffs save in accordance with the contract between them. The district obtained, therefore, nothing more than a right to go upon the land, to make necessary excavations in the channel, and to flow water through plaintiffs' land so long as it fulfilled the conditions under which the right to do these things was given it by the plaintiffs. The findings of the court show fully the conditions under which these continuing rights could be enjoyed. For so long as the rights were used the irrigation district was bound to maintain bridges across the channel in an agreed number with the evident purpose that such bridges would serve as a substitute for the dry channel crossings theretofore used by plaintiffs. As the court found, these limitations of the rights being exercised by the irrigation district were understood and observed by the district until after two years, the district abandoned its project of using the channel as a conduit for water from the river and, coincidentally with that abandonment, discontinued likewise the maintenance of the bridges. The trial court found that in so doing the district was acting within the fair meaning of its contract with plaintiffs, and this finding is borne out by the court's finding as to the terms of that contract. Upon that election, therefore, the irrigation district withdrew from the channel, and the natural processes which had for so long operated to seal the channel off from the river again resumed their way with the result that in the 14 years intervening between the time the irrigation district left the channel and the time when appellant district assumed its present control, the channel, including that part which ran through plaintiffs' land, again filled up. Plaintiffs resumed their previous use of the channel, crossing back and forth over the same freely in the economic operation of their farm. The irrigation district has never resumed any control over the channel nor attempted to do so. It did purport to lease to the appellant district the head gate which it had constructed in the channel east of plaintiffs' land, but even in that it was careful to protect itself from any claim that it was itself making any use of the channel and thereby bringing down upon itself the liability to maintain plaintiffs' bridges, which structures by that time were all but unusable. We think, therefore, that for all practical purposes North Slough had returned to the condition that existed before the irrigation district, with plaintiffs' leave and license had entered thereon, and that the burden of servitude imposed upon plaintiffs' land by the presence of the channel,

if it had ever changed, had reverted to the condition existing before the entry of the irrigation district. Therefore, when the appellant district, without leave or license, entered the channel, excavated it from its mouth down to and through the land of plaintiffs and claimed and exercised the right to flow through the land great quantities of water thus artificially introduced from the river, and exercised over the channel such secondary easements of control as were necessary to continue the use of the channel as a conduit, it did so wholly without right. These things it could not do, as the trial court found, without injuring, damaging and interfering with the very ownership, possession and use of plaintiffs' land. It is still exercising those rights and insists that it will continue to do so and, as the trial court found, is devoting the rights it has thus taken to a public use. We, therefore, have all the elements of a taking and damaging of private property for a public use without compensation paid. Upon the findings of the court, therefore, the appellant district has taken the property of plaintiffs for a public use without paying compensation therefor, and unless there be other defenses which will shield the district from liability the court upon these findings was required to fix and to award to respondents damages adequate to compensate for their injuries.

[6] The appellant district contends in support of its appeal herein that all that it did was done in the exercise of the police power. The contention cannot be sustained. The same argument was made in Smith v. City of Los Angeles, supra, 66 Cal.App.2d at page 576, 153 P.2d 69, where the claim was that dikes constructed by defendants which diverted the flow of a natural watercourse over onto respondents' lands to their damages had been constructed for flood control purposes under the police power and that any damage resulting was damnum absque injuria. Referring to the extended consideration of the question in Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, and in Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505, the court held that the contention was wholly without merit as there was no basis for the application of the police power doctrine to the factual situation shown there and in the cited cases. We make the same observation with respect to the case before us.

> "Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.
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> "* * * it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking or damaging of private property for a public use without compensation." Rose v. State of California, supra, 19 Cal.2d at page 730, 123 P.2d at page 515.

Here the appellant district has gone upon the land of plaintiffs, has exercised and is still exercising sovereignty over those lands, has used them and is still using them in a way which withdraws them to a large extent from the use and occupation of plaintiffs and claims that the rights it has seized are permanently held by it because of its devotion of those rights to a public use. This conduct bears not the slightest similarity to the proper exercise of the police power.

[7] In view of the nature of the acts of the appellant district, the applicable statute of limitations is that found in the five-year limitation expressed in the Code of Civil Procedure § 318. In 18 California Jurisprudence 2d 100 it is said that though in

some cases it has been held the three-year limitation prescribed by section 338, subdivision 2, has been applied in inverse condemnation actions, nevertheless, there are cases "which distinguish between a mere trespass action and an action for damages because of the taking or damaging of private property under the power of eminent domain, and on this basis consider the 5-year period to be applicable." Martin v. Western States Gas & Electric Co., 8 Cal. App.2d 226, 47 P.2d 522; Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 98 P.2d 239. In Martin v. Western States Gas & Elec. Co., supra, which was an action to obtain an injunction in damages for the taking of water from a stream for public use in violation of plaintiff's riparian rights, the court said at page 230 of 8 Cal. App.2d, at page 524 of 47 P.2d:

> "We are of the opinion the court erred in holding that the plaintiff's damages for the appropriation of the increased quantity of water from the American river to the detriment of his riparian right thereto, was barred in three years thereafter under the provisions of subdivision 2 of section 338 of the Code of Civil Procedure. It is the established law of this state that the riparian rights of an owner of real property to the use and benefit thereof are an inherent part of the land, and the appropriation of such water is therefore a detriment to the real property as distinguished from a mere trespass. [Citing cases.] * * *
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> "It follows that the defendants' appropriation of the plaintiff's riparian right to water from the American river adjacent to his Riverton property constituted a taking and damaging of the real property contrary to the provisions of article 1, § 14, of the Constitution of California, and the statutory limitation of time within which the owner thereof may recover damages therefor is not barred in three years, but the right of action for damages, under the circumstances of this case, does not expire short of the five years necessary for the defendants to have acquired title to the water by adverse possession. It may not be said the defendants' appropriation of the increased quantity of water was a mere trespass on the plaintiff's interest in the land."

The application of the foregoing rules to the situation presented here is obvious. This was no mere trespass. It was a taking in perpetuity. The action having been begun within three years and seven months after the commencement of the adverse use, it was brought in time and was not barred by the statute of limitations.

[8] Appellant district contends that the trial court committed reversible error in awarding plaintiffs any relief in view of what they assert to have been plaintiffs' laches. The contention cannot be sustained. The trial court found that there had been no laches on the part of plaintiffs and this finding is supported by the evidence. Apparently plaintiffs, although advisedly maintaining at all times that what appellant district was doing and claiming the right to do to and through their lands was wrongful, were yet willing, in the exercise of good neighborliness, to grant leave or license therefor to the district upon the same conditions that such leave or license had been granted to the irrigation district. They promptly informed the district when it began its unlawful activities that it could not use the channel unless it complied with these conditions; that is, that it build and maintain substitute bridge crossings for plaintiffs' use and that it enter into a written agreement to maintain them. The appellant district claims that in reliance upon inactivity of plaintiffs, it entered into its contractual obligations with the irrigation district, constructed the weir across Mormon Slough in order to facilitate the pouring of the river waters through the north channel, arranged for the use of the City of Stockton's Hogan Dam for storage purposes and did other acts and things, all with the purpose of using North Slough as a conduit through which to deliver river water to lands along North Slough. But the proof of these activities did no more than to create a conflict on the subject of laches with the proof made by plaintiffs of their con-

sistent efforts to stop the contemplated seizure of their land by the district. The finding of the trial court that by what was done on both sides the district's defense of laches was not made out must stand on this appeal.

[9] Appellant district contends that the trial court erred in its rulings upon proof of damage and in the measure of damages and in awarding any damages to plaintiffs. Perhaps it could be said that some things said during the trial about the measure of damages and the mode of ascertaining the same might have been said with greater precision, but it is apparent, nevertheless, that in substance and to all practical ends the award of damages made by the trial court is supported by the law and the evidence. Appellant district has wrongfully taken the rights with respect to and over plaintiffs' property which we have heretofore discussed and described. The physical effect of this was to cut the plaintiffs' land in two and it appears that plaintiffs' efforts to prove the damages thus inflicted upon them was directed and confined to proving the amount by which the theretofore existing value of their holdings had been reduced by what the district had done and was doing and would continue to do in the future. By what it had done and by the dedication of the rights it had taken to public use and its active exercise of those rights in that use, the district had taken and now owned such rights in perpetuity. By reason of the law of its creation, and so long as the public ought to be so served, it was required to continue the exercise of those rights and thereby to continue the delivery of water from the river to the lands along North Slough. Having seized the rights and set up the use, it needed no license, leave or conveyance from plaintiffs to the perfection of its ownership of those rights. Just compensation it was obliged now to pay. There was testimony, and as to this there was little if any conflict, that by what it had taken the district had diminished the value of plaintiffs' property in the amount of $77,000 and it was this sum that the trial court awarded in the judgment against the district. It was not until after the entry of that judgment that appellant district sought leave on motion for new trial to introduce testimony of expert land valuers contradicting the testimony of plaintiffs' expert witnesses. The trial court refused to reopen the case to receive such evidence, and it was acting within the limits of its discretion in so doing. Appellant district claimed that it had not pictured the action as being one in inverse condemnation and as, therefore, requiring proof of damages usual in such actions. The trial court's holding against this contention is supported by those parts of the record which show that the plaintiffs at least had openly tried their case upon the theory that it was an action in inverse condemnation.

[10, 11] We find no error in the method adopted to determine damages. No proof was made of the value of the rights and easements taken, but of this omission appellant district cannot complain. The proof was confined to damage to the property not taken by reason of its severance from the part taken and the construction of the improvement. Code Civ.Proc. §§ 1248–1252. It was permissible to prove this element of damage by showing market value before and after, as was done. People v. Ricciardi, 23 Cal.2d 390, 401, 144 P.2d 799.

[12, 13] There was no error in giving no consideration to benefits from construction of the improvements. Code Civ.Proc. §§ 1248–1253. The benefits referred to in the code are special benefits as contrasted to general benefits common to the community. Whether benefits are special or general in a given case is often a perplexing question. We think the trial court was here justified in refusing to offset benefits. "* * * general benefits consist in an increase in the value of land, common to the community generally, and resulting from advantages which will accrue to the community from the improvement. Special benefits, on the other hand, are such as result from the mere construction of the improvement, and are peculiar to the land in question." Los Angeles County v. Marblehead Land Co., 95 Cal.App. 602, 614–615, 273 P. 131, 137. Here there was no special benefit peculiar to plaintiffs' land. At the

time of trial there were 119 pumps within appellant district using water out of the various channels controlled by the district, and 61 of these were in North Slough. Also, for the service of water through that channel, a charge could be made upon all lands receiving water. If that were done and if plaintiffs were presently charged with the full value of the benefit, the result would be a double charge. This cannot be done. Oro Loma Sanitary District v. Valley, 86 Cal.App.2d 875, 195 P.2d 913. See also Prudential Ins. Co. v. Central Nebraska Public Power & Irrigation Dist., 139 Neb. 114, 296 N.W. 752, 145 A.L.R. 1.

Appellant district makes no other attacks on the judgment either as to form or substance.

[14] Plaintiffs have appealed from that part of the judgment which decrees that they take nothing from the irrigation district. The appeal is without merit. Plaintiffs contend the district, by leasing its head gates in North Slough to the irrigation distict so placed itself in privity therewith as to make itself equally liable. But the irrigation district has taken nothing from the plaintiffs. And it was not obliged to anticipate the irrigation district would put the leased head gates to wrongful use; it could assume the lessee would obey the law.

The judgment is affirmed.

SCHOTTKY, J., concurs.

PEEK, Justice.

I dissent. I cannot agree with that portion of the opinion which holds that although admitted by the parties, and as the trial court found, North Slough is a natural watercourse, nevertheless "the burden of service owed by land through which there is a natural watercourse is largely determined, not by the fact that it is a natural watercourse, but by the factual conditions which measure the nature and the extent of the servitude." The facts and conditions, it is stated, which so measure the servitude in the present case, are as shown by the findings of the trial court that since 1936 when the irrigation district abandoned its project, North Slough, by slow and natural processes, has been so built up by debris as to be all but completely sealed off from the parent river; that water flowed in the slough only for negligible periods and only when the river was at flood stage; that respondents had adapted their farming operations to this changed condition in that they had been able to use the dry channel for the passage of farm machinery and livestock to the extent that the channel had become a part of the integrated farming operations of their land which consisted of three parcels purchased in 1926, 1931 and 1935 respectively; that the acts of defendants in entering upon plaintiffs' land, removing the debris at the mouth of the channel, leveling it and diverting water therein were wholly without right and had the effect of severing plaintiffs' land into two parcels, and hence the trial court was required to award adequate damages to plaintiffs for their injuries.

At the outset the conclusion of the majority is met with the basic finding that North Slough is a natural watercourse. It did not lose its characteristics as such merely because water flowed therein only "'"infrequently in times of storm * * *." * * * It is sufficient if, during some seasons, water does not in fact flow in the stream bed.'" Mogle v. Moore, 16 Cal.2d 1, 104 P.2d 785, 787. And being a natural watercourse, defendants could properly use it as a conduit for conducting foreign waters, Water Code, § 7075; City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 142 P.2d 289; Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 352, 90 P.2d 58, and augment its flow not to exceed the capacity of its channel. San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200.

But, say the majority, the factual conditions found by the trial court "required" it to fix and award plaintiffs adequate damages for their injuries. But what were plaintiffs' injuries? The evidence, and it is not contended otherwise, cnly shows a use by the defendants of a natural watercourse as a conduit for conducting irrigation waters which obviously augmented the flow during summer months, but did not exceed its capacity. There is absolutely no evidence of direct injury to plaintiffs' land such as flooding or erosion by reason of defendants' use of the channel; hence the only damage which could have been suffered by plaintiffs was, and the court so found, that their lands were severed into two parcels thereby precluding them from using the channel for the free passage of their employees, their farm equipment and their livestock from the north side where extensive farm buildings were located to the south side of North Slough.

It would appear to me that the question so posed has been adequately answered in a series of four cases recently decided by this court.

The first was Fell v. M. & T. Inc., 73 Cal.App.2d 692, 166 P.2d 642, 643. In that case as in the present, the stream was dry in summer but wet in winter. Because of defendants' draining of irrigation water therein during the summer months, plaintiffs' lands were flooded, foul growth was stimulated and it was impossible for defendants to move farm machinery and livestock across the stream bed as before. The trial court granted plaintiffs' injunction as prayed and perpetually enjoined defendants from allowing any irrigation waters to flow in said stream. Upon appeal the sole argument in support of the judgment was that since the watercourse had formerly been dry throughout the summer season, any water which would not flow therein during that time of year was foreign to its natural flow; hence it constituted damage per se to the defendants in their farming operations. In reversing the order of the trial court granting the injunctive relief sought, we said:

> "The California Constitution, Article XIV, Section 3, declares that the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent possible. Compare, Water Code sections 100–107. The mandates of this section 'apply to the use of all water, under whatever right the use may be enjoyed.' Peabody v. City of Vallejo, 2 Cal.2d 351, 367, 40 P.2d 486, 491. Since foreign waters may be produced for beneficial use (Stevens v. Oakdale Irr. Dist., 13 Cal.2d 343, 352, 90 P.2d 58), and a natural channel may be used as a conduit or drain for the flow of such waters (City of Los Angeles v. City of Glendale, 23 Cal.2d 68, 76, 77, 142 P.2d 289; Stevens v. Oakdale Irr. Dist., supra), and since the use of such foreign waters, as long as it does not interfere with the rights of another, is of no concern to such other (Bloss v. Rahilly, 16 Cal.2d 70, at pages 78–79, 104 P.2d 1049), it follows that a noninjurious and reasonable use by defendants of the waters imported upon their lands and allowed to drain into Little Chico Creek is within the protection of the Constitution and may not be enjoined."

In their petition for hearing before the Supreme Court, plaintiffs stated, "If this is to be the law of the State of California, the decision should be affirmed by the Supreme Court, for it is a revolutionary application of the constitutional provisions * * *." This is true, they said, because any interference with the rights of another may be enjoined, and to allow waters which would not naturally flow in the stream was a positive interference with such rights. However, the petition for hearing was denied.

Shortly thereafter we were presented with a second case, Cheesman v. Odermott, 113 Cal.App.2d 26, 247 P.2d 594. There again, as in the instant case, plaintiffs, lower owners, sought to enjoin defendants, upper owners, from discharging irrigation water into a natural watercourse which transversed plaintiffs' property. The evidence showed that plaintiffs, in preparing their land for irrigation and farming, had destroyed the natural watercourse through their land. The court affirmed the trial courts' denial of the injunctive relief sought by plaintiffs, and in preface to a restatement of the above quotation from the Fell case said, "Whatever the rule may be in other jurisdictions, we think that in California it has been modified to fit the necessities of a people who must depend greatly on irrigation." 113 Cal.App.2d at page 28, 247 P.2d at page 595. We further held that since there was no evidence that the use made of the watercourse there in question was anything more than as a conduit to conduct water, that such use, although making it impossible for plaintiffs to farm their land as previously, and as they desired to continue, the acts of defendants in so discharging irrigation water into a natural watercourse could not be enjoined. Again a petition for hearing in the Supreme Court was denied.

The third case was Provident Irrigation District v. Cecil, 126 Cal.App.2d 13, 271 P.2d 157, 159. There the defendants constructed a dike cutting off the flow of water through channels and drains on their land through which irrigation water was run by the plaintiff irrigation district, and thereafter leveled their land, filling such drains. In affirming the judgment of the trial court prohibiting such acts by the defendants, we said that since the channels were natural drains, plaintiffs "had the right to have them maintained in their natural state to carry off waters naturally flowing through them and also to discharge into them such reasonable quantities of excess waters as could be discharged and borne away without injury to defendants' lands." Citing Fell v. M. & T. Inc., supra. No petition for hearing was filed in the Supreme Court.

In the fourth case of this series, Phillips v. Burke, 133 Cal.App.2d 700, 284 P.2d 809, 812, the defendants as in the Cheesman and Provident cases, in leveling their land for irrigation and farming, had obliterated the natural watercourses through their land. It was defendants' testimony that because of the irrigation run-off during the summer months, it was impossible to farm the land as before and in effect such waters had so divided the land that they were compelled to farm it as though it were three separate parcels. Upon appeal it was contended that winter flow was no measure of reasonable and noninjurious use and that their farming operations would "* * * be seriously impaired by the maintenance of ditches across their lands the year around". In affirming the judgment of the trial court on the particular phase of that case which is the same as the question at issue in the instant case, this court said:

> "The answer to this would seem to lie in the plain meaning and logic of the Fell and Cheesman decisions. The right to discharge surplus irrigation waters would of necessity be used primarily during the summer months, there being little if any need to irrigate during the winter season. If the right exists, it must also be for use during the summer months. Thus to argue, as defendants do, that for the use to be reasonable and noninjurious it must be limited to use outside of the summer irrigating season, is but to wholly deny the right."

Although, as it appears to me, the identical question was involved in each of the cited cases, we found in favor of the party using the natural channel across the lower owner's land for the flowage of irrigation waters, even to the extent of dividing it into three parcels as in the Phillips case, and even though it was contended in the Phillips case that "the Fell and Cheesman decisions are not sound." But again in the Phillips case, as on each previous occasion, the Supreme Court denied a hearing.

Hence it would seem to follow (1) that if, under the constitutional provision, the applicable code section and the cases cited and discussed, a natural watercourse may be used as a conduit to conduct irrigation waters, and (2) if, as our courts have held, a natural watercourse retains its characteristics whether water flows therein continually or sporadically, and (3) if the flowage of water in a watercourse during the dry season, in the absence of a showing of unreasonable or injurious use, cannot be enjoined even though it divides another's land making it impossible for him to freely cross what was formerly a dry bed of the channel in carrying on his farming activities, then the judgment of the trial court herein, which is directly contrary thereto, should be reversed.

Rehearing denied; PEEK, J., dissenting.

Inga A. BRANDELIUS and Pierre Brandelius, Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, et al., Defendants and Respondents.*

Civ. 16525.

District Court of Appeal, First District, Division 2, California.

April 26, 1956.

Rehearing Denied May 25, 1956.

Hearing Granted June 20, 1956.

Action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction. The Superior Court, City and County of San Francisco, Sherrill Halbert, J., following verdict for plaintiffs, granted new trial, and plaintiffs appealed. The District Court of Appeal held that evidence was sufficient to warrant giving of an instruction on doctrine of last clear chance.

Order reversed.

1. Carriers ⚿320(2)

When cable car passenger cleared car from which he alighted, carrier-passenger relations were not terminated as matter of law.

2. Carriers ⚿247(4)

Ordinarily, carrier-passenger relationship ends when cable car passenger has terminated his trip by alighting safely from car which transported him.

3. Carriers ⚿303(1)

Duty of utmost care in operation of cable cars is owed by municipality, as operator of cable cars, to passengers which have alighted from cable car in place designed therefor so long they have not yet reached place safe from cable car's operation and are in place which they can be expected to use in getting safely away from car which transported them.

4. Carriers ⚿320(25)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, question whether man was hit while occupying place which he could be expected to use in getting away to safety from car from which he had alighted was for jury.

5. Trial ⚿252(7)

Only where there is not any substantial evidence, conflicting or otherwise, to justify application of the doctrine of last clear chance should court keep it from jury, and, only in such case, is giving of an instruction on last clear chance error.

6. Negligence ⚿138(4)

Giving of instruction on doctrine of last clear chance is proper where there is evidence that plaintiff had been negligent and, as result thereof, was in position of danger from which he could not escape by exercise of ordinary care because of physical impossibility of escape or total unawareness of his danger and that defendant knew plaintiff was in such situation and knew, or in exercise of ordinary care should have known, that plaintiff could not escape and had last clear chance to avoid accident by exercising ordinary care but failed to exercise such care with result that plaintiff was injured.

7. Carriers ⚿347(13)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars was fatally injured when struck by another car coming from the opposite direction, question whether man was negligent and, as result thereof, in position of danger from which he could not escape because he was totally unaware of it until too late to escape was for jury.

8. Carriers ⚿347(13)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, question whether presumption that man was exercising due care had been overcome by the evidence was for jury.

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* Opinion vacated 306 P.2d 432.

9. Carriers ⚿320(28)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, question whether defendant's negligence could be found in the running of the northbound car past stopped car when passengers had to alight between tracks and distance between passing cars was only 1′ 10″ was for jury.

10. Carriers ⚿320(25)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, questions whether gripman of other car was aware of man's peculiar situation as soon as gripman saw man alight between the tracks and whether gripman should have known that the man was unaware of the danger when he turned his back to gripman were for jury.

11. Carriers ⚿348(14)

In action against municipality and others for wrongful death of man who, after alighting from one of municipality's cable cars, was fatally injured when struck by another car coming from the opposite direction, evidence was sufficient to warrant giving of instruction on doctrine of last clear chance.

12. Negligence ⚿83.7, 83.8

Doctrine of last clear chance requires defendant to avail himself of a last clear chance to avoid the accident only if the opportunity is present when defendant realizes plaintiff's dangerous position and also realizes, or ought to realize, plaintiff's probable inability to escape therefrom because of physical impossibility or plaintiff's unawareness of his danger.

13. Negligence ⚿141(9)
Trial ⚿296(4)

In wrongful death action, giving of that part of last clear chance instruction which stated, as one of the prerequisites to invocation of the doctrine, that, after defendant had acquired actual knowledge of perilous situation of deceased, he would have to have had clear opportunity to avoid accident and ability to do so by exercising ordinary care, was improper, but such error was not prejudicial in view of other instructions given. West's Ann.Const. art. 6, § 4½.

14. Trial ⚿295(1)

In reviewing instructions, reviewing court must read the charge as a whole and give the instructions a reasonable construction from standpoint of their probable effect on the jury.

15. Appeal and Error ⚿1064(1)

Prejudicial error does not necessarily result from giving of an instruction which, when subjected to meticulous analysis, might be given a possible construction which makes instruction subject to criticism.

◆

Hoberg & Finger, San Francisco, for appellants.

Dion R. Holm, City Atty., City & County of San Francisco, Jerome Cohen, Deputy City Atty., San Francisco, for respondents.

PER CURIAM.

This is an appeal from an order granting a new trial after verdict for plaintiffs in an action for the wrongful death of a man who, after alighting from a cable car of defendant City and County, was struck by another such car coming from the opposite direction. The order specifies that the new trial was granted on the sole ground that the jury was not properly instructed on "the duties of a street railway toward a passenger who has alighted from a car and moved away from that car in a direction of his own choosing." In support of their motion respondents had strongly urged error in instructing on the doctrine of last clear chance when this doctrine was not applicable and this standpoint also is maintained in their brief on appeal. At the oral argument they for the first time urged error in the formulation of the instruction on last clear chance as justifying the new trial.

I.

The extensive instructions given as to the care required by the carrier with respect to an alighting passenger were proposed by appellants and given partly as proposed, partly as modified by the court. The more crucial ones are the following:

> "The responsibility imposed by law upon a carrier of passengers for hire, such as the operation of a cable railway, includes the duty to provide a reasonably safe place where the passengers may board or alight from the cable cars.
>
> "If you find from the evidence that the deceased was exercising ordinary care for his own safety and that he had been discharged as a passenger at and was occupying a place designed by defendant City and County as a regular stopping place for the discharge of passengers, then the defendant City and County owed to the deceased the duty to exercise the highest degree of care to avoid injuring him.
>
> "A place to discharge passengers, as used in these instructions, refers to any place at which it is the practice of the carrier to stop for the purpose of discharging passengers. This includes such places immediately adjacent to the track which must be used or reasonably may be expected to be used, by persons being discharged from the cable cars.
>
> "The relationship of carrier and passenger, and the obligation to exercise the utmost care and diligence to provide safe carriage of passengers, continues until such time as an alighting passenger has reasonable opportunity to reach a place outside of the immediate sphere of activity of the carrier which might reasonably constitute an active hazard to the passenger."

[1] Appellants urge that there is no error in said instructions and that they are supported by the California cases. Respondents in defending the order do not contend that any of the instructions stated is not supported by the authority adduced for it, but urges error on the general ground that "the carrier-passenger relationship had terminated as a matter of law when deceased alighted from the cable car and cleared the car from which he alighted." We have concluded that the rule advocated by respondents if applied to the present case would too rigidly restrict the carrier-passenger relation and the duty of utmost care which attaches to it, that the instructions given do not erroneously extend respondents' burden of utmost care and that the evidence does not make them inapplicable as showing termination of the carrier-passenger relation as a matter of law.

[2, 3] It is true that ordinarily the carrier-passenger relation ends when a streetcar passenger has terminated his trip by alighting safely from the car which transported him, Choquette v. Key System Transit Co., 118 Cal.App. 643, 653, 5 P.2d 921, but said rule is subject to qualifications. In Dayton v. Yellow Cab Co., 85 Cal.App.2d 740, 745, 193 P.2d 959, 962, this court stated that the rule of utmost care and diligence set forth in Civil Code section 2100 applies "until the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger." In Boa v. San Francisco-Oakland Terminal Rys., 182 Cal. 93, 100–101, 187 P. 2, 4, the Supreme Court expresses its approval of the principles "that responsibility continues until the passenger has had a reasonable opportunity of getting away from the car without injury"; that it is for the jury to decide "whether or not the defendant allowed plaintiff a reasonable opportunity to leave its car in safety and thus to pass beyond its care" and that these rules apply to streetcar passengers specifically in case of accidents "caused by the negligent use by the railway company of its own instrumentalities." In Lagomarsino v. Market Street R. Co., 69 Cal.App.2d 388, 158 P.2d 982, 986, it was held that the company owed the highest degree of care to prospective passengers waiting to board a loading car in a customary loading place to protect them from injury by other cars operated

by the company passing such loading place or station, and instructions were upheld to the effect that said duty extended to "'such places which must be used, or reasonably may be expected to be used, by persons intending to become passengers and while waiting to board vehicles of the carrier.'" We hold that the same duty of utmost care in the operation of its streetcars to prevent injury is owed by the City and County to passengers which have alighted from a streetcar in a place designed therefor so long as they have not yet reached a place safe from the city's streetcar operation and are in a place which they can be expected to use in getting safely away from the car that transported them. The instructions with which this matter was submitted to the jury, stated this principle correctly and at any rate not too favorably for appellants. There remains in this respect the question whether the evidence was such that instruction on this principle was justified.

The accident occurred in the intersection of California and Powell Streets in San Francisco. On Powell the city runs a cable car northerly and southerly, on California one westerly and easterly. At the southwest corner of the intersection are the Stanford Court Apartments, where decedent was employed. The accident happened on May 6, 1952 at about 8:05 or 8:06 in the morning, the time at which decedent was accustomed to go to work by means of the southbound Powell cable car. That cable car makes a stop in the southwest part of the intersection with its front in the southern crosswalk across Powell Street. The car has an open front part with two benches back to back along the longitudinal axis of the car. The passengers on the left hand bench (looking to the front) have no access to any other part of the car and must alight to the left between the southbound and northbound tracks. According to the scale map in evidence the distance between these tracks is 5′ 10″; the tracks in each direction are 4′ wide. According to a scale model of a cable car in evidence such car is 8′ wide, with a wheel distance of 4′ and an overhang in part 2′ wide at each side. The free space between two passing cable cars is therefore 1′ 10″.

The traffic of cable cars in the intersection is controlled by the city from a control tower in its southeast corner. Nearing the intersection a northbound car ascends a hill from Pine to California. The northbound car automatically has a red light against it when reaching Pine. It is turned to green when the car is permitted to start up the hill. There was conflict in the evidence as to whether the green light was normally withheld only when a California cable car was crossing the intersection or also when a southbound Powell cable car was discharging passengers in the intersection.

Just before the accident the witness Reinhardt, a mechanical engineer, was going to his work walking east along the north side of California. When he came to the intersection he waited for a southbound Powell cable car to cross his path. It stopped at the stopping place in the southwest part of the intersection mentioned before. As it went across the intersection Reinhardt crossed the southbound tracks in the northern pedestrian crosswalk across Powell. When he was there on the more easterly of the southbound tracks he saw decedent walking north in his direction next to the stopped southbound car between the southbound and northbound tracks. The spot on the map where the witness placed decedent when he first saw him indicates that he was then six feet south of the rear end of the stopped car. Simultaneously the witness saw a northbound Powell cable car approaching with its front in the southern crosswalk across Powell. According to the map the distance between decedent and the front of the northbound car was then twenty feet. The witness remained in the same spot looking at what would happen because he saw that the man was in a precarious position. He saw that decedent took several steps toward him (northerly), then, when the cable car was bearing close upon him he turned around throwing up his hands facing the oncoming car, and, evidently after being hit, staggered back several steps and fell on the pavement his head pointing to the northwest corner of the intersection. It was stipulated that the death was caused by a head injury suffered as a result of the accident.

The police officer who investigated the accident found a puddle of blood on the most northerly westbound track on California, 21′ 2″ east of the west curbline of Powell Street. (This is between the northbound and southbound tracks on Powell, a little nearer to the southbound ones. The northernmost track on California was, according to the map in evidence, approximately seventeen feet north of the rear end of the stopped southbound cable car.) The investigating officer testified also that the gripman of the northbound car, the witness Mosley, told him that decedent "got off the left front of a southbound cable car and just stepped in front of the left front of this northbound cable car." We will revert to the conflicting evidence of the gripman Mosley later. The evidence stated presented a question of fact as to whether under the legal principles above developed the carrier-passenger relation and the carrier's duty of utmost care not to injure the passenger by the operation of the cable cars had terminated or not.

[4] Said evidence supports the conclusion that decedent had been sitting on the left front bench of the southbound cable car, that when that car stopped he alighted in the only possible way between the tracks and that because the space between passing cars was only 1′ 10″, said place was not safe for alighting or walking away if a car from the south should pass, certainly not if it should approach unnoticed. If the jury believed Mosley's above evidence that decedent was hit when he had just stepped off the southbound car they undoubtedly were justified in holding that the carrier-passenger relation had not yet terminated. But also if the jury believed the testimony of the distinterested witness Reinhardt, a question of fact in that respect would be presented. It would then appear that when decedent had alighted between the tracks, he walked north along the stopped cable car intending to go to the Stanford Court Apartments around its rear end, that he did not notice the northbound car until he was a few feet north of the rear end of the stopped car, where he was going to turn to the left, probably some 10 feet north from the place where Reinhardt first saw him, that he was hit there, that he staggered back some 9 or 10 feet more and that then his head hit the pavement 3 or 4 feet further north. It was then for the jury to decide whether decedent was hit in a place which he could be expected to use in getting away to safety from the car that had transported him. It was for them to say whether he, forced to alight between tracks to the east of the car he was riding, could be expected to go to his destination at the southwest corner of the intersection around the rear of the stopped car and to be between the tracks near the rear of said car. It cannot be said as a matter of law that decedent could only be expected immediately to cross the northbound tracks in westerly direction, the direction opposite to his destination, or to cross in front of the car from which he had alighted and which would soon start up again.

II.

[5, 6] The second question is the one regulating to the propriety of instruction on "last clear chance." To said doctrine the normal rule applies that only when there is not any substantial evidence, conflicting or otherwise which could justify the application of the doctrine the court should keep it from the jury and only in such a case is the giving of an instruction on last clear chance error. Hardin v. Key System Transit Lines, 134 Cal.App.2d 677, 684–685, 286 P.2d 373; Doran v. City and County of San Francisco, 44 Cal.2d 477, 487, 283 P.2d 1. It is a regularly stated rule that "An instruction stating the doctrine is proper when there is evidence showing: '(1) That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; (2) that defendant has knowledge that the plaintiff is in such a situation, and knows,

or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and (3) has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure.'" Daniels v. City and County of San Francisco, 40 Cal.2d 614, 619, 255 P.2d 785, 788; Doran v. City and County of San Francisco, 44 Cal.2d 477, 483, 283 P.2d 1; Peterson v. Burkhalter, 38 Cal.2d 107, 109-110, 237 P.2d 977; Girdner v. Union Oil Co., 216 Cal. 197, 202, 13 P.2d 915.

[7-9] There can be no doubt that on the basis of the evidence the jury could find that decedent was negligent and, as a result thereof, in a position of danger from which he could not escape because he was totally unaware of it until it was too late to escape. It could be held that decedent when stepping from the car should have looked out to the right and should then have seen the northbound car nearing from Pine Street. There was moreover evidence that on that car a gong had been rung until it came to the commencement of the southern crosswalk and that that gong was heard by another passenger of the stopped southbound car. Decedent's unawareness can be inferred from his action as described by the witness Reinhardt, supra, and also from the testimony of the defendant Mosley, who testified that all the time he saw decedent he was walking along with his back turned to Mosley and that he gave no indication that he knew the car was starting up behind him. Respondents' contention that because the law presumes that decedent was exercising ordinary care, it must be assumed that he was aware of the approaching car and its danger but nevertheless chose to walk in front of it is devoid of all merit. The jury could hold that the presumption of due care was overcome by the evidence stated. Neither is there any doubt that negligence of defendants could be found in their running of the northbound car past the stopped car when passengers had to alight between tracks and the distance between passing cars was only 1′ 10″. (The conductor of the northbound car Pucheu testified that he did not think there was enough room for anybody to be walking between passing cable cars.)

[10] For the same reason the jury could find that the gripman Mosley had knowledge of plaintiff's precarious situation and knew or in the exercise of ordinary care should know that decedent could not escape. In his deposition he declared that he saw decedent step off the car and to the investigating police officer that "he got off the left front of a southbound cable car." According to the testimony of Reinhardt, previously stated, Mosley's car was still in the crosswalk 20 feet from decedent when decedent was between the tracks with his back to Mosley's car 6 feet south of the rear of the stopped southbound car. The length of such a cable car, according to the scale model in evidence is 27 feet of which the open front part accounts for 12 feet, the back part for 15 feet. Therefore decedent had at that time gone some 10 to 20 feet between the tracks with his back to Mosley since the moment Mosley saw him step from the left front of the car. Considering the distance of only 1′ 10″ between the overhangs of the two cars and Pucheu's testimony that he thought the room between passing cable cars was insufficient for anybody to walk there, the jury could hold that Mosley, an experienced gripman, must have been aware of deceased's precarious situation as soon as he saw him alight between the tracks and that he should have known that deceased was unaware of his danger when he turned his back to him and walked north between the tracks. Respondent contends that it must be accepted that Mosley had no knowledge of the danger because he testified that he had often seen people get off the car and stand between cars in safety and that therefore he did not pay particular attention to the standing car. Evidently the jury need not have believed this testimony considering the evidence stated before and the fact that Mosley was an interested witness in whose testimony there were many conflicts. Moreover Mosley testified in another place: "When I saw him, yes, he was in the path of the left

front grab handle, too close to my track, going away from me."

[11] A somewhat more dubious point is whether defendants could be said to have had the last clear chance to avoid the accident by exercising ordinary care. In Doran v. City and County of San Francisco, 44 Cal.2d 477, 488, 283 P.2d 1, 7, it was stressed that "the doctrine excludes from its application any case in which plaintiff's state of helplessness, resulting from his own negligence, is created so nearly simultaneously with the happening of the accident that neither party may be fairly said to have thereafter a last clear chance to avoid the accident." In this case decedent's danger and his unawareness of it were not shown until he had alighted and turned his back to the oncoming car. After that he proceeded between 20 and 30 feet before he was struck. Assuming that a pedestrian goes with a speed of approximately 4 feet per second, that gave Mosley between 5 and 7½ seconds to avoid the accident from the moment he saw decedent alight and turn his back to him. We do not consider the period of 5 to 7½ seconds so "nearly simultaneous" as to necessarily exclude the application of the doctrine. In Wylie v. Vellis, 132 Cal.App.2d 854, 283 P.2d 327, this court recently held that 4 seconds was not such a short period, when the speed of the vehicles involved was not more than 10 miles an hour. See for the proposition that still shorter periods available to prevent accident need not exclude application of the doctrine Peterson v. Burkhalter, 38 Cal.2d 107, 112, 237 P.2d 977; Buck v. Hill, 121 Cal.App.2d 352, 358 et seq., 263 P.2d 643. Here the speed of the cable car before it reached the intersection was at most 9½ miles per hour, after the release of the cable in the intersection at most 6½ miles an hour. There were three braking devices. When the cable car was disengaged and going at the latter speed it could be stopped in 5 or 6 feet. The contention that Mosley had no clear chance to avoid the accident is based on his evidence that decedent stepped from the stopped car in front of his car at a distance of not more than 4 feet when he was engaged in or on the point of releasing the cable and that at the moment he is doing that he is in no position to use any of the braking devices. To avoid catching or fouling the cable of the California line the gripman of an oncoming Powell car must release its cable. A sign "let go" is painted in the southern crosswalk twenty-five feet south of the southernmost rail on California. Mosley testified that the release was made halfway between the "let go" sign and a somewhat more northerly protective bumper, which he first testified was 4 or 5 feet north of the sign, later that it was under a hatch nearer to the California track (probably some 10 feet south of the most southerly rail). However, this evidence is inconsistent with Mosley's testimony that decedent was struck near or on the eastbound California track, which accords with the testimony of Reinhardt and places the point of the accident 20 to 30 feet from the point where decedent alighted. If, as testified by Reinhardt, Mosley's car was still in the southern crosswalk 20 feet from decedent after decedent had gone 10 to 20 feet, the car must have been 35 to 70 feet further south when decedent alighted and turned his back to it. Mosley in his deposition testified that he could not see passengers getting off the unloading car until he reached the crosswalk but after experiments had shown that they were visible at least from halfway between Pine and California he so testified. He could have seen them at least from 135 feet from the intersection and testified that the last 100 feet he looked straight in front and that there was no traffic interrupting his view. Under such evidence it was for the jury to decide whether there was a clear chance to stop the cable car before the let go sign, or whether he could have stopped after releasing the cable in the more than 20 feet between the let go sign and the place where decedent was hit. Moreover the jury could also have found that he could have warned decedent by continuing the gong signal after the car had reached the crosswalk. Hence the giving of an instruction on last clear chance was no error.

III.

Finally respondent urged at the oral argument in this court that, even if instruction on the doctrine of last clear chance was proper in this case, the instruction given, BAJI 205, was erroneously formulated. Respondent relied on Moreno v. Los Angeles Transit Lines, Cal.App., 286 P.2d 923, decided after the order appealed from, in which case a reversal of a judgment for plaintiff in a negligence action was based on the ground among others that said instruction, BAJI 205, long a standard instruction and upheld in many cases, was erroneous. In the Moreno case the Supreme Court granted a hearing and the appeal was thereafter dismissed by stipulation of the parties. However, the reasoning of the district court in criticizing the instruction remains persuasive.

The instruction in question reads:

> "There has grown up in our law a certain reasoning process that we sometimes call to our aid in analyzing the facts of an accident case, and which is known as the doctrine of last clear chance. It is permissible to use the doctrine only after we first find, and you may not use it unless and until you first shall have found, that in the events leading up to the accident in question, both the deceased and defendants were negligent.
>
> "The doctrine of last clear chance may be invoked if, and only if, you find from the evidence that these six facts existed:
>
> "First: That deceased, by his own negligence, got himself into a position of danger.
>
> "Second: That thereupon, either it was physically impossible for him, through the exercise of ordinary care, to escape from the danger, or he was totally unaware of impending danger in his position.
>
> "Third: That the defendant had actual knowledge of the perilous situation of the deceased.
>
> "Fourth: That it appeared to the defendant, or would have appeared to him in the exercise of ordinary care, that deceased either was unaware of the danger impending in the situation or was unable to escape therefrom through the exercise of ordinary care.
>
> "Fifth: That after the defendant acquired actual knowledge of the perilous situation of the deceased, he had a clear opportunity to avoid the accident and could have done so by exercising ordinary care.
>
> "Sixth: That the defendant did not avail himself of that opportunity, but by negligent conduct proximately caused the accident.
>
> "If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the defense of contributory negligence, because under such conditions, the law holds the defendant liable for any injury suffered by the plaintiff and proximately resulting from the accident, despite the negligence of the plaintiff."

[12, 13] The court in the Moreno case found error in the formulation of "fifth", supra. The doctrine requires the defendant to avail himself of a last clear chance to avoid the accident only if the opportunity is present when defendant realizes plaintiff's dangerous position and also realizes or ought to realize his probable inability to escape therefrom because of physical impossibility or plaintiff's unawareness of his danger. Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 637, 255 P.2d 795; Palmer v. Tschudy, 191 Cal. 696, 700, 218 P. 36; Johnson v. Southwestern Engineering Co., 41 Cal.App.2d 623, 626, 107 P.2d 417; Restatement Torts § 480 comment b. Although the requirements as to defendant's realization of these two circumstances are clearly and correctly expressed in third and fourth respectively, when fifth states the time at which a clear chance must have been available it considers third only (knowledge of dangerous position), not fourth (actual or constructive knowledge of apparent unaware-

ness of danger or inability to escape). Literally construed the instruction would permit application of the doctrine of last clear chance, if defendant became aware of deceased's dangerous situation at a time at which he could avert the accident but at which he still could expect deceased to extricate himself, and defendant became thereafter aware of the impossibility of escape at a time at which he could not avoid the accident any more, a situation in which the doctrine evidently is not applicable. It cannot be said that "perilous situation" in fifth includes both the position of danger of deceased and his inability to escape or unawareness. "Perilous situation" in fifth must have the same meaning as the same expression in third. In third, where actual knowledge is required, perilous situation evidently relates to "position of danger" in first, whereas the requirement of actual or constructive knowledge of deceased's unawareness or inability to escape is separately stated in fourth. We therefore agree in so far with the Moreno opinion that we consider the formulation of fifth of the instruction BAJI 205 inaccurate. The court in that case points out correctly that in none of the cases which upheld said instruction the above defect had been urged or considered.

[14, 15] Another question is, however, whether said inaccuracy in the formulation, which for many years escaped the attention of the courts, should be considered to have had a prejudicial effect on the jury which requires the granting of a new trial. It must be noted in this respect that the order granting a new trial expressly states that it was granted on a different ground only, that at the time of said order no attention to the formulation of BAJI 205 had yet been called by the Moreno opinion and that this point had not been urged on or considered by the trial court. We must therefore decide the question of the probability of prejudicial effect without the benefit of the opinion of the trial court on this question. We are convinced that it is hardly conceivable that reasonable men should apply to the instruction BAJI 205 as a whole the literal construction stated above, from which the inaccuracy of the formulation is derived. Under fourth the instruction clearly requires for the applicability of the doctrine that the defendant realized or should have realized the apparent unawareness of danger or inability to escape of the victim. No reasonable man will consider the possibility that the law would attach significance to the realization of facts at a time at which no effective action can be based thereon any more. This is probably also the reason why the inaccuracy in the instruction remained so long unnoticed. "In reviewing instructions, the appellate court must read the charge as a whole and give the instructions a reasonable construction from the standpoint of their probable effect upon the jury." Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, 475; Megee v. Fasulis, 65 Cal.App.2d 94, 101, 150 P.2d 281. In Popejoy v. Hannon, 37 Cal.2d 159, 168, 231 P.2d 484, 490, it is said: "Prejudicial error does not necessarily result from the giving of an instruction which, subjected to meticulous analysis, might be given a 'possible construction' making it subject to 'criticism'. It is extremely doubtful that the jurors analyzed the instruction with such exactitude as counsel for the Hannons." See also Duff v. Schaefer Ambulance Service, Inc., 132 Cal.App.2d 655, 680, 283 P.2d 91; Mayfield v. Fidelity & Casualty Co., 16 Cal.App.2d 611, 629–630, 61 P.2d 83; Reuter v. Hill, 136 Cal.App. 67, 77, 28 P.2d 390. We have stated before that we think there is no probability whatever that the jury has taken the instruction BAJI 205 in the stated literal meaning, which, though theoretically possible, is evidently senseless. Under Article VI, § 4½ of the Constitution and the authorities cited above the theoretical inaccuracy in said instruction then does not require the granting of a new trial, although in future paragraph fifth of said instruction should better be given in a corrected form. It may also be noted, that at the end of the instruction "despite the negligence of the *plaintiff*" should not be used when, as in this case, the action is for wrongful death.

In the absence of any error which would justify the granting of a new trial the order granting defendants' motion for a new trial must be reversed.

Order reversed.

141 Cal.App.2d 135

Leopoldine VOSS et al., Plaintiffs-Respondents,

v.

John Raymond FRIEDGEN and Alvin T. Dickens et al., Defendants-Appellants.

Civ. 21595.

District Court of Appeal, Second District, Division 2, California.

April 25, 1956.

Actions for money paid in transactions which violated the Corporate Securities Law. The Superior Court of Los Angeles County, Newcomb Condee, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained finding that transaction was a sale of securities without permit, though in form of loan.

Affirmed.

1. Fraud 🔑49

Fraud may be proved under general allegation of negligent fraud.

2. Trial 🔑395(3)

Findings may be in general language of the complaint.

3. Appeal and Error 🔑931(3), 1010(1)

Where complaint contained only common counts but gravamen of each cause of action as shown by evidence was negligent fraud, it would be deemed on appeal that trial court impliedly found in accordance with evidence presented by prevailing party, and reviewing court must determine whether evidence supported implied findings which trial judge was presumed to have made upon basis of the evidence most favorable to respondents' cause.

4. Appeal and Error 🔑1010(1)

A claim of insufficiency of evidence requires appealing defendants to demonstrate that there is no substantial evidence to support the challenged findings.

5. Appeal and Error 🔑989

Appellate court's power begins and ends with determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings, and when two or more inferences can be reasonably deduced from the facts, reviewing court is without power to substitute its deductions for those of trial court.

6. Evidence 🔑588, 595

Trial judge was free to reject all or any part of testimony of any witness which did not ring true and to draw such reasonable inferences favorable to plaintiffs' case as he saw fit.

7. Appeal and Error 🔑995

Unless it clearly appear that upon no hypothesis whatever is there substantial evidence to support a finding of trier of fact, it cannot be set aside on appeal.

8. Licenses 🔑39.24

In action to recover money paid in transactions violating Corporate Securities Law, trial court was not bound to accept conclusion of plaintiffs expressed in their testimony referring to transactions as loans, or to refuse to look through form of the transaction to its substance. West's Ann.Corp.Code, § 25000 et seq.

9. Licenses 🔑39.24

Evidence authorized recovery of money paid in transactions which violated Corporate Securities Law, though transactions were in form of loans. West's Ann.Corp. Code, § 25000 et seq.

10. Limitation of Actions 🔑100(12)

Cause of action for recovery of money paid in transaction violative of Corporate

Securities Act accrued for purposes of limitations upon discovery of falsity of implied representation of existence of permit.

11. Trial ⚿395(3)

Findings should not be made in general language of complaint when it contains only common counts. West's Ann.Code Civ.Proc. § 426.

◆

Burke Mathes, Los Angeles, for appellants.

LeSage & Bowman, Pasadena and Ray M. Steele, Los Angeles, for respondents.

ASHBURN, Justice.

Plaintiffs Leopoldine Voss, Edna Fornier and Helen Voss Wolsky, recovered judgment against defendants John Raymond Friedgen, Olga Donato Lindenberg and Alvin T. Dickens for sums aggregating $4,950 (principal amount), being moneys paid to defendants in transactions held to be in violation of the Corporate Securities Law, Corporations Code, § 25000 et seq., on the part of defendants. Defendant Lindenberg did not appeal. The other defendants have brought the case to this court. Essentially their arguments go to the sufficiency of the evidence to sustain the findings.

[1-3] The complaint contains only common counts, but the gravamen of each cause of action, as shown by the evidence, is a negligent fraud within the purview of Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 525-526, 86 P.2d 102 (discussed below); under established practice in this state fraud may be proved under that general type of allegation. Minor v. Baldridge, 123 Cal. 187, 190, 55 P. 783; Adams v. Harrison, 34 Cal.App.2d 288, 293, 93 P.2d 237. That was done at bar without objection. The findings are in the general language of the complaint, a permissible procedure. Rauer's Law & Collection Co. v. Bradbury, 3 Cal.App. 256, 260, 84 P. 1007; Gantner & Mattern Co. v. Hawkins, 89 Cal.App.2d 783, 786, 201 P.2d 847. In this situation it is deemed that "the court impliedly found in accordance with the evidence presented by the prevailing party." Cherry v. Hayden, 100 Cal. App.2d 416, 421, 223 P.2d 878, 881. See also, Broadway Fed. Savings & Loan Ass'n v. Howard, 133 Cal.App.2d 382, 396, 285 P.2d 61. Therefore, the reviewing court must determine whether the evidence supports implied findings which the trial judge is presumed to have made upon the basis of the evidence most favorable to respondents' cause. We heartily agree, however, with all that the Presiding Justice says on this subject in his concurring opinion.

[4, 5] Appellants' opening brief assumes and asserts that the transactions in question were but loans to defendants' corporation (D. F. D. Production), represented by ordinary promissory notes. In his reply brief, however, counsel undertakes to offset the argument of respondents' counsel that plaintiffs' money was taken in a series of sales of corporate securities without a permit therefor. It is to be remembered that a claim of insufficiency of the evidence "requires defendants to demonstrate that there is no substantial evidence to support the challenged findings. As was stated in the oft-cited case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, at page 429, 45 P.2d 183, at page 184: '* * * the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' which will support the findings, and when 'two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'" Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550, 552.

[6, 7] The trial judge was free to reject all or any part of the testimony of any witness which did not ring true, and to draw such reasonable inferences favorable to plaintiffs' case as he saw fit. "Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal." Murphy v. Ablow, 123 Cal.App.2d 853, 858, 268 P.2d 80, 83. Upon this basis we reconstruct the implied findings presumptively made by the trial court.

[8] The three defendants were the promoters and sole officers and directors of a California corporation known as D. F. D. Production, which was formed for the purpose of producing and distributing motion pictures. No stock was ever issued and no application was made or permit granted therefor until after the subject transactions between plaintiffs and defendants had occurred. Each of the three individual defendants had undertaken to raise money for the corporation. Dickens' mother-in-law had put in $3,500 for him and the corporation had been advertising for funds. Dickens was on friendly terms with Mrs. Leopoldine Voss and her two daughters, Edna Fornier and Helen Voss Wolsky (who, for the sake of brevity, will be referred to as Mrs. Voss, Edna and Helen). Dickens was a real estate broker and as such had handled transactions for the Vosses, and in one instance had invested $1,000 for Helen, yielding a profit of $73 from an investment the nature of which she did not know. The Dickens family and the Voss family were "very good friends." In July, 1947, he visited the Voss home and talked with Edna about investing some money in a motion picture enterprise. He himself testified: "Q. During the summer of 1947, did you approach any members of that family concerning getting some money to invest in D. F. D. Productions? A. Yes, I did." Mrs. Voss was at home in the kitchen and Edna called to her to know whether she had any money to invest; she wanted to know if it was good; Dickens told them the Bank of America had backed the picture for $25,000 and he had put some money in; they trusted him as a friend and decided that the three of them, Mrs. Voss and the two daughters, had $3,500 which they would put in, whereupon Dickens offered them a return of $4,500 by November 1, 1947. Though he later attempted to give the complexion of a loan to the transaction, it was presented to the plaintiffs on the basis of investment, not loan. On July 15, 1947, Edna handed Dickens $1,000 in the Voss home and he wrote a receipt whose language is well nigh unintelligible but is suggestive of a loan with a bonus of "its interest or profit."[1] On August 19th Mrs. Voss and Helen each delivered $1,000 to Dickens but he gave them no receipt. This made up the $3,500 which the three women had agreed to invest. It is true that at times they spoke of these moneys as loans in their testimony, but the trial judge was not bound to accept their conclusion or to refuse to look through the form of the transaction to its substance. Indeed, these ladies showed such lack of understanding of the transaction as to bring them clearly within the class of persons for whose protection the statute was enacted. When their trusted friend, Dickens, called it a loan, they called it one; when he called it a right to one per cent interest in the profits, they called it that; as one of them phrased it, "we just trusted—took his word for it. That is all." In People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913, 915, the Supreme Court said: "The understanding or misunderstanding of the parties as to the nature of the transaction is not determinative of its legal effect. However innocent in one sense may have been the defendants' intentions, their acts in entering into the contract were deliberate and it is by their acts and the language of the Corporate Securities Act that we must judge the legal consequences of those acts and the sufficiency of the evidence to sustain the judgment."

On August 28, 1947, the corporation commissioner issued a "Desist and Refrain Order" directing the corporation and each of the defendants "not to sell or offer for sale, negotiate for the sale of, nor deal in any of the capital stock or other securities of D. F. D. Corp., for the reason that * * * the sale thereof is and would be unfair, unjust and inequitable to the purchaser thereof and in violation of the Corporate Securities Act."

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[1] "Los Angeles, Calif. July 15–1947 Received of Edna Fournier the Sum of $1,-500 to apply on loan to D. F. D. Productions agreement to follow in form of note as Security signed by officers of D. F. D. Productions plus its intrest or profit. Alvin T. Dickens."

[9] Two or more weeks after August 19, 1947, Dickens brought a promissory note to Mrs. Voss in the amount of $4,500 dated August 1, 1947 and payable November 1, 1947. August 1 was an arbitrary date, nothing had occurred on that day. The $1,500 was delivered on July 15, and the other $2,000 on August 19th. The note came after the Desist and Refrain Order was issued and it was antedated. The note was delivered by Dickens with no explanation except that "he brought that and said that is what he was going to give us for lending him that money." Defendant Dickens, though a witness under § 2055, Code of Civil Procedure and in his own behalf, offered no explanation, merely saying that he did not remember it; "I don't remember this specifically of taking it over and giving it to her." (The other defendants were absent from the trial and no deposition of either one was offered.) It is a fair inference that the note was an effort to cover up a transaction occurring before the Desist and Refrain Order, one which was considered by defendants to be in need of repair. The situation is analogous to those considered in People v. Sidwell, supra, 27 Cal.2d 121, 162 P.2d 913; People v. Whelpton, 99 Cal.App.2d 828, 831, 222 P.2d 935; Strangman v. Arc-Saws, Inc., 123 Cal.App.2d 620, 624, 267 P.2d 395; Taormina v. Antelope Mining Corp., 110 Cal.App.2d 314, 319, 242 P.2d 665; People v. McCabe, 60 Cal.App.2d 492, 498, 141 P.2d 54. In each of those cases the court looked through the form of a loan and found the sale of a security underneath. In the Sidwell case, supra, the court concluded this phase of the discussion, 27 Cal.2d at page 129, 162 P.2d at page 917, as follows: "In the present case the trial court, upon conflicting but sufficient evidence, impliedly found that the transaction, in substance as well as in form, was within the act. The fact that the evidence amply admits of inferences that in its essential substance such transaction was not within the proscription of the act does not permit us to disturb the trial judge's determination."

When November 1st (the maturity date of the $4,500 note) arrived there were no funds to pay it. Dickens then had a conversation with Edna "about additional investment in this enterprise." He called at the plaintiff's home and, as she testified: "He told me that they weren't going to be able to return that money and if we had any more that we wanted to make some money with, well, we could put it in too." She agreed to put in an additional $1,000, which she paid him on November 1st. He then took her to the company office where she met defendant Friedgen. Dickens said to him "that we, my sister and my mother and I, had all been so good and not demanded the note be paid, as it was due, and that we were willing to help them out a little bit more, that wouldn't it be nice or right to give us one percent of the producer's share of the profit of the picture when it was made, if we left our $3500 in and for the other that we were giving in," and Friedgen agreed. Then Dickens wrote out exhibit 6 and delivered it to her, bearing the signatures of himself and Friedgen. Upon the letterhead of the corporation, it says: "Nov. 1st 1947 Recd. of Edna Fournier the sum of $1,000.00 to be secured by a note plus intrest in picture of producers share—agreement to be drawn up by and between Edna Fournier and D. F. D. Productions. Alvin T. Dickens. John Raymond Friedgen, Pres." There is no doubt about what this means. Plaintiff was to have an interest in the picture payable out of the producer's share. Two days later Dickens brought to the Voss home a corporate promissory note payable to Edna in the sum of $1,000, and bearing date November 3, 1947. It has no due date and contains in its body this language: "Principal and interest payable in Lawful Money of the United States *As an agreement dated today*." The underlined portion was typed into a printed form. Again we have no explanation of the delivery of the note. Dickens testified that he might have delivered the note of November 3rd "but I don't remember this one." The agreement mentioned in the receipt of November 1st was never presented to or received by plaintiffs. Concerning the phrase, "agreement to be drawn up by and between Edna Fournier and D. F. D. Productions," Dickens testified he had no recollection and did not know what that referred to.

At or about the time that Edna invested the additional $1,000, Helen agreed to put in $500 new money; she delivered it to Dickens on November 5, 1947,[2] and she then received a document written by defendant reading as follows: "Nov. 5–1947 Received of Helen Voss $500.00 Five Hundred dollars, for D. F. D. Productions, and agreement to come from D. F. D. Productions by Alvin T. Dickens." Helen never saw or received any agreement such as mentioned therein.

When November 1, 1947, arrived plaintiffs held a corporate note for $4,500, which they could have elected to enforce and which the maker could not pay. Dickens called at the Voss home saying, according to Helen's testimony, "they were unable to pay back our original $3500 that we had loaned them and if I had any more money, I only had $500 left, and I agreed to give him that and we were to receive one percent of the profits of the picture." In consideration of plaintiffs' refraining from enforcing the note and their investing further funds, it was agreed that plaintiffs should have a one per cent interest in the producer's share of the profits. The true aspect of Dickens' dealings with plaintiffs now appears on the surface. They take the form of a sale of a one per cent interest in the venture in consideration of the previous investment of $3,500, plus $1,500 new money.

After Friedgen had suffered a stroke and the business had shut down, Dickens told plaintiffs that one Major Ellis was interested in investing in the picture and for them, when talking to him, to insist upon one per cent of the profits.

Dickens himself testified: "No, these were strictly loans. We were to repay the money with the interest on the money and then that other that you mentioned or that was mentioned, the one percent, was to be given if and when the stock was issued." If this be accepted as accurate, the facts fall within the controlling influence of Strangman v. Arc-Saws, Inc., supra, 123 Cal.App.2d 620, 624, 267 P.2d 395, 397, which we quote: "As part consideration for the loan plaintiff was promised one share of stock in the corporation. It is asserted that the condition upon which Alexander was to receive stock was never met and that stock was never issued to plaintiff. There was, however, a conditional promise of stock which the court found was an inducement to the making of the loan. * * * The transaction clearly involved the issuance of a security as that term is defined by section 25008, Corporations Code." See also Cecil B. De Mille Productions v. Woolery, 9 Cir., 61 F.2d 45, 50; People v. Woodson, 78 Cal.App.2d 132, 136, 177 P.2d 586; People v. Sidwell, supra, 27 Cal.2d 121, 127, 162 P.2d 913.

The court orally ruled that "it was a security deal" which violated the statute, and the evidence is sufficient to sustain the conclusion.

[10] Appellants assert that the action is barred by limitation, but their reasoning is so brief as to be obscure. The moneys were paid to defendants on July 15, 1947, August 19, 1947, November 1, 1947, and November 5, 1947. The applicable statute of limitation is to be found through application of Mary Pickford Co. v. Bayly Bros., Inc., supra, 12 Cal.2d 501, 525, 86 P.2d 102, 114, to the facts at bar. The court there said: "Upon a full consideration of the applicable principles of law, it is clear that a person who sells a security impliedly represents that a permit therefor has been secured when one is required by the Corporate Securities Act for such a sale. If this implied representation is false, then it is a negligent misrepresentation which is an actionable fraud, and the buyer's right of action does not accrue until he discovers its falsity unless the seller acted upon information sufficient to justify a reasonable man in concluding that no permit was required. In that event there has been a breach of warranty, but no fraud, and the buyer's cause of action accrues at the date of the sale." See also, Taormina v. Ante-

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[2] Ultimately, $50 was repaid to her by Dickens.

lope Mining Corp., supra, 110 Cal.App.2d 314, 320, 242 P.2d 665. There is no room in this instance for an inference that defendants did not know of the necessity for a permit. Plaintiffs' cause of action accrued upon discovery of the falsity of the implied representation of the existence of a permit.

When plaintiffs were trying to collect their money from or through Dickens, he, on one occasion, went out the back door as some of them entered the front. This made them suspicious, so they consulted Mr. Mathes, who was attorney for Dickens and the corporation. He referred them to another attorney. This was near the end of 1950. Some time after August, 1951, plaintiffs consulted attorney Ray M. Steele (attorney of record herein), who then gave them their first information that no permit had been obtained from the corporation commissioner. This action was filed on October 31, 1951. The plea of limitation is without substance.

Judgment affirmed.

FOX, J., concurs.

MOORE, Presiding Justice.

[11] I concur. However I enter my protest against the practice of making findings "in the general language of the complaint" when it contains only common counts. It was a generous concession on the part of the Supreme Court nearly a hundred years ago to approve that type of pleading, Glawin v. Stebbins, 2 Cal. 103, 105; Freeborn v. Glazer, 10 Cal. 337, 338, when the basis of the action is fraud in any form. A statement of the facts as originally designed by the legislature, Code Civ. Proc. § 426, Stats. 1851, Ch. 5, p. 56, § 39, would be more in keeping with the universal concept of pleading a cause of action. While it is too late to abuse the common count as a form for stating a claim, yet it is going too far for trial courts to bundle its findings on serious factual issues into a few phrases and start them to the reviewing courts as "findings." I abhor the practice as a careless, hasty, indifferent method for trial courts to pursue. It not only imposes an undeserved burden upon the appellate courts, but, also, it makes no record of the judicial effort of the trial court. Hasten the day when there will be carefully prepared findings on all factual issues.

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141 Cal.App.2d 149

VERDI DEVELOPMENT COMPANY, a Nevada corporation, Roy H. Tull and Helen Tull, Plaintiffs and Respondents,

v.

DONO-HAN MINING COMPANY, a California corporation, Robert Donovan, Chriss Hansen, Harvey Stump and Delbert Van Winkle, Defendants,

and

Dono-Han Mining Company, a California corporation, Robert Donovan, and Chriss Hansen, Defendants and Appellants.

Civ. 5331.

District Court of Appeal, Fourth District, California.

April 25, 1956.

Action by owners and lessees of northeast quarter of section of land to enjoin alleged continuing illegal entry upon and to recover damages from mining corporation and others connected with its operation, wherein defendants, on basis of old monument purportedly established by original government survey alleged that corporation's operations were within boundaries of southeast quarter section upon which corporation had valid mining claim. The Superior Court, Robert B. Lambert, J., found in favor of plaintiffs and defendants appealed. The District Court of Appeal, Conley, J. pro tem., held that refusal of trial court to allow defendants' expert surveyors from giving in detail their opinion as to whether wooden marker or monument relied upon by defendants actually established true corner of quarter sections of land involved in controversy, was prejudicial and reversible error.

Judgment reversed.

1. Public Lands ⚷25

Original government surveys, whether they are mathematically correct or grossly erroneous, control the location and length of boundaries of sections and parts thereof and the shape and size of tracts granted to patentees.

2. Public Lands ⚷25

A survey of public land does not ascertain boundaries but rather creates them.

3. Public Lands ⚷26

A section of a township or a quarter of a section is that which is laid out on the ground and a patentee takes only such land as is concluded within the survey of the plat conveyed and he cannot later question the survey as erroneous, although in fact the line in question should have been placed elsewhere.

4. Boundaries ⚷3(3)

Location of monument placed in connection with original survey is of primary importance and such monuments control over courses, distances, lines and angles. West's Ann.Code Civ.Proc. § 2077.

5. Boundaries ⚷7

If monuments themselves are lost and undiscoverable, the corners at which they were originally placed should be re-established in accordance with the natural objects described in the field notes and found to exist upon the ground, and which are least inconsistent with the distances mentioned in said notes and plat of government survey.

6. Boundaries ⚷3(9)

Quantity is the least reliable of all descriptions of land, and resort to proportional methods of locating lost corners must not be resorted to unless all other prescribed methods fail.

7. Appeal and Error ⚷1056(1)

Boundaries ⚷35(3)

In action to enjoin alleged continuing illegal entry on land and to recover damages against mining corporation and others connected with its operation, wherein defendants alleged, on basis of monument which was purportedly government survey marker, that corporation's operations were within boundaries of quarter section on which corporation had valid mining claims, refusal of trial court to allow defendants' expert surveyors to give in detail their opinion as to whether monument relied upon by defendants established true corner of quarter section was prejudicial error.

C. Douglas Wikle, Los Angeles, and Dell L. Falls, Lancaster, for appellants.

Walker, Curry, Eilers & Wehrle, Los Angeles, for respondents.

CONLEY, Justice pro tem.

This suit was brought by Roy H. Tull and Helen Tull, the owners, and Verdi Development Company, a corporation, the lessee, of the Northeast Quarter of Section 10, Township 9 North, Range 13 West, San Bernardino Base and Meridian, against Dono-Han Mining Company, a corporation and several individuals connected with its operations, to enjoin their continuing entry upon the land and to recover damages. The defendant corporation, having a valid mining claim on public land in the Southeast Quarter of Section 10, Township 9 North, Range 13 West, San Bernardino Base and Meridian, was carrying on operations in territory claimed by it to be in the Southeast Quarter of the Section, but alleged by the plaintiffs to be in the Northeast Quarter. Upon analysis of the evidence in the light of the clear principles of applicable law, it appears that the case turns on the location of the quarter section corner on the easterly line of Section 10, for if its position is as claimed by appellants, all of the mining operations are south of the southerly boundary of the Northeast Quarter; however, if the quarter section corner was correctly placed by the respondents' surveyor, the mine is on plaintiffs' property.

The trial court found in favor of the plaintiffs, locating the southerly boundary line of the quarter section south of the mine in accordance with the testimony of their surveyor, Eugene Field, that the quarter section corner set by the original government survey in 1855 could not be found. Defendants' two surveyors, Ralph Gentry and N. P. Browne, on the other hand, accepted a pine stake appropriately marked and found in a mound of rocks as the original quarter corner set in 1855 by the government surveyor; it was 480.70 feet north of the east quarter corner marker of Section 10 set according to the proportionate method by Mr. Field.

Plaintiffs' surveyor, Eugene Field, a registered civil engineer, of Rosamond, has practiced his profession since 1929. He located the northeast corner of Section 10 by the double proportionate method and he also proportioned the distance between what he took to be the northeast and southeast corners of the Section to locate what he designates as the east quarter section corner. He testified that in doing so he followed the calls set forth in the field notes of the original government survey. Mr. Field admitted that he was aware of the existence of a piece of milled pine stake one by three inches in size seen by him in a small mound of stones 13 feet west of the section line as he drew it and 480.70 feet north of the east quarter section corner which he established. There were stones "lying around in a circle" at the point in question and a part of the stake was still in the ground. The witness admitted that the stake had been there "for some time", but he did not accept it as the quarter corner.

Robert Donovan, one of the defendants interested in the mining operations, described his first view of the pine stake after a long hard search when the controversy arose relative to the location of the mine. There was also a mound of rocks there, the top portion alone being exposed, the rest buried. The pine stake was broken off, part of it remaining in the ground.

The defendants offered to prove the discovery of the stake by one Glenn Brown, whom they termed a disinterested witness, but the court said there was no question but that the stake was found at the point mentioned by Mr. Field and Mr. Donovan and that he was convinced that it was not "planted" there, that is, placed fraudulently in that position. Henry Kelsey testified that he has lived at Rosamond since 1906 "on and off" and that he first saw the wooden stake, or one that was like it in appearance, at the point described by Mr. Field in the year 1906, "* * * (j)ust a stake sticking up out of the ground about fifteen or eighteen inches, and a little pile of rocks around it". He has seen it many times since when he hunted quail or mined on that hill; he lived "* * * (r)ight close there and I have been over it many times."

Ralph Gentry of Vista one of the surveyors called by the defendants secured his degree as a Civil Engineer in 1908 in the University of Utah. He was a deputy land surveyor under contract with the federal government for about two years, and afterwards acted for a time in private engineering ventures. In August, 1910, he was appointed as a surveyor by the United States Government and continuously worked in the service for thirty-five years until October, 1945; the last official title he held was Cadastral Engineer. While he made "all kinds of surveys" during this period, the major portion of his work was on resurvey work "* * * (M)ost of my work has been investigating old surveys and making re-surveys, restoration of corners and so forth." The "* * * biggest part of the work, is trying to locate the original corners * * * irrespective of error or anything else * * *." In connection with his professional employment, he testified that he had had occasion to determine the methods used by the government surveyors in early days, but the court sustained an objection to further questions along this line as immaterial.

Mr. Gentry pointed out that the scribe marks on the pine stake, ¼ and S, were such as were used on similar corner markers and that the stake appeared to be 100 years old. The witness testified that he had found errors in excess of 481 feet in other government surveys and that similar mistakes in the early surveys were common. He thinks he would accept the monument with the scribed pine board as the true east quarter corner of the section and from a close study of the field notes with relation to the topography he does not believe that the southeast section corner as fixed by the surveyor, Field, is correct.

N. P. Browne, licensed surveyor and civil engineer since 1907, experienced in making land measurements in Utah, Arizona, Nevada and California since 1914, conducted a survey of the land in question for the defendants. He testified that the southeast corner of the section as fixed by Mr. Field does not correspond to the calls in the government field notes; that the location of the wooden stake answers the calls in the official notes for the east quarter corner of Section 10 and that the stake was correctly marked to indicate a quarter corner. He then testified in detail concerning the existing topography and stated that in his opinion the fixing of the southeast corner of the section by Mr. Field does not correspond with the clear descriptions, directions and distances contained in the field notes.

[1-3] If the quarter corner accepted by Messrs. Gentry and Browne, the surveying experts of defendants, was in fact the original quarter corner as fixed by the official Government Survey, it would have to be accepted under the law. The original government surveys, whether they are mathematically correct or grossly erroneous, control the location and length of boundaries of section and parts thereof and the shape and size of tracts granted to patentees.

> "'A survey of public lands does not *ascertain* boundaries; it *creates* them. Robinson v. Forrest, 29 Cal. 318, 325; Sawyer v. Gray, D.C., 205 F. 160, 163.' Cox v. Hart, 260 U.S. 427, 436, 43 S.Ct. 154, 157, 67 L.Ed. 332, 337; Harrington v. Boehmer, 134 Cal. 196, 199, 66 P.2d 214, 489."
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> "A section of a township is that which is laid out on the ground, and a patentee takes only such land as is included within the survey of the plot conveyed and he cannot later question the survey as erroneous, although in fact the line in question should have been placed elsewhere." Phelps v. Pacific Gas & Elec. Co., 84 Cal.App. 2d 243, 247, 190 P.2d 209, 212.

What is said in Harrington v. Boehmer, 134 Cal. 196, 199, 66 P. 214, 215, 66 P. 489, with respect to township lines is equally applicable to the lines of sections, and parts of sections:

> "The question in all cases similar to this is, where were the lines run in the field by the government surveyor? A government township lies just where the government surveyor lines it out on the face of the earth. These lines are to be determined by the monuments in the field."

Kaiser v. Dalto, 140 Cal. 167, 172, 73 P. 828, 830, uses the following language to the same effect:

> "The lines as originally located must govern in such cases. The survey as made in the field, and the lines as actually run on the surface of the earth at the time the blocks were surveyed and the plats filed, must control. The parties who own the property have a right to rely upon such lines and monuments. They must, when established control courses and distances. A line, as shown by monuments * * * cannot be overturned by measurements alone."

[4-6] The location of the monuments placed in connection with the original survey is of primary importance; monuments control over courses, distances, lines and angles. Code Civ.Proc. § 2077; Weaver v. Howatt, 161 Cal. 77, 80, 118 P. 519; Trabucco v. Sorrels, 113 Cal.App. 401, 403, 298 P. 521; Kimball v. McKee, 149 Cal. 435, 450, 86 P. 1089; De Escobar v. Isom, 112 Cal.App.2d 172, 175, 245 P.2d 1105; Gordon v. Booker, 97 Cal. 586, 588, 32 P. 593; Phelps v. Pacific Gas & Elec. Co., supra, 84 Cal.App.2d 243, 248, 190 P. 2d 209. If the monuments themselves are lost and undiscoverable, the corners at which they were originally placed should be re-established "in accordance with the natural objects described in the field notes and found to exist upon the ground, and which [are] least inconsistent with the distances mentioned in said notes and the

plat of the government survey." Hiltscher v. Wagner, 96 Cal.App. 66, 68, 273 P. 590, 591. See also: Weaver v. Howatt, 171 Cal. 302, 307, 152 P. 925; Weaver v. Howatt, 161 Cal. 77, 86, 118 P. 519; Golden v. City of Vallejo, 41 Cal.App. 113, 119, 182 P. 347; Wilmon v. Aros, 191 Cal. 80, 214 P. 962; Kimball v. McKee, 149 Cal. 435, 440, 86 P. 1089. Quantity is the least reliable of all descriptions of land: Phelps v. Pacific Gas & Electric Co., supra, 84 Cal.App.2d 243, 248, 190 P.2d 209. And resort to the proportional methods of locating lost corners must not be resorted to unless all other prescribed methods fail. Weaver v. Howatt, supra, 161 Cal. 77, 84, 118 P. 519; County of Yolo v. Nolan, 144 Cal. 445, 448, 77 P. 1006.

[7] The foregoing review of the applicable law shows the unique and compelling importance of the question whether the pine board in the mound of rocks was in fact the monument marking the quarter corner of Section 10 as determined in the original government survey. All other questions in the case are insignificant compared with this central and determinative enquiry. And each item of legitimate evidence which if admitted might have been weighed by the trier of fact in deciding this basic question was essential proof which the party offering it had a right to place in the record. The court prevented the expert surveyors called by the defendants from giving in detail their opinions as to the fact that the wooden marker was that originally placed at the monument which they believed established the true quarter corner of the section and which, if true, places the southerly line of the northeast quarter section north of defendants' mine. The trial court sustained an objection to the question asked Mr. Gentry whether in his opinion the stake was placed in the ground in the year 1855 "on the ground it is immaterial". The defendants attempted, and offered, to prove in connection with the testimony of this witness that the stake "showed an original corner placed by the government on a government survey, and of course, as a matter of law, if that is true, this marker just has to be honored over anything else; and the age of the stake would be very material, because so far as we know, the last survey was 1855." The court sustained the objection to the offer of proof remarking: "* * * (t)he offer is disallowed. Now, that is all there is to it. I've listened very patiently at this evidence here, but I am not going to waste anybody's time, taking up to waste anybody's time, taking up stuff that don't have any weight to it."

The surveyors produced by defendants were experienced and presumably competent licensed surveyors who had worked all their lives on similar problems.

In Richfield Oil Corp. v. Crawford, 39 Cal.2d 729, 741, 249 P.2d 600, 608, it is said:

> "Surveyors and civil engineers, like other experts, may give testimony on questions involving matters of technical skill and experience with which they are peculiarly acquainted. Jenny Lind Co. v. Bower & Co., 11 Cal. 194, 197; Byard v. Hoelscher, 112 Conn. 5, 9, 151 A. 351; Dundalk Holding Co. v. Easter, 195 Md. 488, 73 A.2d 877, 879; Gutha v. Roscommon County Road Comm., 296 Mich. 600, 607, 296 N.W. 694; Zipf v. Dalgarn, 114 Ohio St. 291, 295, 151 N.E. 174; Pennington v. Mixon, 199 Ala. 74, 74 So. 238; Tacoma Bldg. & Sav. Ass'n v. Clark, 8 Wash. 289, 36 P. 135; Burgess v. Healey, 73 Utah 316, 318, 273 P. 968; 7 Wigmore, Evidence [3d ed.], p. 87; 11 C.J.S., Boundaries, § 107, p. 703; contra: Edwards v. W. M. Ritter Lbr. Co., 163 Va. 851, 857, 177 S.E. 841; Vaught v. McClymond, 116 Mont. 542, 555, 155 P.2d 612. The testimony is not accepted for the purpose of varying or contradicting the terms of the deed, but to aid the trial court in its difficult task of translating the words of the deed into monuments on the surface of the earth, in accord with accepted surveying practices."

To illustrate the helpful value of the excluded evidence the court at one point refers to the piece of pine board constituting the exhibit rejected by plaintiffs' surveyor and accepted by defendants' experts as "this little stake here that he got," leading to the inference that the trier of fact was inclined to discount the theory that it was part of the original monument because of its small size; but in one of the latest official publications of the United States Department of the Interior, Bureau of Land Management, entitled "Restoration of Lost or Obliterated Corners and Subdivision of Sections" (1952 Reprint with corrections, 1955) [page 11] illustrations of corner monuments of the public land surveys are shown and designated as "(b) wooden posts, the one on the left not much more than a twig".

At the time the stake was first referred to in the evidence the court remarked that it would be of little or no significance unless "* * * you can * * * connect it up with somebody that put it there. The reason for that, anybody could put a southeast quarter of—on a stake and set it wherever they want it. That is why it isn't any evidence unless you can connect it up. Of course, those stakes like that, with those marks, they don't last too long anyhow out there. But I say that wouldn't be of any significance unless you find who put the stake there". It is apparent that the opinion of experts such as the defendants' surveyors might well supply the missing links which the court mentioned.

Chapter IV, pages 245 to 280 of the current "Manual of Surveying Instructions" [1947] officially published by the United States Department of the Interior, Bureau of Land Management, contains detailed descriptions and requirements for the placing and construction of monuments in the process of surveying the public lands. The corresponding regulations in force in 1855, when the government's original survey of the land in question was made were, we assume, comparably voluminous and explicit. Surveyors such as the expert witnesses for the defendants who have devoted years of professional attention to the location of ancient monuments and the restoration of lost or obliterated corners should be in a position to give a helpful opinion in a case of this kind relative to the age of a questioned monument from its form, materials, weathering, scribing, persistence and present condition. And to rule out testimony which might well prove helpful or even determinative of the central question in the case under the circumstances presented by the record is unquestionably prejudicial.

The judgment is reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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141 Cal.App.2d 162

Raymond H. JENSEN, Dorothy J. Jensen, Marian Morrow, and Vincent James Di Matteo, by and through his Guardian ad litem John Di Matteo, Plaintiffs and Respondents,

v.

TRADERS & GENERAL INSURANCE COMPANY, a corporation, Defendant and Appellant,

Joseph P. Lotz, A. A. Moschetti et al., Defendants.

No. 16530.

District Court of Appeal, First District, Division 1, California.

April 26, 1956.

As Modified on Denial of Rehearing May 25, 1956.

Hearing Denied June 20, 1956.

Action by insurer and by persons who recovered judgment against him for injuries sustained in automobile accident, to recover from automobile liability insurer the cost of defending the injured persons' action against insured. Insurer claimed that it canceled policy prior to accident. The Supreme Court, Alameda County, A. J. Woolsey, J., entered judgment for plaintiffs and insurer appealed. The District Court of Appeal, Fred B. Wood, J., held that giving of instruction which erroneously predicated effectiveness of cancellation on premium refund was prejudicial.

Judgment reversed.

1. Evidence 🔑333(7)

Postal receipt which acknowledged receipt into United States mail of piece of ordinary mail addressed to person named on receipt was competent evidence of mailing under Uniform Business Records as Evidence Act. West's Ann.Code Civ.Proc. §§ 1953e–1953h, 1953f.

2. Evidence 🔑351, 383(7)

Fact that a business record is self serving does not make it inadmissible under the Uniform Business Records as Evidence Act, but is a factor for the jury to consider in weighing its effect. West's Ann.Code Civ. Proc. § 1953f.

3. Evidence 🔑71

If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course, so proof that no letter was received warrants a finding that it was never posted. West's Ann.Code Civ.Proc. § 1963, subd. 24.

4. Insurance 🔑668(1)

In action to recover from automobile liability insurer the cost of defending action against insured, evidence relating to mailing of policy cancellation notice and nonreceipt of notice by insured raised question for jury as to whether notice had been mailed.

5. Insurance 🔑239

Where automobile liability policy provides that premium adjustment "may be made at the time cancelation is effected" and "if not then made" it shall be made "as soon as practicable after cancelation becomes effective", cancellation is not dependent for its effectiveness upon payment of refund and delay in performing or failure to perform duty to refund does not render cancellation ineffective.

6. Appeal and Error 🔑1064(1)

In action to recover from automobile liability insurer the cost of defending action against insured, wherein insurer asserted that policy was canceled prior to accident, giving of instruction which erroneously predicated effectiveness of cancellation on premium refund was prejudicial.

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Partridge, O'Connell & Whitney, Wallace O'Connell, San Francisco, for appellant.

Nichols, Richard, Allard & Williams, Jesse Nichols, Edward M. Digardi, Anthony R. Brookman, Sheridan, Hoffman & Mendel, Oakland, for respondents.

FRED B. WOOD, Justice.

Plaintiffs Raymond Jensen, Dorothy Jensen and Marian Morrow recovered judgment against plaintiff Vincent (Jim) Di Matteo for injuries sustained in an automobile accident and then joined with Di Matteo in bringing the present action against his insurance carrier, Traders & General Insurance Company, Di Matteo claiming a right to be reimbursed for the cost to him of defending the first action. Plaintiffs recovered and the insurance company has appealed.

(1) *Did the trial court err in denying defendant's motions for a directed verdict and for judgment notwithstanding the verdict? No.*

[1, 2] Defendant claims it canceled the policy prior to the accident.[1] It adduced evidence tending to show that it mailed notices of cancelation to the policyholders (John Di Matteo and his son Jim) on Au-

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[1] The cancelation clause, in § 23 of the "Conditions" expressed in the policy, read as follows:

"This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing."

gust 10, 1951. The person in charge of its cancelation department did not specifically recall the handling of the papers in question. Based upon defendant's office system and practice, she deduced from carbon copies of cancelation notices to the Di Matteos (which bore her initials) and from two post office receipts in the defendant's possession, that the originals of these two notices were mailed in sealed envelopes properly addressed, with sufficient postage affixed. The dates stamped on the postal receipts were indistinct as to the year. She admitted "it isn't very clear" from the postal receipts whether the notices were sent out in 1950, 1951, 1952, or 1953. As to one of them, she said "You can see a faint part of the '1'. I hardly think that would be a 2 or 3," but added that what she thought might be a part of a "1" was no bigger in size than a period. As to the date on the other postal receipt, she said "this one you can't read at all." These postal receipts did not indicate the nature of the contents of the envelopes. A postal official who described the use and purpose of such a receipt explained it is not a receipt for registered mail; it serves solely as an acknowledgment of the receipt into the U. S. mail of a piece of ordinary mail addressed to a person named on the receipt.

This was competent evidence of mailing[2] but not the only evidence on that subject. Plaintiffs John and Jim Di Matteo testified positively that no cancelation notice was received and that they had no inkling of any cancelation until three months later, when the accident occurred and they reported it to the insurance company. A circumstance tending inferentially to support their testimony is the fact that the Di Matteos sought no new insurance and continued to make the monthly payments on their car to the auto dealer who sold it to them on a conditional sales contract which included an item by way of premium upon the policy in each monthly installment. There was the added circumstance that the father, who made the down payment on the car, signed the sales contract and joined in the application for the policy, would not allow the son, who was under 21, to drive without insurance coverage.

[3, 4] This furnishes a substantial basis for an inference that notices of cancelation were not mailed, and thus presented a conflict in the evidence to be weighed and resolved by the jury. "If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course (1 Wig.Ev. § 95), so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted." Wilson v. Frankfort Marine, Accident & Plate Glass Ins. Co., 1914, 77 N.H. 344, 91 A. 913, 914. See also Calkins v. Vaughan, 1927, 217 Ala. 56, 114 So. 570, 574; Matlock v. Citizens' Nat. Bank, 1926, 43 Idaho 214, 250 P. 648, 649, 50 A.L.R. 1418; Hobson v. Security State Bank, 1936, 56 Idaho 601, 57 P.2d 685, 688; Meyers v. Brown-Forman Distillery Co., 1942, 289 Ky. 185, 158 S.W.2d 407, 412; Keeling v. Travelers Ins. Co., Hartford, Conn., 1937, 180 Okl. 99, 67 P.2d 944, 945; Keller v. Provident Life & Accident Ins. Co., 1948, 213 S.C. 339, 49 S.E.2d 577, 581; Cisco Mut. Life Ins. Ass'n v. Ferguson, Tex.Civ.App.1928, 8 S.W.2d 546, 547–548; Texas Mut. Life Ins. Ass'n v. Burns, Tex.Civ.App.1936, 92 S.W.2d 469, 470; Border State Life Ins. Co. v. Noble, Tex.Civ.App. 1940, 138 S.W.2d 119, 122; IX Wigmore on Evidence, 3d ed., pp. 432–433, § 2519. In New York this principle has been applied in a case in which the testimony of mailing came from an interested witness, Kingsland Land Co. v. Newman, 1896, 1 App.Div. 1,

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[2] See §§ 1953e–1953h, particularly § 1953f, Code of Civil Procedure. As to the purpose of these sections, known as the Uniform Business Records as Evidence Act, see Loper v. Morrison, 23 Cal.2d 600, 607–609, 145 P.2d 1. Evidence thus produced is for the trier of the facts to weigh; e. g., the fact that a business record may be self-serving does not make it inadmissible. As said in Gallup v. Sparks-Mundo Engineering Co., 43 Cal.2d 1, at page 8, 271 P.2d 34, at page 37. "[t]his fact was one for the jury to consider in weighing its effect."

36 N.Y.S. 960; rejected in a case in which the evidence of mailing came from a disinterested witness (a notary's certificate of protest) and was controverted merely by the addressee's denial of receipt. Trusts & Guarantee Co. v. Barnhardt, 1936, 270 N.Y. 350, 1 N.E.2d 459, 461–462, criticised in IX Wigmore on Evidence, supra, at pp. 433–434, note 4. The evidence in our case meets all of the requirements of the rule, even as limited in New York.

This is a sufficient answer to defendant's claim that the trial court erred in denying the motions for a directed verdict and for judgment notwithstanding the verdict. In arriving at this conclusion we have not had occasion to decide the question whether, under the contract here involved, a proper mailing, if proven, would or would not effect a cancellation if nonreceipt of the notice were also proven. Upon that question we express no opinion.

[5, 6] (2) *Defendant questions the following instruction, given at plaintiff's request:* "If you find from the evidence that the policy of insurance issued to Vincent James Di Matteo was paid for by a payment made to defendant Traders and General Insurance Company's agent Joseph P. Lotz,[3] then in order to effect a cancellation of said policy, pursuant to its terms, it was necessary that defendant Traders and General Insurance Company refund the premium, 'at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective.' *A failure under such circumstances to refund the premium would invalidate the attempted cancellation.*"[4] (Emphasis added.)

This instruction was erroneous, the policy did not predicate the effectiveness of a cancelation upon any such condition.

The provision in respect to payment by the insured to the insurer of the unearned portion of the premium the latter had paid, immediately followed the cancelation clause (quoted in the footnote on page 2 of this opinion [296 P.2d 435]) and read as follows:

> "If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured." (Second paragraph of section 23 of "Conditions" of the policy.)

A mere reading of this provision (premium adjustment "may be made at the time cancelation is effected" and "if not then made" it shall be made "as soon as practicable after cancelation becomes effective") demonstrates that cancelation is not dependent for its effectiveness upon payment of the refund. Also, it follows a cancelation clause which is complete in itself, one which declares that the notice of cancelation shall state "when not less than five days thereafter [after mailing] such cancelation shall be effective" and that [if actually and properly mailed] "the effective date and hour of cancelation stated in the notice shall become the end of the policy period." The duty to refund is an obligation that springs into being when the company cancels the policy. Delay in performing, or failure to perform, this duty does not of itself render cancelation ineffective.

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[3] There was substantial evidence that the full amount of the premium on this policy for the year for which issued (April 19, 1951, to April 19, 1952) had been paid to defendant's agent Lotz by Moschetti & Vader, the firm that sold the car to the Di Matteos and obtained the policy for them.

[4] Defendant requested but the court refused an instruction to the effect that cancelation was not dependent, for its effectiveness, upon the return to the policyholder of the amount of the unearned portion, if any, of the premium, if any, that had been paid.

A somewhat similar return of unearned premium clause was similarly interpreted by our Supreme Court in Mangrum & Otter v. Law Union & Rock Ins. Co., 172 Cal. 497, 157 P. 239, L.R.A.1916F, 440. The rationale of that decision applies here.

Clauses practically identical to the return of unearned premium clause here involved were similarly interpreted in the following cases: Genone v. Citizens Ins. Co. of New Jersey, 1950, 207 Ga. 83, 60 S.E.2d 125, 128–129; Parks v. Lumbermens Mut. Casualty Co., 1945, 327 Ill.App. 356, 64 N.E.2d 210, 212; Leslie v. Standard Acc. Ins. Co., 1945, 327 Ill.App. 343, 64 N.E.2d 391, 393; American Fire & Casualty Co. v. Combs, Ky.1954, 273 S.W.2d 37, 38–39; Gibbons v. Kelly, 1951, 156 Ohio St. 163, 101 N.E.2d 497, 498–499; Medford v. Pacific Nat. Fire Ins. Co., 1950, 189 Or. 617, 219 P.2d 142, 144, 151, 222 P.2d 407, 16 A.L.R.2d 1181; Turney v. Allstate Ins. Co., 1950, 167 Pa.Super. 175, 74 A.2d 730; Wallace v. State Farm Mut. Automobile Ins. Co., 1949, 187 Tenn. 692, 216 S.W.2d 697; Putman v. Deinhamer, 1955, 270 Wis. 157, 70 N.W.2d 652, 655.

The cases upon which plaintiffs rely for their interpretation involve, principally, clauses that differ significantly from those here involved; a few are out of state cases that represent the minority view. There is no need to list them here. Most of the cases, pro and con, which interpret policy provisions that are the same as or that closely resemble those here involved, are collected in 16 A.L.R.2d 1200, section 5, at page 1204, and in A.L.R.2d Supplement Service for 1948–1956 at page 900.

The erroneous instruction under discussion cannot have failed to be prejudicial. Accordingly, the judgment must be reversed. This conclusion renders it unnecsary to consider other points discussed by the parties upon this appeal.

The order denying the motion for judgment notwithstanding the verdict is affirmed. The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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141 Cal.App.2d 172

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William F. CROSBY, Defendant and Appellant.

Cr. 3139.

District Court of Appeal, First District, Division 2, California.

April 27, 1956.

Rehearing Denied May 11, 1956.

Hearing Denied May 23, 1956.

Public administrator was convicted of appropriating public moneys to his own use. The Superior Court, San Mateo County, Leonard R. Avilla, J., entered judgment, and public administrator appealed. The District Court of Appeals, Dooling, J., held that where public administrator relied on the defense that he did not use public moneys but at all times had such moneys either in bank or in cash in safe deposit box or elsewhere, it was reversible error to give instruction that if jury found that public administrator knowingly and willfully placed public moneys in safe deposit box, instead of depositing them with county treasurer or with a bank, jury could find that such use of public moneys was without authorization and contrary to law, since to keep money in safe deposit box or elsewhere was not to "use" the money.

Judgment reversed.

1. Embezzlement ⚿11(2)

Executors and Administrators ⚿24

A public administrator is a "public officer" of a county, and estate moneys received by him are "public moneys" within meaning of section of the Penal Code providing that each officer of the state, or of any county, city, town, or district of the state, and every other person charged with receipt, safekeeping, transfer or disbursement of "public moneys" who appropriates them to his own use or to the use of another is subject to punishment. West's Ann.Pen. Code, § 424, subd. 1; West's Ann.Prob. Code, § 1147.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Moneys" and "Public Officer".

2. Embezzlement 🔑11(2)

The word "use" as used in section of the Penal Code providing that each officer of the state, or of any county, city, town or district of the state, and every other person charged with receipt, safekeeping, transfer, or disbursement of public moneys, who, without authority of law, appropriates the same, or any portion thereof, to his own "use", or to the "use" of another, is subject to punishment, means to make use of, to convert to one's service, to avail oneself of, to employ. West's Ann.Pen.Code, § 424, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Use".

3. Statutes 🔑223.2(8)

Section of the Penal Code providing that each officer of the state, or of any county, city, town or district of the state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who appropriates the same, or any portion thereof, to his own use, or to the use of another, and section providing that every officer charged with the receipt, safekeeping or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of a felony, are in pari materia and must be construed together. Wests' Ann.Pen.Code, §§ 424, subd. 1, 425.

4. Criminal Law 🔑1172(1)
Embezzlement 🔑48(4)

In prosecution of public administrator for allegedly appropriating public moneys to his own "use", wherein public administrator relied on defense that he did not use public moneys but at all times had such moneys either in the bank or in cash in safe deposit box or elsewhere, instruction that if jury should find that public administrator knowingly and willfully placed public moneys in safe deposit box instead of depositing moneys with county treasurer or with a bank, jury could find that such "use" of moneys was without authorization and contrary to law, was prejudicially erroneous, since to keep money in safe deposit box or elsewhere was not to "use" it. West's Ann.Pen.Code, § 424, subd. 1; West's Ann. Prob.Code, § 1147.

James Martin MacInnis, Vladimir Vucinich, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Keith C. Sorenson, Dist. Atty., San Mateo County, W. Howard Hartley, Deputy Dist. Atty., Redwood City, for respondent.

DOOLING, Justice.

The Grand Jury of the County of San Mateo filed a thirty-six count indictment against appellant William F. Crosby charging him with eighteen violations of Penal Code section 424, subdivision 1 and eighteen violations of Penal Code section 424, subdivision 2. Appellant pleaded "Not Guilty" to all counts of the indictment. After a jury trial appellant was found guilty of violating Penal Code section 424, subdivision 1 as charged in eighteen of the counts and not guilty of the charges of violating subdivision 2 of that section. Appellant's motion for a new trial was denied. This appeal is taken from the judgment entered.

It appears that appellant became Public Administrator of San Mateo County in 1935 and retained that position until he resigned on August 13, 1953.

Under section 1147, Probate Code, the public administrator is required to keep the moneys of estates which he is administering on deposit with the county treasurer or "he may deposit any amount thereof with one or more banks authorized to do business in his county." Appellant made no deposits with the county treasurer but used the alternative authorized method of depositing the funds in various banks under accounts opened in the names of the several estates. The evidence showed failures to make deposits of moneys received and apparently unauthorized withdrawals from such accounts with subsequent redeposits of the amounts previously withdrawn. Also withdrawals from some accounts and deposits in others at about the same time. From these circumstances the prosecutor argued that appellant was using the moneys from these estates and later reimbursing them, sometimes from the funds of other estates.

Appellant flatly and consistently denied that he at any time used any of these moneys. He testified that he was a poor bookkeeper, with little formal education, that he at times confused the estates which he was handling and made withdrawals from the wrong estate accounts, but insisted that he at all times had all the funds of all such estates available, keeping a large amount of cash belonging to such estates in his safe deposit box or elsewhere. He denied that he deposited any money that he had drawn from any estate account in the account of any other estate, but insisted that any money so withdrawn by mistake was kept by him at all times in cash, until it was redeposited in the proper account.

Appellant first argues that the funds held by him in his capacity as public administrator were private rather than public moneys. He thus contends that the evidence is fatally inconsistent with the language of the indictment which is couched in the words of Penal Code section 424, subdivisions 1 and 2. That section provides:

"Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:—

"1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,

"2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; * * *

"Is punishable by imprisonment in the state prison for not less than one nor more than ten years, and is disqualified from holding any office in this state."

Penal Code section 426 provides:

"The phrase 'public moneys,' as used in the two preceding sections, includes all bonds and evidence of indebtedness, and all moneys belonging to the State, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by State, county, district, city, or town officers *in their official capacity.*" (Emphasis ours.)

[1] For the most part the argument of appellant on this point seems to ignore the latter statute. Thus the federal cases and those from other jurisdictions relied on by him are distinguishable from the instant one in that they did not involve a statute similar to Penal Code section 426 defining the phrase "public moneys." It may be conceded that in the absence of such a statute the funds here involved would not be public moneys in that they were never the property of a governmental subdivision. However, in view of the latter clause of that section the funds here received by appellant were public moneys in that they were received and held by him in his official capacity as public administrator, a county officer. In People v. Hamilton, 3 Cal. Unrep. 825, 32 P. 526, it was stated that an allegation that moneys were received by the defendant "in his official capacity" is an allegation of a fact which conclusively fixes their character as "public moneys." The court further stated that it was the official character in which the moneys are received, and not the ultimate ownership of the money, which, under the last clause of Penal Code section 426, makes them public moneys. People v. Moulton, 116 Cal.App. 552, 556, 2 P.2d 1009, would seem also to support the view that moneys received by a public officer in his official capacity are "public moneys." On this point appellant relies on People v. Showalter, 126 Cal.App. 665, 14 P.2d 1034, stating that it held that a court-appointed receiver holding the stakes of litigation did not hold public moneys, and hence could not be indicted pursuant to Penal Code section 424. However in that case the court found that the defendant was not a public officer and after reaching this conclusion the money involved could not be public money under the second portion of Penal Code section 426 defining that term. In the instant case appellant seems to argue that although a public administrator may be a public officer he doesn't always act as such and that in the administration of estates he is not such an officer. There

seems to be no merit to this contention. There is no doubt that a public administrator is a public officer of a county. Estate of Miller, 5 Cal.2d 588, 593–595, 55 P.2d 491; People v. McAtee, 35 Cal.App.2d 329, 95 P.2d 471. Further Government Code section 24000 provides that a public administrator is a county officer. We find nothing in Estate of McMillin, 46 Cal.2d 121, 292 P.2d 881, or any other California case inconsistent with this conclusion. While, for most purposes, in the administration of a particular estate he has the powers of any administrator the public administrator still remains "'primarily a public officer performing essentially a governmental function'." Estate of McMillin, supra, 46 Cal.2d 129, 292 P.2d 885.

Appellant next contends that the trial court committed prejudicial error in instructing the jury:

"If you should find that the defendant knowingly and wilfully placed monies belonging to estates under his administration in a safe deposit box, instead of depositing with the County Treasurer or with a bank, you may find that such use of monies was without authorization and contrary to law."

Probate Code section 1147 provides: "The public administrator, as soon as he receives the same, must deposit all moneys of the estate with the county treasurer of the county in which the proceedings are pending; or, if not required for current expenses, he may deposit any amount thereof with one or more banks authorized to do business in his county * * *." In view of this code section the People argue that the instruction attacked was a correct statement of the law. We cannot agree that it was proper to give this instruction in this case.

The instruction cut clearly at the heart of the only defense urged by appellant, that he did not use the money of any estate but at all times had all such moneys either in bank or in cash in the safe deposit box or elsewhere. It is the gist of the offense proscribed by section 424, subdivisions 1 and 2, Penal Code, that the defendant *use* the moneys of the estate in some fashion. By this instruction the jury was not only told that the keeping of such money in a safe deposit box was illegal, but that it was an illegal *use* of such money. In other words they were instructed that under the facts admitted by appellant himself he was guilty of the crimes charged.

[2] We think that this was clearly error. "To use," in the sense in which the word "use" is employed in this section is: "To make use of * * * to convert to one's service; to avail oneself of; to employ; as to *use* a plow, a chair, a book * * *." Webster's New International Dictionary, 2d Ed. To keep money in a safe deposit box or elsewhere is not "to use" it in any common acceptation of that word.

That this is the sense in which the word "use" is employed in section 424, Penal Code, is further demonstrated, if the obvious needs further demonstration, by section 425, Penal Code, which was enacted simultaneously with the original section 424 in 1872. Section 425 reads: "Every officer charged with the receipt, safe keeping, or glects or fails to keep and pay over the same disbursement of public moneys, who ne- in the manner prescribed by law, is guilty of a felony."

[3] By this section the failure to *keep* the money in the manner prescribed by law is made a distinct offense. The two sections are in *pari materia* and must be construed together. 23 Cal.Jur., Statutes, §§ 163–164, pp. 785–787. They make clear, when so construed, that the "use" of such money proscribed by section 424 is not the neglect or failure "to keep" such money "in the manner prescribed by law," denounced by section 425. Nor are the penalties the same. The violation of section 424 is punishable by one to ten years imprisonment and disqualification to hold office. The penalty for violating section 425 is six months to five years, §§ 18, 18a, Pen.Code, with no expressed disqualification.

[4] Appellant was not charged with a violation of section 425 and yet under the instruction complained of it became the jury's duty to convict him of the violation of section 424 on proof which might have supported a conviction of violating section

425, but would fall short of proving a violation of section 424. The prejudice from this instruction is obvious.

Appellant's last contention is that the trial court erroneously declined to consider his probation application because of the prohibition contained in Penal Code section 1203 which states that probation may not be granted to "* * * any public official or peace officer of the State, county, city, city and county, or other political subdivision who, in the discharge of the duties of his public office or employment, * * * embezzled public money * * *." This question need not be considered in view of our conclusion that the judgment must be reversed.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

46 Cal.2d 444

Thomas BURKE and Doris Burke, Plaintiffs and Appellants,

v.

Stanley M. CHROSTOWSKI, Defendant and Respondent.

No. L. A. 23979.

Supreme Court of California.
In Bank.
May 4, 1956.

Rehearing Denied May 29, 1956.

Action by husband and wife, after dissolution of partnership between husband and defendant, for amount allegedly promised them by defendant for husband's half interest in partnership. Defendant cross-complained for amount husband allegedly owed partnership. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for defendant on complaint, but ordered that defendant take nothing on this cross-complaint, and husband and wife appealed. The Supreme Court, Spence, J., held that choice of conflicting inferences to be drawn from evidence, which revealed that husband had disappeared with partnership funds and had sent defendant assignment of all partnership assets and liabilities purportedly in consideration of payment of $2,500 to wife, and that defendant had used blank check signed by husband to put partnership funds in defendant's name, was for trial court, and trial court's determination, based on inferences drawn, that defendant had not contracted to pay the $2,500 would not be disturbed on appeal.

Judgment affirmed.

Opinion, 287 P.2d 805, vacated.

1. Appeal and Error ⚷931(1)

Reviewing court must accept as true all evidence tending to establish correctness of findings as made, and must take into account, as well, all inferences which might reasonably have been thought by trial court to lead to the same conclusion, and every substantial conflict in testimony is to be resolved in favor of the findings.

2. Appeal and Error ⚷996

In action by husband and wife, following dissolution of partnership between husband and defendant, for amount allegedly promised husband and wife by defendant for husband's half interest in partnership, choice of conflicting inferences to be drawn from evidence, which revealed that husband had disappeared with partnership funds and had sent defendant assignment of all partnership assets and liabilities purportedly in consideration of payment of $2,500 to wife, and that defendant had used blank check signed by husband to put partnership funds in defendant's name, was for trial court, and trial court's determination, based on inferences drawn, that defendant had not contracted to pay the $2,500, would not be disturbed on appeal.

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Harry M. Irwin, Los Angeles, for appellants.

Joseph L. Graves, Monterey Park, for respondent.

SPENCE, Justice.

[1] Plaintiffs appeal from a judgment for defendant in an action between partners following the dissolution of the partnership. Their principal contention is that the evidence is insufficient to sustain the trial court's findings which resulted in the denial of their alleged claim of $2,500 upon settlement of the partnership affairs. In determining this question, it is well settled that "an appellate court must accept as true all evidence tending to establish the correctness of the finding[s] as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is * * * to be resolved in favor of the finding[s]." Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 142, 134 P. 1157, 1158; also Patten & Davies Lbr. Co. v. McConville, 219 Cal. 161, 164, 25 P.2d 429.

In June, 1953, plaintiff Thomas Burke and defendant entered into an oral partnership for the operation of a restaurant business under the name of the El Adobe Coffee Shop in Monterey Park. They owned certain equipment therein, operated under a leasehold, had a checking account on which both signatures were required for the partnership checks, and they were to share equally in the business. There was no fixed term for the duration of the partnership. Prior to and on September 13, 1953, there were conversations between the partners about one buying out the other, but no agreement was reached. Then on the night of said date Burke disappeared with three days' unbanked cash receipts for the weekend, amounting to $550 or $600. Coincident with his departure, he sent to defendant an assignment of all assets and liabilities in the business "in consideration of monies received and continued payment of one hundred dollars per week to my wife, Doris * * * for the period of twenty-five weeks or whatever arrangement she cares to make until the additional sum of $2,500.00 is reached or paid." With such assignment, Burke enclosed a blank check on the partnership account signed by him, with a note stating: "You will find enclosed papers giving you the business and you can settle it with Doris. I have no intention of returning ever. Sorry. Tom. The signed check can be used to draw out any money in the name of the El Adobe Coffee Shop and then put in your name."

Immediately after receiving the signed check, defendant used it to withdraw the balance in the partnership account, $1,887.19, closed that account, and deposited the money in a joint account with his wife. Thereafter he conducted all of the coffee shop business through such account, deposited some $2,000 of his own cash therein, and both he and his wife withdrew money therefrom for their personal needs. To clear his individual operation of the business, defendant promptly published a "Notice of Dissolution of Partnership," which declared that the parties had "by mutual consent" dissolved and terminated the partnership on September 14, 1953; that in the future the business would be conducted by defendant, who would pay and discharge all liabilities and debts of the firm and receive all monies payable to the firm; and that thereafter defendant would not be responsible for any obligations incurred by Burke in his own or in the firm's name. The notice was dated September 18, 1953, and was published on September 24, 1953. A few weeks later defendant had the partnership accounts and deposits with the utilities and the board of equalization, which had been made to establish credit and to carry on the partnership business, transferred to his own name.

Burke returned a week or ten days after his departure, but meanwhile his wife had not known of his whereabouts. He made no claim then nor since to the business or any partnership funds. Burke's only demand was that defendant pay $2,500 to his wife Doris, relying on defendant's acts in taking over the business as an acceptance of his (Burke's) offer to dissolve the partnership on the terms proposed by Burke. Following a second demand made on September 30, 1953, and defendant's repeated denial that any contract to pay this sum existed, the Burkes brought this action claiming that defendant was liable on the alleged contract. Defendant filed an answer and a cross-complaint, alleging that there was no contract; that Burke had withdrawn from the partnership; that defendant had published the Notice of Dissolution "to forestall further actions of [Burke] * * * having adverse effect on said restaurant business"; that an audit had been made and a copy thereof given to plaintiffs accounting for the operation of the business through September 13, 1953, which statement showed that Burke owed the partnership $802.56 and to which plaintiffs made no objection; and that plaintiffs were estopped by the conduct of Burke from claiming any right, title or interest in the increase in net worth of the business since September 14, 1953.

The trial court found that there was no contract to pay the $2,500 claimed by plaintiffs, although defendant on September 14, 1953, took possession of the equipment, merchandise, cash, credits and business of the coffee shop and has operated the business since that date. Judgment was for defendant on the complaint, but that he take nothing on his cross-complaint.

Plaintiffs' appeal presents the single question of whether defendant's acts in taking over the business, under the circumstances above related, created a contract between the partners, and obligated defendant to pay the sum of $2,500 to Doris Burke. The theories of plaintiffs and defendant sharply conflict as to what should be the correct deduction from the evidence. Plaintiffs maintain that defendant's acts compel the conclusion that he accepted the offer of his partner, thereby effecting a bilateral contract and causing the terms in the assignment to become defendant's obligations. They take the position that if defendant had not intended to accept the offer but preferred to maintain the partnership, he would not have taken over the partnership business in his own name, closed out all partnership accounts, or published his notice of dissolution "by mutual consent," indicating his assent to his partner's proposal. They further argue that inasmuch as no definite term for the continuance of the partnership had been fixed at the time of entering into it, a dissolution could be lawfully effected by either partner at any time, Corp. Code, § 15031, subd. (1) (b); that Burke did that in forwarding his assignment to defendant "giving you the business and you can settle it with Doris," but such act of dissolution did not diminish his interest in the assets of the partnership " 'until the final closing up of its affairs' ", Zeibak v. Nasser, 12 Cal.2d 1, 17, 82 P.2d 375, 383; see Corp.Code, § 15030. Plaintiffs also argue that defendant then was bound to wind up the partnership affairs either (1) by rejecting his partner's offer, and thereupon applying the partnership property to discharge its liabilities and dividing the surplus between the partners, Corp.Code, § 15038, leaving defendant in the position of "a mere trustee", Ruppe v. Utter, 76 Cal. App. 19, 25, 243 P. 715, 717; also Vangel v. Vangel, 116 Cal.App.2d 615, 628, 254 P.2d 919; Vangel v. Vangel, 45 Cal.2d 804, 291 P.2d 25, or (2) by accepting the offer, thereby obligating defendant to pay the $2,500 as therein specified. Plaintiffs contend that defendant chose the latter course in concluding the partnership affairs and taking over the business himself, showing his compliance with Burke's offer in every respect except in his failure to pay Mrs. Burke the $100 weekly installments for the total sum of $2,500.

On the other hand, defendant insists that the evidence sustains his position of consistent rejection of the alleged contract. He explains his acts of withdrawing the partnership funds and thereafter operating the business from his personal account as necessary steps in consequence of Burke's announced "intention of [never] returning" and the fact that withdrawals from the partnership account required the signatures of both parties. Accordingly, he used the signed check forwarded by Burke to withdraw the balance in the partnership account, the sum of $1,887.19, and therewith paid off the accrued partnership bills, represented by outstanding checks totalling approximately $1,100 and a payroll of some $700. Defendant agrees that under the law either party could elect to dissolve the partnership, and that Burke had definitely so indicated in his notice to defendant, leaving defendant with no alternative but to accept Burke's decision in that regard. Therefore the notice of dissolution "by mutual consent" merely indicated that both partners had agreed to dissolve, but not that defendant acquiesced in Burke's "shotgun" terms coincident with his departure with the week-end receipts from the partnership business. Defendant further maintains that he never took the one unambiguous step that might have indicated acceptance of Burke's proposal, that is, payment or agreement to pay to Mrs. Burke the $100 weekly installment or the $2,500. Thus defendant insists that plaintiffs misconceive the alternative courses of action open to defendant following Burke's notice of his decision to withdraw from the partnership; that in addition to the two courses listed by plaintiffs, defendant had the additional one which he adopted—rejection of the proposed offer and consent to dissolution on terms to be thereafter determined, either through negotiations by the parties or by court decree.

[2] The principal acts on which plaintiffs rely to support their theory of defendant's acceptance of the contract—defendant's use of the signed check to withdraw the balance in the partnership account and his publication of the notice of dissolution "by mutual consent"—were equivocal, capable of more than one construction, but readily support the trial court's finding that the parties had not entered into a contract. Rather, such acts may properly be viewed as reasonable steps taken by defendant to forestall further adverse actions which might be undertaken by his partner, who had departed without notice, taking partnership funds without consent, leaving no address or method of contact, and indicating an intention never to return. In this connection, Burke testified that prior to his departure, he and defendant had discussed the question of dissolving the partnership, that defendant had not accepted his terms, and that he [Burke] had not taken the unbanked weekend receipts of the partnership business pursuant to any agreement with defendant. Following his return, Burke showed no interest in the partnership business or the accounting that defendant had submitted to him but simply stood on the proposition that despite his own inimical conduct in relation to maintenance of the partnership business, defendant's acts in protection of the business constituted an acceptance of his partner's arbitrary contract. Defendant's withdrawal of the partnership funds and their deposit in his personal account were of no personal benefit to him, since the evidence shows that such funds were used to pay off partnership liabilities. Accordingly, in response to defendant's cross-complaint the court adjudged that defendant had accounted for all of plaintiffs' share of copartnership money and that plaintiffs were estopped to assert any interest in values created by the partnership business after September 14, 1953. The choice of conflicting inferences to be drawn from the evidence was for the trial court to make, and its determination based on the inferences drawn will not be disturbed on appeal. Bruce v. Bruce, 71 Cal.App.2d 641, 644, 163 P.2d 95; Maslow v. Maslow, 117 Cal.App.2d 237, 243, 255 P.2d 65; see also Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602–603, 86 P.2d 829.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., and DOOLING, J. pro tem., concur.

Rehearing denied; DOOLING, J., pro tem., participating in place of McCOMB, J.

46 Cal.2d 414

Barbara Lee SPRAGUE, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Canary Cottage and Industrial Indemnity Company, Respondents.

S. F. 19386.

Supreme Court of California.
In Bank.
May 1, 1956.

Rehearing Denied May 29, 1956.

Proceeding for annulment of order of Industrial Accident Commission dismissing workmen's compensation claimant's petition for increased disability rating on ground of want of jurisdiction. The Supreme Court, Spence, J., held that where the claimant filed a petition for further medical treatment, and counsel stipulated that only issue was need for further medical treatment, and no review of denial was sought, filing of such petition did not have effect of giving Commission jurisdiction to determine a petition, filed after expiration of five-year period, for increased disability rating, though the petition for further medical treatment had recited that claimant suffered from increased disability and pain and though petition for increased disability rating sought hearing on issue of increased permanent disability rating "as previously raised in applicant's last petition".

Affirmed.

Carter and Shenk, JJ., dissented.

1. Workmen's Compensation ⚷1177

Liberal construction of workmen's compensation statutes establishing jurisdictional limits upon power of Industrial Accident Commission is proper. West's Ann. Labor Code, §§ 5410, 5804.

2. Workmen's Compensation ⚷2016

Where workmen's compensation claimant filed petition for further medical treatment, and counsel stipulated that only issue was need for further medical treatment, and no review of denial was sought, filing of such petition did not have effect of giving Commission jurisdiction to determine a petition, filed after expiration of five-year period, for increased disability rating, though petition for further medical treatment had recited that claimant suffered from increased disability and pain and though petition for increased disability rating sought hearing on issue of increased permanent disability rating "as previously raised in applicant's last petition". West's Ann.Labor Code, §§ 5410, 5804.

◆

Johnson, Thorne, Speed & Bamford and Harry Bamford, San Jose, petitioner.

Everett A. Corten, Daniel C. Murphy, Leonard, Hanna & Brophy and Edmond D. Leonard, San Francisco, for respondents.

SPENCE, Justice.

Petitioner seeks annulment of an order of the respondent commission dismissing her "Petition for Increased Disability Rating," which order was made upon the ground of "want of jurisdiction."

Petitioner, a waitress, was suffering from a pre-existing, progressive "congenital defect in the fifth lumbar process associated with a spondylolisthesis," at the time that she fell to a sitting position on January 1, 1949. She did not immediately "notice any particular pain," and she continued her work until the following month. Since leaving her work, there has been a serious dispute as to whether her difficulties at any given time have resulted from her pre-existing, progressive condition or the fall, or both. She was given a temporary disability award on February 27, 1950. That award was terminated on September 7, 1950, with a reservation of the issue of permanent disability for later determination. In 1951 her permanent disability rating was fixed by the commission at 31 per cent. No part of her disability was apportioned to her "pre-existing permanent disability," as the referee found no evidence of "work disability from the pre-existing physical defect." Reconsideration was granted but the award was confirmed on June 11, 1952. The referee's report upon which the commission acted stated: "Concerning the question of apportionment, whether this should or should not be done is a decision completely within the province of either the Referee or the Commission. This Referee feels that the disinclination or refusal of the Referee to apportion was proper." Petitioner thereafter filed in 1953 a "Petition for Further Medical Treatment," which was denied on July 27, 1954. The present "Petition for Increased Disability Rating" was filed on February 25, 1955, and was dismissed for lack of jurisdiction on March 15, 1955.

As the date of the injury was January 1, 1949, and as the "Petition for Increased Disability Rating" was not filed until February 25, 1955, being more than six years after the date of injury, we are of the opinion that the commission correctly determined that it was without jurisdiction to entertain said petition. Labor Code, §§ 5804, 5410.

Petitioner seeks to avoid the jurisdictional limitations of the cited sections by pointing out that her "Petition for Increased Disability Rating" purports to refer to "the issue of increased permanent disability rating, as previously raised in applicant's last petition." She claims that her prior "Petition for Further Medical Treatment," filed within the five-year period, raised the issue that the original injury had caused "new and further disability" within the meaning of section 5410 of the Labor Code, and that the commission therefore had jurisdiction to hear and determine her petition for an increased permanent disability rating after the expiration of the five-year period. Douglas

Aircraft Co. v. Industrial Acc. Comm., 31 Cal.2d 853, 193 P.2d 468; Gobel v. Industrial Acc. Comm., 1 Cal.2d 100, 33 P.2d 413; Westvaco, etc., Corp. v. Industrial Acc. Comm., 136 Cal.App.2d 60, 288 P.2d 300; Furness Pacific, Ltd. v. Industrial Acc. Comm., 74 Cal.App.2d 324, 168 P.2d 761. We are of the opinion, however, that the cited authorities do not sustain petitioner's position here.

Petitioner's prior petition was entitled "Petition for Further Medical Treatment," and it prayed only for an order requiring the furnishing of "further medical treatment." Said petition was denied in its entirety and without qualification by an order reading "Applicant's Petition for Further Medical Treatment, filed herein on November 24, 1953, is denied." It was not suggested upon the hearing of that petition that petitioner was seeking an increased permanent disability rating because of any "new and further disability." On the contrary, her counsel agreed at the time of the hearing that the "only question" was that of "need for further medical treatment." It appeared that petitioner had discontinued the use of a recommended support, and there was medical testimony showing that the use of a support was the only appropriate treatment. The testimony of one doctor, who had only recently examined petitioner and who advocated a spinal fusion, was rejected by the commission. Petitioner sought neither reconsideration nor judicial review, and the order of denial became final.

If there is merit in petitioner's contention that under a liberal construction of her "Petition for Further Medical Treatment," it might be treated as sufficient to raise the claim of a "new and further disability" by reason of a recital therein that she had "suffered from increased disability and pain," it is a conclusive answer that it was stipulated at the hearing that the only issue raised was the "need for further medical treatment"; and that petitioner did not thereafter claim, by petition for reconsideration or for judicial review, that any issue that had been raised had been left undetermined. Under these circumstances petitioner cannot now consistently attribute to her prior petition the widest possible significance for jurisdictional purposes, and at the same time fail to give the unqualified denial of that petition the same significance for the same purposes.

Petitioner's cited authorities are readily distinguishable. In none of those cases had the petition, filed within the five-year period, been unqualifiedly denied by the commission after a hearing upon the merits. In Gobel v. Industrial Acc. Comm., supra, 1 Cal.2d 100, 33 P.2d 413, the petition was admittedly filed two days before the expiration of the prescribed time, and was thereafter dismissed without a hearing on the ground of lack of jurisdiction. It was there held that the commission had jurisdiction to determine the merits of the petition after the prescribed time, as the petition had been filed within the prescribed time. The same principle was applied in Furness Pacific, Ltd. v. Industrial Acc. Comm., supra, 74 Cal.App.2d 324, 168 P.2d 761. In Douglas Aircraft Co. v. Industrial Acc. Comm., supra, 31 Cal.2d 853, at page 855, 193 P.2d 468, at page 469, the commission stated, in making its prior award upon a petition timely filed, that " 'Applicant's condition is not yet stationary and permanent, and jurisdiction is hereby reserved to determine extent of permanent disability * * * upon request of any party in interest.' " In Westvaco, etc., Corp. v. Industrial Acc. Comm., supra, 136 Cal.App.2d 60, 288 P.2d 300, the commission similarly stated in making its prior award, that " 'Applicant's condition is not stationary, and a Finding in respect to the nature and extent of disability, temporary or permanent, or both, is not being made at this time, and jurisdiction is hereby reserved to re-determine said issue at a later date.' " 136 Cal.App.2d at page 61, 288 P.2d at page 301. No comparable situation is presented by the record before us, as the only petition filed here within the prescribed time had been denied after a hearing on the merits, and the commission's unqualified order of denial had become final.

[1, 2] While the courts have properly given a liberal construction to the sections establishing jurisdictional limitations upon the power of the commission, Labor

Code, §§ 5804, 5410, we cannot hold here that any proceeding was left pending and undetermined before the commission after the time that the commission's unqualified order of denial of petitioner's prior petition became final. The "Petition for Increased Disability Rating" must therefore be treated as an independent petition for that purpose, and as it was admittedly filed more than six years after the date of injury, the commission correctly determined that it had no jurisdiction to entertain said petition. Labor Code, § 5410.

The order is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The holding of the majority here is a far cry from the liberal construction of the Workmen's Compensation Act made mandatory by its provisions, Lab.Code, § 3202.

It should be noted that the majority opinion in its statement of facts seeks to reargue an issue of fact which has been long since finally settled. Attention is called to the fact that Mrs. Sprague had a pre-existing spinal defect and that there was a serious dispute as to whether her difficulties were caused by reason of her employment. Inasmuch as she had been awarded a permanent disability rating of 31%, it appears certain that the commission found her disability to be employment connected. We have held in the past, and only just recently, that industry takes the employee as it finds him (except as provided for in section 4750 of the Labor Code; Smith v. Industrial Acc. Comm., 44 Cal.2d 364, 282 P.2d 64; Subsequent Injuries Fund of State of California v. Industrial Acc. Comm., 44 Cal.2d 604, 283 P.2d 1039), and that he is entitled to compensation for disability proximately caused by industrial injury regardless of whether the employee's condition at the time of injury was average or subnormal. Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 166 P.2d 908; Associated Indem. Corp. v. Industrial Acc. Comm., 120 Cal.App.2d 423, 261 P.2d 25. The majority opinion concedes that the commission here refused an apportionment under section 4750. Hence the question of Mrs. Sprague's pre-existing ailment and its bearing on her present condition had been concluded prior to the petition under consideration here.

The rule is that the nature of a pleading will be determined from its allegations or averments regardless of the title it bears. Standard Brands of California v. Bryce, 1 Cal.2d 718, 37 P.2d 446; Luckey v. Superior Court, 209 Cal. 360, 365, 287 P. 450; Weber v. Superior Court, 26 Cal.2d 144, 148, 156 P.2d 923; Sullivan v. Compton, 61 Cal.App.2d 500, 502, 143 P.2d 357; Morgan v. Veach, 59 Cal.App.2d 682, 692, 139 P.2d 976; Hutchason v. Marks, 54 Cal.App.2d 113, 114, 128 P.2d 573.

Mrs. Sprague sustained an industrial injury on January 1, 1949. On January 18, 1952, she was awarded further medical care and a permanent disability rating of 31%. This award was confirmed following reconsideration on June 10, 1952. In November, 1953, petitioner filed a "Petition for Further Medical Treatment" in which she stated that she had "suffered from increased disability and pain." At the time of the hearing on May 12, 1954, there was no dispute that Mrs. Sprague's disability had substantially increased since the rating made in 1952 but there was a dispute concerning the treatment to be accorded her. Petitioner's orthopedic surgeon was of the opinion that a spinal fusion should be undertaken *prior to a re-evaluation of the case;* defendants' orthopedic surgeon was of the opinion that she should be accorded only palliative, conservative care. In an order dated July 15, 1954, it was ordered that "Applicant's Petition for *Further Medical Treatment,* filed herein November 24, 1953, is denied." (Emphasis added.) Some few months thereafter Mrs. Sprague requested a hearing on her petition for an increased disability rating "as previously raised in her last petition" which was denied on the ground that the commission lacked jurisdiction to proceed. The question is, therefore, whether the petition for further medical treatment filed within the time limited raised the issue of Mrs.

Sprague's "new and further disability" within the meaning of section 5410 of the Labor Code. The majority holds that the issue was not raised, that the commission lost jurisdiction and that the matter of further disability could not be considered. I definitely do not agree with this holding.

It is well settled that the commission has power to determine new and further disability beyond the five-year period, where application is made within that period. Gobel v. Industrial Acc. Comm., 1 Cal.2d 100, 33 P.2d 413; Douglas Aircraft Co. v. Industrial Acc. Comm., 31 Cal.2d 853, 193 P.2d 468; Broadway-Locust Co. v. Industrial Acc. Comm., 92 Cal.App.2d 287, 206 P.2d 856; Pacific Indem. Co. v. Industrial Acc. Comm., 85 Cal.App.2d 490, 193 P.2d 117; Furness Pacific, Ltd. v. Industrial Acc. Comm., 74 Cal.App.2d 324, 168 P.2d 761; Westvaco, etc., Corp. v. Industrial Acc. Comm., 136 Cal.App.2d 60, 288 P.2d 300.

When in November, 1953, Mrs. Sprague petitioned for further medical treatment she raised the issue of the fact of her increased permanent disability—a fact *which was never disputed.* At the time of her petition, it was felt by her and her orthopedic surgeon that a certain type of surgery might relieve her condition and cure her disability. Any determination by the commission as to the issue of further disability could not be made until after it had been determined whether surgery would cure her disability. Once the commission determined that surgery was not the answer, then the issue of new and further disability remained for determination. It is this determination which the majority has concluded cannot be made, despite the fact that the only thing done by the commission was to deny Mrs. Sprague's request for "further medical treatment." After the denial of further medical treatment, Mrs. Sprague filed a "Petition for Increased Permanent Disability Rating" which reads as follows: "Comes now applicant, Barbara Lee Sprague, and respectfully requests that this matter be set down for hearing in San Jose, California, *on the issue of increased permanent disability rating, as previously raised in applicant's last petition,* and based upon the medical evidence adduced on the hearing on said petition, together with further testimony and medical evidence to be adduced herein." (Emphasis added.)

The majority states that it was stipulated at the hearing that the only issue raised was the "'need for further medical treatment'" but then states that "petitioner did not thereafter claim, by petition for reconsideration or for judicial review, that any issue that had been raised had been left undetermined." I have just pointed out how, after her request for further medical treatment was denied, petitioner requested an increased permanent disability rating "*as previously raised in applicant's last petition.*" (Emphasis added.) The only issue before the commission was whether or not surgery would take care of Mrs. Sprague's admitted further disability—if it would not, then it was undenied that her increased disability was permanent. Thus it is clear that the issue of increased permanent disability was before the commission. It had to be before the commission, since, if the request for surgery were denied, the issue of the rating to be given her for increased disability remained open and undecided. The request for further medical treatment was not determined until after the expiration of the five-year period, so Mrs. Sprague could not have petitioned for reconsideration or for judicial review or for an increased disability rating within the time limited since there was no way she could know what action the commission would take on her petition. Moreover, she was apparently willing to accept the determination of the commission that further medical treatment would not cure her disability.

In speaking of Westvaco etc., Corp. v. Industrial Acc. Comm., 136 Cal.App.2d 60, 288 P.2d 300, the majority opinion says: "No comparable situation is presented by the record before us, as the only petition filed here within the prescribed time had been denied after a hearing on the merits, and the commission's unqualified order of denial had become final." The finality of the order of the commission has nothing to do with the facts of this case, since the only thing denied by the commission was further medical treatment for Mrs. Sprague and this denial took place after the expiration of the period allowed. Since the essence of the majority opinion is simply that since Mrs. Sprague did not specifically request an increased disability rating at the same time she made her request for medical treatment she is forever foreclosed from requesting an increase in her disability rating even though it is admitted by all that her disability has increased. It would appear that this is far short of the liberal construction made mandatory by the Labor Code so that the "purpose of extending * * * benefits for the protection of persons injured in the course of their employment" might be achieved. Lab.Code, § 3202. When technicalities are employed to deprive working men and women of the benefits to which they are entitled, substantial justice is not being accomplished.

I am of the opinion that the language used in Westvaco, etc., Corp. v. Industrial Acc. Comm., 136 Cal.App.2d 60, 288 P.2d 300, 302, is applicable to the case at bar even though in the Westvaco case jurisdiction was expressly reserved. The court there said that the action of the commission "while not expressly revoking the first order, had the effect of taking from it its final character. From then on there was no effective finding of permanent disability; in effect, the original finding was set aside. * * * [I]f the commission, proceeding under section 5410, should find that there was new and further disability, it could then make an award therefor. This latter award could be made after the expiration of the five year period, as the petition for it had been filed within that period." The commission, in the case before us, had the request of Mrs. Sprague for increased disability before it, but determined *only* that further medical treatment would be of no avail and therefore denied *only* that request leaving open the matter of an increased disability rating. Mrs. Sprague's claim of increased disability was not denied—therefore, that question was one of law, and the stipulation mentioned in the majority opinion would have no effect any more than a stipulation agreeing to a court's jurisdiction when there was a total lack thereof.

In Consolidated Steel Corp. v. Industrial Acc. Comm., 6 Cal.2d 368, 369, 57 P.2d 919, a self-insured steel company sought to annul an award of the commission where the injured person had filed "an application for adjustment of his claim for further medical attention and treatment" after an injured finger had healed in a deformed shape with loss of function. The court there said, in answering the contention that the claim was barred by section 11 of the act "not having been commenced within six months of the injury or of the last payment of compensation or benefits" that the evidence showed such a new and further disability as to bring the injured person within "subdivision (c) of section 11 so as to extend the period within which he might make application to 245 weeks after the date of injury." See, also, Armstrong v. Industrial Acc. Comm., 219 Cal. 673, 28 P.2d 672.

A fair and just interpretation of the record in this case is that in November, 1953, Mrs. Sprague filed a petition which embraced both a claim for further medical treatment and a further disability rating; that the commission heard only the issue relating to further medical treatment and denied this portion of the petition; that Mrs. Sprague thereafter on February 25, 1955, requested the commission to hear and determine the portion of her petition relating to increased permanent disability rating. There is no question and it is not disputed that Mrs. Sprague had suffered increased disability which she sought to have corrected by further medical treatment. There was a dispute as to whether further medical treatment was advisable and the commission denied her request for this relief, leaving her request for an increased permanent disability rating undisposed of.

The issue of increased permanent disability having been raised prior to the expiration of the five-year period, the commission had jurisdiction to determine that issue.

I would therefore annul the order.

SHENK, J., concurs.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

46 Cal.2d 450

R. T. TIEDJE, Plaintiff and Appellant,

v.

ALUMINUM TAPER MILLING CO., Inc., a corporation, and M. R. Peppard, Jr., Defendants and Respondents.

L. A. 24088.

Supreme Court of California.
In Bank.
May 4, 1956.

Former shareholder's action against corporation to which he had conveyed his shares, for, inter alia, restoration of shares on ground that purchase by corporation was in violation of statute. The Superior Court, Los Angeles County, Bayard Rhone, J., entered judgment for defendants after sustaining demurrer to complaint without leave to amend, and plaintiff appealed. The Supreme Court, Spence, J., held that complaint, which alleged plaintiff did not know corporation was illegally purchasing stock out of earned surplus in violation of governing statutory law presented an issue of fact which must be determined upon trial of that issue.

Judgment reversed.

Opinion, 291 P.2d 521, vacated.

1. Action ⚿38(1)

Where three counts in complaint for declaratory relief, for quieting of title and for voiding an illegal transaction were all based on same facts, they would be treated as one.

2. Appeal and Error ⚿843(4)

Where general and special demurrers were interposed and judgment of dismissal was entered upon sustaining of demurrers to amended complaint without leave to amend, grounds of special demurrer to complaint need not be considered on appeal, as determinative question was sufficiency of plaintiff's complaint against general demurrer.

3. Corporations ⚿376

Under California Corporation Law, as a general rule the purchase by corporation of its own shares should not be allowed except out of earned surplus which would be available for distribution as cash dividends. West's Ann.Corp.Code, §§ 1705–1708.

4. Contracts ⚿138(1)

Ordinarily, a party to an illegal contract can neither recover damages for breach nor, by rescinding, recover the performance that he has rendered or its value.

5. Contracts ⚿138(1)

A contract made contrary to public policy or against express mandate of a statute may not serve as the foundation of any action, either in law or in equity, and the parties will be left, therefore, where they are found when they come to court for relief.

6. Contracts ⚿138(1)

Principles preventing a party to an illegal contract from suing thereon are not applied to secure justice between the parties, but are applied because of regard for a higher interest, namely that of the public, whose welfare demands that certain transactions be discouraged.

7. Contracts ⚿139

Where the illegality of a contract is due to facts of which one party is justifiably ignorant and the other party is not, the party who is justifiably ignorant may maintain action on such contract.

8. Pleading ⚿214(3)

For purposes of passing on order sustaining demurrer to complaint, which was brought for relief from a contract illegal in nature, allegation by plaintiff that he did not have knowledge of illegality of the contract would be considered true.

9. Pleading ⚿193(5)

Complaint, which was brought to obtain relief from illegal contract for purchase of stock by corporation from plaintiff, and which alleged plaintiff did not know corporation was illegally purchasing its stock from plaintiff out of earned surplus in violation of governing statutory law, presented issue of fact which must be determined upon trial, and thus complaint was not subject to demurrer. West's Ann. Corp.Code, §§ 1705–1708.

10. Corporations ⚷376

A stockholder who sells stock of corporation back to corporation is not within class of persons protected by statute providing that generally a corporation shall only be allowed to purchase shares of stock from earned surplus. West's Ann.Corp.Code, §§ 1705–1708.

11. Corporations ⚷376

Corporation Code section providing that any shareholder who makes sale of stock to corporation with knowledge of facts indicating impropriety of purchase is liable to corporation to extent of payments received therefor, with interest, shows statutory restriction on corporation in regard to purchase of its own shares was enacted for benefit of corporation as whole, its creditors and stockholders other than participating stockholders. West's Ann.Corp.Code, §§ 1705–1708, 1715.

12. Action ⚷4

Where there is no parity of delictum, one party, having no duty under the law and having the right to assume that the other party, who has a duty, has complied with the law, may resort to the courts though the illegal transaction has been completed.

13. Appeal and Error ⚷1201(6)

Where trial court sustained demurrers to plaintiff's amended complaint but did not indicate upon what ground it based its ruling, conclusion of Supreme Court that plaintiff's amended complaint was not vulnerable to general demurrer did not mean that it was not subject to special demurrer, and upon remanding of cause, trial court could in its discretion require clarification of such uncertainties or ambiguities as may exist in plaintiff's third amended complaint as well as explanation or correction of discrepancies as may appear material because of allegations contained in superseded pleadings.

Lech T. Niemo and William R. Law, Los Angeles, for appellant.

Alan H. Cassman, Los Angeles, and Edmund I. Read, Wilmington, for respondents.

SPENCE, Justice.

[1, 2] Plaintiff appeals from a judgment of dismissal entered upon the sustaining of demurrers to his third amended complaint without leave to amend. Said amended complaint contains three counts: (1) for declaratory relief; (2) to quiet title; and (3) for voiding an illegal sale of stock. However, these counts rely upon the same facts as the basis for plaintiff's claimed right to recover certain corporate stock and accordingly, they will be treated as one. Stephan v. Obersmith, 48 Cal. App.2d 199, 202, 119 P.2d 388; also Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 833, 172 P.2d 501. Both general and special demurrers were interposed. But in view of the denial of leave to amend, the grounds of special demurrer need not be considered here, for the determinative question is the sufficiency of plaintiff's complaint against general demurrer. Maguire v. Hibernia Savings & Loan Soc., 23 Cal.2d 719, 737, 146 P.2d 673, 151 A. L.R. 1062; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747. Plaintiff properly maintains that the allegations of his third amended complaint are sufficient against the general demurrer, and the trial court therefore erred in its ruling.

Plaintiff alleges that defendant Aluminum Taper Milling Co., Inc., is a California corporation and he was the owner of 2,500 shares of its stock; that on September 30, 1953, he agreed with the corporation to sell his shares to it for $25,000, plus an Oldsmobile automobile which they valued at $4,000, and that there was no other consideration; that he received the money and automobile and delivered the stock to the corporation on that day, September 30, 1953; that the purchase of the stock by the corporation was a violation of Corporations Code sections 1705–1708, in that it was purchased "with the capital assets and from the stated capital" rather than "from earned surplus," and it did not come within any of the permitted transactions listed in those sections; that he "did not know that the said defendant corporation at the time he entered into said purported agreement, was not purchasing the said stock out of earned surplus, but that it was, on the contrary, purchasing the said shares in violation of the express provisions of the Corporation Code as stated hereinabove"; and that the agreement for sale and purchase of the stock, in not meeting the aforementioned statutory requirements, is therefore "void and a nullity." Plaintiff prays for declaratory relief, a decree quieting title, and for restoration of possession of the shares upon condition that he return the sum paid him for the stock with appropriate interest thereon.

[3–6] It is the theory of the California Corporation Law, Corp.Code, §§ 1705–1708, that as "a general rule the purchase by a corporation of its own shares should not be allowed except out of earned surplus which would be available for distribution as cash dividends." Ballantine & Sterling on California Corporation Laws, 1949 Ed., § 152, p. 211. The allegations of plaintiff's complaint are sufficient to show that the purchase here did not come within any of the authorized exceptions to the general rule; and accordingly, such allegations support the conclusional averment of invalidity of the transaction. Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Mindenberg v. Carmel Film Productions, 132 Cal.App.2d 598, 607, 282 P.2d 1024. Ordinarily, a party to an illegal contract can neither recover damages for breach nor, by rescinding, recover the performance that he has rendered or its value. Owens v. Haslett, 98 Cal.App.2d 829, 833, 221 P.2d 252; Fong v. Miller, 105 Cal.App.2d 411, 413, 233 P.2d 606. A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity, Hooper v. Barranti, 81 Cal.App.2d 570, 574, 184 P.2d 688, and the parties will be left, therefore, where they are found when they come to a court for relief. Brooks v. Brooks, 63 Cal.App.2d 671, 676, 147 P.2d 417. These principles are not applied to secure justice between the parties, but from regard for a higher interest—that of the public, whose welfare demands that certain transactions be discouraged. Franklin v. Nat C. Goldstone Agency, 33 Cal.2d 628, 632, 204 P.2d 37.

[7] However, to these settled rules there are certain recognized exceptions in favor of a party who is not *in pari delicto* with the other party to the contract, and who as the more innocent of the two, seeks recovery. One of these exceptions is "where the illegality of a bargain is due to facts of which one party is justifiably ignorant and the other party is not." Rest., Contracts, § 599(a); also 12 Cal. Jur.2d § 104, p. 304. This exception was applied in Hardy v. Musicraft Records, Inc., 93 Cal.App.2d 698, 209 P.2d 839, where defendant, the seller, failed to comply with the Corporate Securities Act requiring a permit to sell securities and plaintiffs, the buyers, were allowed to recover the amount paid. In so holding, the court stated in 93 Cal.App.2d at page 703, 209 P.2d at page 842: "It was the duty of the corporation to procure a permit. No obligation rested on the buyers to ascertain whether or not a permit had been issued. They had a right to assume that the corporation had complied with the law before offering its securities for sale."

[8, 9] Plaintiff here seeks to bring himself within this exception by alleging that at the time he entered into the agreement with defendant company, he "did not know that [it] * * * was not purchasing the said stock out of earned surplus, but that it was, on the contrary, purchasing the said shares in violation of the" governing statutory law. For the purposes of demurrer, this allegation must be accepted as true. Brotemarkle v. Snyder, 99 Cal.App.2d 388, 390, 221 P.2d 992. It thus becomes a matter of proof as to whether plaintiff and defendant company were equally guilty, Hardy v. Musicraft Records, Inc., supra, 93 Cal.App.2d 698, 703, 209 P.2d 839, and plaintiff should have his day in court to prove his allegations. Owens v. Haslett, supra, 98 Cal.App.2d 829, 834–835, 221 P.2d 252. While plaintiff is chargeable with knowledge of the law prohibiting the transaction in question, Stevens v. Boyes Hot Springs Co., 113 Cal.App. 479, 483, 298 P. 508, his pleading of lack of knowledge of the facts which would bring that law into operation presents an issue of fact which must be de-

termined upon the trial of that issue rather than upon demurrer.

[10–12] It is clear that plaintiff does not occupy the position of one who belongs to a class for whose protection the statute was enacted. Pollak v. Staunton, 210 Cal. 656, 662–663, 293 P. 26; Carter v. Seaboard Finance Co., 33 Cal.2d 564, 574, 203 P.2d 758; see Ballantine & Sterling on California Corporation Laws, 1949 Ed., § 166, p. 227. Corporations Code section 1715 provides that any shareholder who makes a sale of stock to the corporation "with knowledge of facts indicating the impropriety of the purchase is liable to the corporation * * * to the extent of the payments received therefor, with interest thereon at 7 per cent a year until paid." Such provision indicates that the restriction on the corporation's purchase of its own shares was enacted for the benefit of the corporation as a whole, its creditors and stockholders other than the participating stockholder. But there still remains the question of plaintiff's right to relief despite the illegality of the transaction, because of his asserted lack of knowledge of the facts which made defendant company's purchase of his stock a violation of the law. Plaintiff is not asking the court to carry out an illegal contract or to enforce rights arising out of the illegal transaction, Wise v. Radis, 74 Cal.App. 765, 242 P. 90, but he is seeking relief from a contract which was illegally made. Under these circumstances, the allegation concerning his lack of knowledge of the facts which made defendant company's purchase of his stock a violation of the law presents a material allegation of fact. Where there is no parity of delictum, one party having no duty under the law and having the right to assume that the other party, who has a duty, has complied with the law may resort to the courts though the illegal transaction has been completed. Hardy v. Musicraft Records, Inc., supra, 93 Cal.App.2d 698, 209 P.2d 839.

[13] The conclusion that plaintiff's third amended complaint is not vulnerable to general demurrer does not mean that it is not subject to special demurrer. In sustaining the demurrers to plaintiff's said amended complaint, the trial court did not indicate upon what ground it based its ruling. Upon the remanding of the cause, the trial court may in its discretion require the clarification of such uncertainties or ambiguities as may exist in plaintiff's third amended complaint, Maguire v. Hibernia Savings & Loan Soc., supra, 23 Cal.2d 719, 737, 146 P.2d 673, 151 A.L.R. 1062; Columbia Pictures Corp. v. DeToth, supra, 26 Cal.2d 753, 762, 161 P.2d 217, 162 A.L.R. 747, as well as the explanation or correction of such discrepancies as may appear material because of allegations contained in plaintiff's superseded pleadings. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 211–212, 212 P.2d 591.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR and SCHAUER, JJ., and DOOLING, J. pro tem., concur.

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46 Cal.2d 456

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Dorothy DIXON, Defendant and Appellant.

Cr. 5816.

Supreme Court of California.
In Bank.
May 4, 1956.

Defendant was convicted of unlawfully possessing heroin. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment of conviction and order denying defendant's motion for new trial, and defendant appealed. The Supreme Court, Traynor, J., held that heroin obtained as a result of entry of apartment, arrest of tenant and search of garage without a warrant was illegally obtained and therefore inadmissible in prosecution for possessing heroin, in absence of evidence of reasonable cause for entry of apartment and arrest of tenant.

Judgment and order reversed.

Spence and Shenk, JJ., dissented.

Opinion, 288 P.2d 273, vacated.

1. Criminal Law ⚷395

That garage key was forcibly taken from defendant by arresting officers did not preclude use of heroin found in garage as evidence in prosecution for unlawful possession of heroin, where officers used no more force than was reasonably necessary to take key from defendant's hand. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⚷395

Searches and Seizures ⚷3(1)

Heroin seized as a result of entry of apartment, arrest of tenant and search of apartment and garage without a warrant was illegally obtained and therefore inadmissible in prosecution of tenant for unlawfully possessing heroin, in absence of evidence of reasonable cause for entry of apartment and arrest of tenant. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 836, 844.

3. Criminal Law ⚷1169(1)

Testimony of defendant in explanation of her possession of heroin, showing that she knowingly possessed it, was impelled by erroneous admission in evidence of heroin obtained by illegal search and could not be segregated from such evidence to sustain conviction for illegally possessing heroin. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 836, 844.

4. Arrest ⚷71

If reasonable cause is shown for entry of apartment and arrest of tenant, contemporaneous search of garage on the premises also rented by tenant and under her control would be lawful. West's Ann. Code Civ.Proc. § 53; West's Ann.Pen. Code, §§ 836, 844.

Dorothy Dixon, in pro. per., John H. Marshall, Los Angeles, and Henry S. Rupp, Long Beach, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment of conviction entered after the court sitting without a jury found her guilty of one count of possessing heroin. Health and Safety Code, § 11500. She also appeals from an order denying her motion for a new trial.

Defendant resided in a court apartment rented from Ramona Lopez, who occupied another apartment of the same court. Sometime during the evening of November 29, 1954, Officer O'Grady of the Narcotic Division of the Los Angeles Police Department entered and searched the apartment of Mrs. Lopez but failed to find any narcotics or substances commonly used in cutting them.

Thereafter, at about 10:30 p. m., Officer O'Grady, accompanied by Officer Kennedy and State Narcotics Inspector Wells, entered defendant's apartment, placed her under arrest, and told her to remain seated on the bed while they searched her apartment. They did not have a warrant. In defendant's kitchen cupboard they found an opened carton of milk sugar, which is used to cut heroin. Officer O'Grady testified that defendant appeared extremely nervous and on several occasions got up and "wandered around" the room while the officers were searching it. He told her that if she did not remain seated until they finished, it would be necessary to handcuff her. She insisted on going to the bathroom and told him that she had recently aborted herself and that she was "having difficulties." He offered to call a doctor for her if one was necessary or to see that she received medical attention before going to jail. As he turned his back, she took something from the upper part of her dress. He ordered her to hand it to him, and when she refused and made a motion to place it in her mouth, he and the other officers seized her arms to keep the object from her mouth. She kicked one of the officers, and in the ensuing struggle they lifted her onto the bed and forced a key from her hand. She admitted that it was the key to one of the apartment garages rented by her. Officer O'Grady and Inspector Wells entered the garage and found ten latex bags containing preparations of heroin that had been cut with milk sugar. Defendant produced keys to two other garages. In one of them the officers found a box of empty capsules.

[1] The People's case was submitted on the testimony in the transcript of the preliminary hearing and the exhibits received at that hearing including the heroin, capsules, and milk sugar. Her contention that the judgment must be reversed on the basis of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, because the narcotics were found only after the garage key was forcibly taken from her is without merit. The brutal and shocking force condemned in that case was not present here; no more force was used than was reasonably necessary to take the key from her hand.

[2, 3] It follows, however, from the officer's own testimony that they had no warrant and from the absence of any evidence to justify their entry, arrest, and search that the evidence was illegally obtained and should therefore have been excluded. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905; Badillo v. Superior Court, Cal., 294 P.2d 23. Defendant's testimony in explanation of her possession of the narcotic that Mrs. Lopez forced her to keep it revealed that she knowingly possessed it. This testimony, however, was impelled by the erroneous admission of the illegally obtained evidence and cannot be segregated from that evidence to sustain the judgment. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; People v. Berger, 44 Cal.2d 459, 462, 282 P.2d 509; Badillo v. Superior Court, supra.

[4] It remains only to add for the guidance of the trial court, Code Civ.Proc. § 53, that if on a new trial reasonable cause is shown for the entry of defendant's apartment and her arrest, Pen.Code, §§ 836, 844; see People v. Martin, 45 Cal.2d 755, 290 P.2d 855; People v. Maddox, Cal., 294 P.2d 6; Willson v. Superior Court, Cal., 294 P.2d 36, the contemporaneous search of the garage would be a lawful search as an incident to that arrest since the garage was on the premises and under defendant's control. See United States v. Pisano, 7 Cir., 193 F.2d 361, 363–364; Kelley v. United States, 8 Cir., 61 F.2d 843, 846–847; Dibello v. United States, 8 Cir., 19 F.2d 749, 750–751; United States v. Charles, 9 Cir., 8 F.2d 302; Fryar v. United States, 6 Cir., 3 F.2d 598, 599; Sayers v. United States, 9 Cir., 2 F.2d 146, 147–148; State v. Estes, 151 Wash. 51, 274 P. 1053, 1054; cf. Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 70 L.Ed. 145; Application of Rose, D.C., 32 F.Supp. 103, 104; People v. Gorg, 45 Cal.2d 776, 291 P.2d 469.

The judgment and order are reversed.

GIBSON, C. J., and SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I concur in the judgment of reversal but prefer to base my concurrence upon the legal proposition that the conduct of the law enforcement officers here not only amounted to a violation of defendant's right of privacy guaranteed by the Fourth Amendment to the Constitution of the United States and section 19 of article I of the Constitution of California but also amounted to a denial of due process of law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States as interpreted by the Supreme Court of the United States in the case of Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

SPENCE, Justice.

I dissent.

The record clearly shows that defendant had committed and was committing a felony at the time of her arrest. I am therefore of the opinion that the arrest was lawful, Pen.Code, § 836, subd. 2; that the search made as an incident of that arrest was a reasonable search; and that the evidence obtained as the result of such search was properly admitted. See dissenting opinion in Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23. I would affirm the judgment and the order denying a new trial.

SHENK, J., concurs.

141 Cal.App.2d 299

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William S. BROWN, Jr., Defendant and Appellant.

Cr. 3186.

District Court of Appeal, First District, Division 1, California.

May 4, 1956.

Prosecution for issuance of six insufficient-fund checks. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment convicting defendant of issuing four such checks. Defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that, in view of defendant's testimony, the defendant could not assert as to four of the checks his defense of lack of intent to defraud because of his belief that he had sufficient funds on deposit.

Affirmed.

1. False Pretenses ⚷52

In prosecution for issuance of six insufficient-fund checks, defendant's testimony that he was not relying upon funds expected from his debtor when he cashed four of the checks warranted instruction that evidence on which he based his defense of reasonable expectation of funds from debtors could not be considered in respect to the four checks.

2. Criminal Law ⚷575

Where information charging issuance of insufficient-fund checks was filed March 31, and trial was continued to May 31, and the 60th day after March 31, was May 30, a holiday, and trial started May 31, on which day jury was selected and two witnesses testified, there was a bringing to trial within required 60 days after filing. West's Ann.Pen.Code, §§ 1050, 1382.

3. Criminal Law ⚷575, 578

The statute declaring the policy that trial of criminal case commenced not later than 30 days after entry of defendant's plea and that continuances be not granted except under certain conditions operates more as a declaration of policy and not as a strict and literal mandate. West's Ann. Pen.Code, § 1050.

4. Criminal Law ⚷573, 594(2)

In prosecution for issuance of insufficient-fund checks drawn on Portland bank, record relating to prosecutor's attempts to secure Oregon witness and to defendant's representation as to how he would plead and prosecutor's reliance thereon in selecting time for trial preparations disclosed that granting of continuance to obtain Oregon subpoena to bring official of Portland bank to San Francisco as witness was not abuse of discretion and did not violate defendant's right to speedy trial.

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Harry S. Wainwright, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., of the State of California, Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Between February 22 and March 3, 1955, defendant, engaged in business in Portland, Oregon, cashed six checks in San

Francisco which were returned by the drawee Portland bank because of insufficient funds. Prosecuted for issuance of these checks, he was convicted on account of four which he issued on February 22, 23 and 24, but acquitted in respect to two which he cashed on February 28 and March 3, and was given four county jail sentences of nine months each, running concurrently.

[1] His defense was lack of intent to defraud, predicated upon his asserted belief that he had sufficient funds upon deposit.

He testified that in the first part of January, 1955, he opened the bank account by making a deposit of $1,000, followed by additional deposits on February 1, 4 and 5, bringing the total to $2,600. Also, $2,500 became due him from a Mr. Hodges for work which was completed on February 7, 1955. He told Mr. Hodges that he was going to take a trip and the latter said he would deposit the $2,500 to defendant's account at the Portland bank "right away." Defendant was not definite as to the exact date that Mr. Hodges was to deposit the money, but he had a "strong impression that he said that he would do it the following day." Defendant was not concerned about it because he "wasn't embarrassed" for funds at the time. Defendant left Portland on February 7, with the expectation that Hodges would deposit the money to his account. Later, on February 15, defendant spoke to Mrs. Hodges on the telephone and she told him that Hodges was in Los Angeles and that the money would be deposited immediately.

Defendant testified that when he wrote the two checks of February 28 and March 3, he believed Mr. Hodges had deposited the funds to defendant's account but that when he issued the other four checks on February 22, 23 and 24 he gave no consideration to the Hodges' deposit, that he believed he had sufficient funds in the bank irrespective of the funds which he believed were forthcoming from Mr. Hodges; those checks were not written with any reliance upon the Hodges' money being deposited to defendant's account; he believed he had sufficient funds in the bank to cover those checks irrespective of the Hodges' funds.

The trial court instructed the jury that one of the defenses was the defense of reasonable expectation of funds from Mr. Hodges but the jury should not consider that evidence in respect to the four checks issued during the period February 22 to 24, inclusive, because defendant was not at the time of their issuance relying upon the funds he expected from Mr. Hodges.

Defendant claims that thus limiting this evidence was prejudicial error. We are not persuaded. Honorable John B. Molinari, the judge who presided at the trial, aptly answered this contention in these words, during a discussion of the subject outside the presence of the jury: "The witness testified in practically unequivocal terms that it didn't make any difference to him whether he had the Hodges money in the bank, as far as these four checks were concerned. He wasn't concerned whether Hodges ever made that deposit, so far as those checks are concerned."

[2, 3] In further support of his appeal defendant claims that his right to a speedy trial was violated. Two informations were filed against him, one on March 31, the other on May 25. On May 26, pursuant to stipulation, the two cases were consolidated for trial, to commence May 31, the date to which the trial of the first case had theretofore been continued. On May 31 the trial started. A jury was selected and two witnesses testified that day, proving the issuance of the checks and putting the checks in evidence. That was a bringing to trial within 60 days after the filing of the first information in view of the fact that the 60th day fell upon May 30, a holiday. That satisfied the requirements of section 1382 of the Penal Code.[1]

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[1] Section 1050 of the Penal Code declares the policy that the trial of a criminal case commence not later than 30 days after entry of defendant's plea and that continuances be not granted except under certain conditions. These provisions

[4] Upon making proof of the issuance of the checks in San Francisco and their return after rejection by the Portland bank, the district attorney asked for a continuance to obtain an Oregon subpoena to bring an official of the Portland bank here as a witness. Defense counsel objected because, he stated, the prosecutor had had ample time before trial to subpoena the witness. The prosecutor gave his reasons for the delay, as follows: "I was in telephone communication with the bank authorities and they hold me they would be present today and it was not until Friday morning [May 31 fell on a Tuesday] that they called me and said that their legal staff had advised them not to come, and they would not come. As your Honor knows, I then got out a regular foreign subpoena and served it on them, and they still didn't think that was sufficient. They were informed this morning that they did not consider our foreign subpoena sufficient; that they would want one in conformance with the uniform witness act."

The court believed the prosecutor and stated that the court had been informed all along of the steps that the prosecution was taking to obtain the Oregon witnesses, and felt that the prosecutor had been diligent in his attempts to secure the witnesses as soon as possible.

The prosecutor further stated in reply to defense counsel's accusation that he did not begin his trial preparation in time, that defendant had represented to the district attorney's office that he was going to plead guilty. Defense counsel denied that such a representation had been made, but the prosecutor stated that at the time that the representation had been made, defendant was not represented by the present defense counsel. The court stated in that regard: "From what Mr. Campbell [the prosecutor] tells me, whoever represented this man in the lower court lulled the District Attorney into believing perhaps there would be a plea and those of us who are acquainted with procedures around here can almost take judicial knowledge that quite often when a plea is indicated, the People do not prosecute on other available counts." The trial judge also stated that he knew that the district attorney gave precedence in his preparation to cases in which a plea of guilty is not indicated. The court concluded that in its opinion the People's request for a continuance was reasonable because they had been diligent, and continued the trial to June 6.

We conclude that in the granting of this continuance there was neither a violation of defendant's right to a speedy trial nor an abuse of the sound discretion vested in the trial judge.

On June 6, an official of the Portland bank took the witness stand and the trial was resumed. When the People rested defendant's counsel made his opening statement and defendant testified at considerable length, whereupon a recess was taken to June 8. Upon the latter date, after evidence was all in, the trial was continued to June 14 to have defendant's testimony transcribed by the reporter and considered by the judge in determining whether or not defendant's testimony concerning the expected payment from Mr. Hodges should be applicable only in relation to the two checks last issued by defendant. This continuance to June 14 was for defendant's own benefit. Defendant is not complaining of the last two continuances but mention of them seems desirable in order to complete the picture.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

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operate more as a declaration of policy, not as a strict and literal mandate. Zamloch v. Municipal Court, 106 Cal. App.2d 260, 263, 235 P.2d 25 and cases there cited.

141 Cal.App.2d 246

**Alta CHURCH and Cecil S. Church,
Plaintiffs and Appellants,
v.
CAPITAL FREIGHT LINES, a California corporation, and Harris W. Kelly,
Defendants and Respondents.
Civ. 8704.**

District Court of Appeal, Third District,
California.
May 2, 1956.

As Modified May 28, 1956.

Action for personal injuries. The Superior Court, Tehama County, Curtiss E. Wetter, J., entered judgment on verdict for defendants and after plaintiffs' motion for new trial was denied by operation of law, plaintiffs appealed. The District Court of Appeal, Peek, J., held that in view of conflicting evidence, trial judge did not abuse his discretion in denying plaintiffs' motion for new trial, which motion was made on ground plaintiffs were denied their right to trial before jury of 12 competent persons in that jury foreman was mentally incompetent at time of trial.

Judgment affirmed.

1. Jury 🔑33(2)

A right to trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors, which latter right is an inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution. West's Ann.Code Civ.Proc. §§ 198, 199.

2. New Trial 🔑140(3)

On plaintiffs' motion for new trial on ground plaintiffs were denied their right of trial before jury of 12 competent persons in that jury foreman was mentally incompetent at time of trial, jurors' affidavits were admissible in evidence for purpose of assisting in determining qualifications of jury foreman to serve as juror. West's Ann.Code Civ.Proc. §§ 198, 199.

3. Evidence 🔑63
Mental Health 🔑7

The presumption is always that a person is sane, and therefore one who claims that a person is insane at a particular time has the burden of establishing that fact by preponderance of evidence.

4. Evidence 🔑67(3)

Although proof of subsequent insanity may have some evidentiary effect as to prior mental illness, it will not create nor carry a presumption of its past existence.

5. New Trial 🔑140(3)

On motion for new trial on ground plaintiffs were denied right to trial before jury of 12 competent persons in that foreman of jury was mentally incompetent at time of trial, trial judge did not abuse his discretion in reaching conclusion that jury foreman was mentally competent at time of trial and in denying motion, in presence of conflicting evidence on the question of sanity, at time of trial, of foreman, who was declared to be mentally ill on a petition filed 11 days after verdict and judgment. West's Ann.Code Civ.Proc. § 660.

Alfred E. Frazier, Red Bluff, L. C. Smith, Redding, for appellants.

Fitzwilliam & Memering, Sacramento, for respondents.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment entered pursuant to a jury verdict in favor of defendants in an action for personal injuries. Plaintiffs' sole contention is that they were denied their right to a trial before a jury of 12 competent persons in that Norman Sindel, the foreman of the jury, was mentally incompetent at the time of trial.

The record shows that the verdict and judgment were entered on March 5; that on March 16, 11 days thereafter, Sindel's wife filed her petition to have him declared to be a mentally ill person; and that on March 18 he was declared so to be and was committed to Agnews State Hospital. On March 17 plaintiffs filed their notice of motion for a new trial, stating the same would be made on affidavits and all of the records and files in said action. On April 30 they filed their notice of motion for mistrial. Although that motion was noticed for May

10, the record shows that the date of hearing thereon was May 6, and the court, in its order denying the same, states: "Motion for mistrial was made, together with motion for new trial. The grounds were that one of the jurors was mentally incompetent and hence there was a jury of eleven persons without the consent of the parties." The order was filed on May 24. Since no ruling was made on plaintiffs' motion for a new trial, it will be deemed to have been denied by operation of law. Section 660, Code of Civ.Proc.

[1, 2] Although we have been referred to no cases in this state directly in point, surely there can be no question but that the right to a trial before mentally competent jurors is as fundamental as the right to trial before unbiased and unprejudiced jurors which our courts have held to be an "'inseparable and inalienable part of the right to a trial by jury guaranteed by the Constitution.'" People v. Galloway, 202 Cal. 81, 92, 259 P. 332, 336. In amplification of this constitutional right, the Legislature by statute has determined who are competent, Code of Civ.Proc. § 198, and who are not competent, Code of Civ.Proc. § 199, to act as jurors. By such statutory provisions a person not in "possession of his natural faculties" may be disqualified to serve as a juror. But that fact would not necessarily be disclosed under ordinary questioning on voir dire. Contrary to defendants' argument, the very nature of the affliction would preclude the application of any rule predicated upon rationalization such as the intentional or unintentional failure to disclose one's disqualification. Therefore in the present case the court properly considered the affidavits of the jurors, not for the purpose of impeaching the verdict, but to assist it in determining the qualifications of Sindel to serve as a juror. (See Shipley v. Permanente Hospital, 127 Cal.App.2d 417, 274 P.2d 53.)

[3, 4] The presumption is always that a person is sane; therefore one who claims that a person is insane at a particular time has the burden of establishing that fact by a preponderance of the evidence. Mattos v. Kirby, 133 Cal.App.2d 649, 652, 285 P.2d 56. Furthermore, although proof of subsequent insanity may have some evidentiary effect as to prior mental illness, it will not create nor carry a presumption of its past existence. In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45; see also 27 Cal.Jur.2d, sec. 10, page 332.

[5] Thus in the present case the burden was cast upon plaintiffs to establish by a preponderance of the evidence that Sindel was in fact mentally incompetent at the time of the trial. The affidavits submitted by plaintiffs in support of their motions consisted of four by jurors, three of which were addressed primarily to the vote of the jurors in the juryroom which they aver was 9 to 3 in favor of defendants, as contrasted with the vote of 11 to 1 when the jury was polled, and it is agreed by all that Sindel consistently voted for the defendants. The affidavit of the fourth juror, in addition to referring to the vote as noted, also went into considerable detail concerning the activities of Sindel in the juryroom; that is that he was most emphatic and outspoken in his bias toward plaintiffs, their witnesses and their case, and was most officious in his capacity as jury foreman. Additionally each of the plaintiffs filed affidavits to the effect that they had no previous acquaintanceship with Sindel nor any knowledge of his mental condition. Affidavits were also filed by plaintiffs' attorneys, one in substantially the same phraseology as plaintiffs'—the other that although he knew Sindel by sight, he had no knowledge of his mental condition until he read a newspaper account of his commitment. An affidavit was also filed by one of the two doctors appointed by the court to examine Sindel prior to his commitment. The pertinent portions of his affidavit were that, based upon his observation and examination of Sindel and the information set forth in the affidavits submitted by plaintiffs, it was his opinion that during the time of the trial Sindel was "suffering from dementia præcox, paranoid type," and that he was not, during that period, "in the possession of his natural faculties." It was the doctor's further opinion that the condition which he observed on the date of his examination could

not "have developed in a shorter period of time than three or four weeks." He further stated that his mental condition during that time was one "which would prevent the weighing of testimony and the arriving at such a fair opinion as would be expected of a normal individual; that the probabilities are that one side or the other in any litigation in which said party was a juror would be prejudiced by reason of the above-described mental condition."

The affidavits filed by defendants in opposition include six by jurors which were substantially to the same effect as those filed by plaintiffs concerning the votes taken by the jury, but which denied the notice of anything out of the ordinary concerning Sindel. A further affidavit was filed by Sindel's wife wherein she averred that except for restlessness at night during the time of the trial, she had noticed nothing different in his conduct; that on the third day following the trial, he mentioned a conversation with a person he had met, that seemed to upset him; that on March 13th, or 8 days after the trial, he suddenly became very excited and a doctor was called. Defendants' counsel likewise filed an affidavit which was to the effect that he had noted nothing during the course of the trial which would have caused him to question Mr. Sindel's mental capacity. Defendants also filed an affidavit by a psychiatrist who did not personally examine Sindel but based his opinion on the record of the case and the affidavits of the jurors. His conclusion was that conceding that on the day of his commitment Sindel was undoubtedly suffering from "some form of mental illness," it could not be said with "reasonable medical certainty that the condition of mental illness found to exist in said Norman Sindel on March 17, 1954, had existed for three or four weeks, or for any greater or lesser period." On the contrary, he said that it was medically certain that the mental illness from which Sindel was suffering might "develop and manifest itself in one day, one week, one month, one year, or many years." The psychiatrist further stated, "This is a disease that the symptoms are not particularly related to any time factors. The disease may lie dormant and then appear within hours." He further stated that in the absence of any evidence of unusual conduct on the part of Sindel during the time of the trial or prior thereto, his subsequent mental breakdown, although it might have been induced by the strain of serving as a juror, actually occurred subsequent to the conclusion of the trial. He concluded his affidavit with the following statement:

> "It is my opinion the conduct of said Norman Sindel during the period March 2, 1954, through March 5, 1954, as related in the affidavits of the jurors above mentioned was consistent with that of a normal, mentally well person.
>
> "Based upon all the evidence available to me at this time, it is my strong belief and opinion that this man was rational and in complete possession of his natural faculties during the period March 2, 1954, through March 5, 1954."

Upon the conflicting evidence so presented the trial court concluded that Sindel was qualified to serve as a juror. Although a different conclusion by the trial court would have been equally well-founded, nevertheless that is not to say that upon the conflicting evidence presented, the trial judge abused his discretion in following the conclusion of defendants' doctor rather than the evidence produced by plaintiffs.

It would appear wholly unnecessary to discuss in detail plaintiffs' further contention relative to the failure of defendants to submit any evidence in opposition to plaintiffs' motion for a mistrial, nor does it seem necessary to discuss the propriety of plaintiffs' motion for a mistrial. Suffice it to say that the record shows, and it is not contradicted, that plaintiffs' motion for a new trial and their motion for a mistrial were heard at the same time. Hence in the absence of any showing to the contrary we assume that all evidence (obviously the same in each matter) was before the court and was considered by it in reaching its conclusion.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

141 Cal.App.2d 274

Petition for Naturalization of John THIESEN.

John THIESEN, Appellant,

v.

UNITED STATES of America, Respondent.

Civ. 4999.

District Court of Appeal, Fourth District, California.

May 2, 1956.

Petition for naturalization. From an order of the Superior Court, Tulare County, W. G. Machetanz, J., denying the petition, the petitioner appealed. The District Court of Appeal, Fourth District, Barnard, P. J., held that a member of the Mennonite Brethren Church who expressed a willingness to take any one of three oaths required by 1940 Act, 1950 Act, or 1952 Act, but who, because of religious scruples, was unwilling to bear arms or serve in the military was entitled to be admitted to citizenship.

Order reversed and cause remanded with directions.

Aliens ⚿62(2)

A member of Mennonite Brethren Church who expressed a willingness to take any one of three oaths required by 1940 Act, 1950 Act or 1952 Act but who, because of religious scruples, was unwilling to bear arms or serve in the military was entitled to be admitted to citizenship. Immigration and Nationality Act, §§ 319(a), 337(a) (5) (C), 8 U.S.C.A. §§ 1430(a), 1448(a) (5) (C).

◆

Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, for appellant.

Laughlin E. Waters, U. S. Atty., Max F. Deutz, Asst. U. S. Atty., Chief, Civil Division, Arline Martin, Asst. U. S. Atty., Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order denying a petition for naturalization.

The appellant, who is a Russian native, entered the United States with his parents in 1930, when he was about four years old. He is a member of the Mennonite Brethren Church, and the family entered the United States as a result of aid furnished by that church and, apparently, as a part of a group which fled Russia to escape religious persecution. During World War II the appellant was classified 4–E as a conscientious objector, and assigned to the Civilian Public Service System, in which he served seven months at a forestry camp, and eleven months at a veteran's hospital. He married a native-born American woman in October, 1947, and they have two children. On September 17, 1948, he filed a petition in the superior court of Tulare County for naturalization under Section 310(b) of the Nationality Act of 1940.[1]

On the day the petition was filed appellant was questioned by a naturalization examiner and answered a number of questions, among which were the following:

> "Q. In the event we should again go to war would you be willing to either enlist or be inducted into the armed forces to serve in the Medical Corps? A. (Note: hesitates several minutes before replying) If that would not have anything to do with killing I would be willing to enlist as a conscientious objector in the armed forces.
>
> "Q. As a Medical Corpsman would you be willing to wear the uniform of the United States Army, that is, serve as first aid men on the front line if need be? A. Well, if it would be giving them first aid so they could shoot again, I can't do that.
>
> "Q. You are advised that from my own experience in the past war, that the medical corpsmen or first aid men did not carry arms, but their duty was to give first aid and to help any soldier who might be wounded on the field of battle. You now state that you would not be willing to serve in the armed forces in this capacity, if it means that the soldier you might be aiding would again be able to take up his own arms

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[1] Now 8 U.S.C.A. § 1430(a).

> in order to kill the enemy, is that correct? A. That's right.
>
> "Q. Likewise then, would you be willing to serve in the capacity of transporting arms to the front line for the purpose of repelling the enemy and killing him if necessary? A. Absolutely not.
>
> "Q. It follows then that you are not willing to serve in the capacity of transporting food and other equipment to our forces in the front line if that meant that our soldiers would thereby be enabled the better able to repel the enemy and to kill him, is that correct? A. That's right.
>
> "Q. Would you be willing, as a farmer to grow food with the understanding and assurance that the Armed Forces would buy this food for the specific purpose of sending that food which you grew direct to the front lines of our armed forces to feed our soldiers there so that they could the better be able to repel the enemy? A. If I knew it where it was going, in order to kill someone else, I couldn't do it."

At the hearing the appellant explained his answer to the first of these questions as follows:

> "When I made that statement, I am sure I meant that I couldn't have a part in the military itself. What I meant, if we are inducted and—there was—if they said as Selective Service, they asked us conscientious objectors to go and do that kind of work on the battle field (*sic*), certainly I would. But I would not be under the military."

Appellant testified that he was willing to take the oath of allegiance prescribed by Section 335(b) (2) of the Nationality Act of 1940 as amended by the Internal Security Act of 1950, 64 Stat. 1017, but that he was unwilling to take the oath set forth in Section 335(b) (1) of that Act. He asserts in his brief that he is willing to take the oath in the form prescribed by the Nationality Act of 1940; the oath to "support and defend" but not the alternate oath to "perform noncombatant service" required by the 1950 Act; or to take the oath in the 1952 Act, 8 U.S.C.A. § 1448 (a) with its alternate (5) (C) "to perform work of national importance under civilian direction when required by the law." Although he contends that the 1940 Act oath is the one here involved, he states he can take any of the three oaths as above indicated in order to be admitted to citizenship. It appears, without dispute, that appellant's opposition to military service is based on religious training and belief and the trial court specifically found that it "believes that petitioner by reason of religious training and belief is conscientiously opposed to serving in the armed forces either as a combatant or noncombatant." In its order the court also found, because of his answers to two of the questions as above quoted, that appellant is not "attached to the principles of the Constitution of the United States and well disposed to the good will and happiness of the United States", and that he "cannot take the 1952 oath without mental reservation." The court also expressed the opinion that the appellant is not able to take either the 1940, the 1950, or the 1952 oath "without demanding an implicity excision therefrom in excess of those warranted by" the more recent decisions of the Supreme Court of the United States.

The naturalization examiner originally recommended denial of appellant's petition on the ground that he could not claim conscientious objection by reason of his religious training and belief since some Mennonites, belonging to the same church as appellant, were able to go into military service as noncombatants. Following the decision of the Supreme Court of the United States in Jost v. United States, 347 U.S. 901, 74 S.Ct. 427, 98 L.Ed. 1061, the examiner withdrew that recommendation for the purpose of a further investigation of the matter. Later, although no further investigation was conducted or any new facts brought out, the examiner again recommended denial of the petition on the ground that the petitioner was unable to take an unqualified oath of allegiance.

The Department of Justice concedes in its brief that the court's decision in this case is inconsistent with that of the Supreme Court of the United States in Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 and Cohnstaedt v. Immigration and Naturalization Service, 339 U.S. 901, 70 S.Ct. 516, 94 L.Ed. 1331. It confesses error and suggests that, if this court agrees, the decision of the superior court should be reversed and the cause remanded with directions to admit the appellant to citizenship.

While not without reluctance, we are forced to conclude that the factual questions presented by this case have already been determined by the decisions of the Supreme Court of the United States above mentioned, and that the trial court's decision is inconsistent therewith. While the trial court attempted to distinguish this case from the Cohnstaedt case, similar distinctions which were attempted to be made in that case were not upheld by the decision therein.

A question is raised as to whether the oath which should be applicable here is that required by the 1940 Act, the 1950 Act, or the 1952 Act with its alternate (5) (C). The respondent argues that the oath required by the 1940 Act is applicable, and that since the oath required by the 1950 Act is essentially the same it need not be decided which of those two oaths should be given. Since the appellant expresses a willingness to take any one of the three oaths thus mentioned this question need not be decided. Appellant may be taken at his word and given the oath required by the 1952 Act, 8 U.S.C.A. § 1448 (a) with its alternate (5) (C) "to perform work of national importance under civilian direction when required by the law."

The order appealed from is reversed and the cause remanded to the superior court of Tulare County, with directions to admit the petitioner to citizenship.

GRIFFIN and MUSSELL, JJ., concur.

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141 Cal.App.2d 278

Karl O. URLAND, Plaintiff and Appellant,
v.
Fred Hayward FRENCH, Harvey M. French, Marie Elizabeth Whitmore, Los Angeles Transit Lines, a corporation, and Does I to XX, Inclusive, Defendants.

Los Angeles Transit Lines, a corporation, Respondent.
Civ. 21499.

District Court of Appeal, Second District, Division 1, California.
May 3, 1956.
Rehearing Denied May 21, 1956.
Hearing Denied June 27, 1956.

Action against streetcar company for injuries suffered by pedestrian as result of collision at intersection controlled by traffic lights, when westbound motorist came through amber light and around front of southbound streetcar, which had been given signal to proceed by streetcar flagman and collided with motorist moving south on west side of streetcar, thereby causing westbound motorist to swerve into pedestrian standing on island located on streetcar company right-of-way in center of east-west street. The Superior Court, Los Angeles County, Wilbur C. Curtis, J., entered judgment for streetcar company notwithstanding the verdict. Pedestrian appealed. District Court of Appeal, Fourt, J., held that evidence as to whether streetcar motorman's operation of streetcar was negligent and whether such negligence was proximate cause of pedestrian's injuries was sufficient to present question for jury.

Judgment reversed with directions.

1. Appeal and Error ⟹109, 113(1)

Order granting motion for judgment notwithstanding verdict and order refusing to vacate judgment notwithstanding the verdict or to vacate order granting motion for new trial were not appealable.

2. Trial ⟹142

Unless, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision.

3. Judgment ⚿199(3.2, 3.9)

A motion for judgment notwithstanding the verdict is in the nature of demurrer to evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom.

4. Trial ⚿139(1)

Even though a court might be justified in granting a new trial, the court would not be justified in directing a verdict on the same evidence. West's Ann.Code Civ.Proc. § 629.

5. Judgment ⚿199(3.2)

The power of a court in passing upon motion for judgment notwithstanding the verdict is strictly limited and the court has no power to weigh the evidence but is bound to view it in most favorable light in support of verdict.

6. New Trial ⚿72

If, in opinion of trial court, the evidence is unreliable, it is duty of court to grant new trial, and it may grant such trial even where there is substantial evidence to sustain verdict, if it believes that evidence preponderates against verdict.

7. Negligence ⚿61(1, 2), 62(3)

When an injury results from the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other, and the fact that neither party might have reasonably anticipated the occurrence of the other concurrent cause does not shield from liability him whose own negligence was one of the causes of the injury.

8. Street Railroads ⚿117(5, 34)

In action against streetcar company for injuries sustained by pedestrian as result of collision at controlled intersection when westbound motorist came through amber light and around front of southbound streetcar, which had been given signal to proceed by streetcar flagman, and collided with motorist moving south on west side of streetcar, which collision caused westbound motorist to swerve into pedestrian standing on island located on streetcar right-of-way in center of east-west street, evidence as to whether westbound motorist was lawfully within intersection at time streetcar started forward, and whether westbound motorist was compelled to swerve around front of streetcar by failure of motorman to yield right-of-way, and whether such fact was proximate cause of pedestrian's injuries was sufficient to present questions for jury. Vehicle Code, § 476.

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Robertson, Harney, Drummond & Dorsey, David M. Harney, Los Angeles, for appellant.

Trippet, Newcomer, Yoakum & Thomas, Henry R. Thomas, Wayne Veatch, and Henry F. Walker, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by the plaintiff from a judgment notwithstanding the verdict rendered in favor of defendant Los Angeles Transit Lines, in an action to recover damages for personal injuries sustained in an automobile accident.

The action was originally filed against Fred French, Harvey French, Marie Elizabeth Whitmore and Los Angeles Transit Lines. Fred and Harvey French and their liability insurance carrier, through a covenant not to sue, settled with appellant by payment of $30,000, although the paying parties denied any liability and appellant asserted liability on the part of respondent.

The case was tried against the defendants Whitmore and Los Angeles Transit Lines, appellant recovering a verdict in his favor against both defendants. This verdict was later set aside upon motions for new trial, as to respondent upon the grounds of insufficiency of the evidence and of newly discovered evidence, and as to Whitmore upon the grounds of insufficiency of the evidence.

[1] The case was retried and appellant recovered a verdict against Whitmore and

respondent in the sum of $40,000, less the $30,000 theretofore paid on the covenant not to sue. Respondent moved for judgment notwithstanding the verdict and defendant Whitmore moved for a new trial. Both motions were granted. The appellant has appealed from (1) the order granting defendant Whitmore's motion for a new trial (which has been abandoned by appellant); (2) the order granting respondent's motion for judgment notwithstanding the verdict (which is not appealable—Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 504, 107 P.2d 55); (3) the judgment notwithstanding the verdict "signed * * * on June 27, 1955"; (4) "the final judgment entered in the above entitled action," and (5) refusal to vacate the judgment notwithstanding the verdict and to vacate the order granting the motion for a new trial which is not appealable—Bixby v. California Trust Co., 33 Cal.2d 495, 499, 202 P.2d 1018; Kellow v. Lane, 102 Cal.App.2d 821, 826, 228 P.2d 872.

Appellant contends that (1) the trial court did not have power to grant respondent's motion for judgment notwithstanding the verdict made after entry of judgment since such motion was not made in the alternative with a motion for new trial as provided in section 629, Code of Civil Procedure, and (2) as a matter of law, the judgment notwithstanding the verdict was improperly granted.

The accident occurred about 6:35 in the evening of February 11, 1953, at the signal-controlled intersection of Exposition Boulevard, Vermont Avenue and McClintock, in the city of Los Angeles. It was dark at the time but the intersection was well lighted. Exposition, which runs in an easterly-westerly direction, is paved to the east of Vermont from its north to its south curbs. To the west of Vermont, Exposition has a north portion, for westbound traffic, and a south portion, for eastbound traffic, divided by a private right-of-way of the Pacific Electric Railway. The north portion is 30 feet wide from the north curb of the right-of-way to the north curb of Exposition and has three lanes, one for parking and two traffic lanes. The east end of the right-of-way (also referred to as the "island") is almost even with the west curbline of Vermont, and has a sidewalk upon it. A little west of the sidewalk and on the northerly portion of the right-of-way is a flagman's shack or shelter. Vermont, which runs north and south, has streetcar tracks in the center of its paved street.

At the time of the accident, appellant was on the island on the east end of the right-of-way. Musselwhite, a flagman employed by respondent, was stationed at the intersection to direct and control the movement of the respondent's streetcars, including the one in question, into and through the intersection. The flagman's eyesight was considerably impaired, being blind in one eye and the vision in the other being poor. Respondent's streetcar was being operated by one William Bacon in a southerly direction on Vermont. Defendant Whitmore was driving her automobile south on Vermont, to the right of the streetcar. Both the streetcar and defendant Whitmore were stopped at the intersection by the red light. Fred French was driving his automobile west on Exposition in the second traffic lane from the north curb. It was his intention to go in a straight line across Vermont and into the northernmost traffic lane of Exposition west of Vermont. He entered the intersection on the amber light.

When the light turned green for southbound traffic on Vermont, the flagman gave Bacon a clearance signal to move into the intersection. He did not pay any attention to automobile traffic and did not observe the French automobile until after he gave the clearance signal. The motorman acknowledged this signal and proceeded into the intersection. He could not, pursuant to the rules of the respondent, proceed without such a clearance from the flagman. He first saw the French automobile in the intersection after he acknowledged the flagman's clearance signal.

Just after the streetcar started forward, defendant Whitmore moved into the intersection. She could not see the automobile of Mr. French, nor could he see her, because of the position of the streetcar between them. Mr. French swerved to the southwest, toward the appellant and around the front of the streetcar, and collided with the Whitmore automobile. Mr. French's car went out of control and struck appellant, throwing him 15 feet in the air and 65 feet down the street. The point of impact was established as 21 feet south of the north curb and 14 feet east of the west curb. At the time the two automobiles collided, the Whitmore automobile was approximately even with the front of the streetcar.

[2-6] The rule with respect to the granting of a motion for a judgment notwithstanding the verdict is aptly stated in Hunt v. United Bank & Trust Co., 210 Cal. 108, at pages 117-118, 291 P. 184, at page 188, as follows: "Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision. Umsted v. Scofield Eng. Co., 203 Cal. 224, 263 P. 799. Such a motion is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom. Butler-Veitch, Inc., v. Barnard, 77 Cal.App. 709, 247 P. 597. Even though a court might be justified in granting a new trial, it would not be justified in directing a verdict on the same evidence. In re Estate of Caspar, 172 Cal. 147, 155 P. 631. The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict. The right of a court to direct a verdict is the same as the right of a court to grant a non-suit. This can be done only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, including every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such verdict was given. Newson v. Hawley, 205 Cal. 188, 270 P. 364. If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict."

Fred French testified, his testimony having been introduced by way of deposition, that he entered the intersection on the amber light; that he first saw the Whitmore automobile just as he was passing in front of the streetcar; that it was proceeding south on the right side of the streetcar, about 15 miles per hour, and the front of the car was about parallel with the front of the streetcar.

Officer Floyd, who was an eyewitness to the accident, testified that at the time of the accident he was driving south on Vermont and brought his car to a stop behind and partially to the right of the Whitmore automobile; that the streetcar and the Whitmore automobile started forward "from one to three seconds, perhaps two seconds," after the signal had turned green; that after the streetcar started forward, it came to a stop ten to fifteen feet from where he had first seen it.

Mrs. Whitmore testified that the streetcar started to move a second or two before she did; that she had just reached the front of the streetcar as the westbound automobile came around it and struck the front of her car; that when the collision occurred, Mr. French was swerving around the streetcar.

Respondent asserts that the motorman's operation of the streetcar was neither negligent nor a proximate cause of the plaintiff's injuries; that Section 476 of the Vehicle Code did not prohibit the motorman from proceeding into the intersection but required only that he yield the right of way to other vehicles lawfully within the intersection; that there was no evidence that the streetcar came in contact with either of the automobiles involved in the collision.

Both the question of negligence and that of proximate cause were questions of fact for the determination of the jury. Hilyar v. Union Ice Co., 45 Cal.2d 30, 38, 286 P.2d 21; Smith v. Schwartz, 14 Cal.App.2d 160, 164, 57 P.2d 1386; see also cases cited in Vol. 34, West's California Digest, Negligence, ⚷136(9), 136(25), p. 287, et seq., p. 309, et seq.

[7] When an injury results from the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other. The fact that neither party might have reasonably anticipated the occurrence of the other concurrent cause does not shield from liability him whose own negligence was one of the causes of the injury. Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044.

[8] From the evidence adduced the jury could have found, as it evidently did, that Mr. French entered the intersection on the amber light and was lawfully in the intersection at the time respondent's streetcar started forward; that Mr. French was compelled to swerve around the front of the streetcar, toward plaintiff, by the failure of respondent's motorman to yield the right of way and that such failure was a proximate cause of plaintiff's injuries.

As was said in Gray v. Southern Pacific Co., 23 Cal.2d 632, 646, 145 P.2d 561, 569: " 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. [Citing cases.] That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' "

The question of negligence and proximate cause being one for the determination of the jury, and since there was substantial evidence, considered in the light most favorable to the appellant, upon which the jury could conclude that respondent was negligent and that its negligence proximately contributed to the happening of the accident, it cannot be said as a matter of law that the evidence did not support the verdict.

In view of our conclusion it is unnecessary to consider other points raised by appellant.

The appeal from the order granting defendant Whitmore's motion for a new trial, having been abandoned by appellant, is dismissed; the appeals from the order granting respondent's motion for judgment notwithstanding the verdict and from the refusal to vacate the judgment notwithstanding the verdict and to vacate the order granting the motion for a new trial, being nonappealable, are dismissed.

The judgment is reversed with directions to the trial court to enter judgment on the verdict.

WHITE, P. J., and DORAN, J., concur.

141 Cal.App.2d 207

Peter MEACCI and Severina Meacci, Plaintiffs and Appellants,

v.

Anna KOCHERGEN, Defendant and Respondent.

Civ. 4936.

District Court of Appeal, Fourth District, California.

April 30, 1956.

Hearing Denied June 27, 1956.

Quiet title and ejectment action in which determination of boundary line was principal issue involved. The Superior Court, Fresno County, Strother P. Walton, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Mussell, J., held that, where there was true boundary line, which was readily ascertainable from survey made, and line sought to be established by defendant was not certain, plaintiffs were free to claim true boundary line as shown in their deed.

Judgment reversed.

1. Boundaries ⚿37(5)

In quiet title and ejectment action in which determination of boundary line between adjoining properties was principal issue involved and in which one plaintiff was called as witness for defendant, evidence was not sufficient to establish existence of an agreement to locate boundary line in place different from that provided for by deeds. West's Ann.Code Civ.Proc. § 2055.

2. Boundaries ⚿48(2)

Coterminous owners may, by agreement implied from acquiescence, establish and fix their mutual boundary line, where true line is otherwise unknown or uncertain, but boundary is considered definite and certain when it can, by survey, be made certain from the deed, and boundary line, which has been acquiesced in by adjoining property owners, must be specific, definite, and certain before doctrine of agreed boundary line is applicable.

3. Boundaries ⚿48(6)

Where there was true boundary line, which was readily ascertainable from survey made, and line sought to be established by defendant was not certain, plaintiffs were free to claim true boundary line as shown in their deed.

◆

L. Kenneth Say, Fresno, for appellants.

Thompson & Thompson, Fresno, for respondent.

MUSSELL, Justice.

This is a quiet title and ejectment action in which the determination of the boundary line between adjoining properties is the principal issue involved. Plaintiffs allege in their complaint that they are the owners of and entitled to have their title quieted to the east half of the east half of the southwest quarter of section 22, township 13 south, range 18 east, Mt. Diablo Base and Meridian, according to the United States Government township plats, in the county of Fresno, State of California, (except certain mineral, oil and gas rights therein) and,

> "Also except therefrom that portion thereof described as follows:
>
> "Commencing at a point on the South line of the Southwest quarter of said Section 22 which is 440.15 feet Westerly from the quarter corner on the South side of said Section; thence Northerly parallel with the East line of the Southwest quarter of Section 22, a distance of 270 feet to a point; thence Westerly parallel with the South line of said Section a distance of 218.25 feet; thence Southerly parallel with the East line of the Southwest quarter of Section 22 a distance of 270 feet to a point on the South line of said Section which is 658.4 feet Westerly from the quarter section corner on the South side of said section; thence Easterly along the South line of Section 22 a distance of 218.25 feet to the point of commencement."

Defendant Anna Kochergen admits in her answer that plaintiffs are the owners of the property described in the complaint, excepting therefrom a strip of land 46.95 feet wide and 218.25 feet long, extending along the north boundary line and north of the said 270′ x 218.25′ exception. Defendant alleged that she was the sole owner of this strip and that any claim of the plaintiffs thereto is without right. No special defenses are set up in the answer and the prayer therein is that defendant have judgment, that plaintiffs take nothing, that defendant recover costs, and for such other and further relief as to the court may seem meet and proper.

The trial court rendered judgment that plaintiffs take nothing by reason of their complaint and plaintiffs appeal from said judgment.

On August 16, 1946, Anna Kochergen and her husband, Alex, deeded to Arpiar Markarian, a married man, the property described in the complaint and on December 29, 1949, Markarian and his wife deeded the same property to the plaintiffs herein. These two deeds, together with a map of the property (defendant's exhibit A), prepared in 1954 by Karr-Walker, licensed land surveyors, and stipulated by the parties to be a correct engineer's drawing of the subject property, were introduced in evidence, and plaintiffs rested their case. John A. Kochergen was then called as a witness in behalf of the defendant and testified that he was the son of Anna Kochergen; that he lived on the southwest corner of the property from 1943 to 1947; that there was a chicken house located on the property north of the 270 foot line shown on the map. Photographs (defendant's exhibits B and C) were shown to the witness and, over objection, he testified that exhibit B was a picture of an "iron marker, peg" on the northeast corner of the property which was put there by Mr. Ross, a licensed surveyor, while Markarian owned the property; that exhibit C was a picture of the iron stake at the northwest corner of the property. He was asked to place marks on the map (defendant's exhibit A) showing the location of these stakes or pipes and placed two red dots on the map north of the 270 foot line of the property described in the exception. He testified that these stakes were put in after the property was deeded to Markarian; that the buildings were on the property when the stakes were put there; and that the chicken house has been on the property since 1946.

Plaintiff Peter Meacci was called as a witness on behalf of the defendants under section 2055 of the Code of Civil Procedure, and, on being asked if he had ever seen the iron stakes shown in exhibit C, he answered in the negative, and on being shown exhibit B, stated that he did not know whether it showed a pipe which his surveyor put on the property or not. He testified that he did not live on the property but had farmed it since 1949; that in June, 1954, he got his surveyor to make a survey of the property; that the chicken house was on the property when he bought it and that at one time he saw an old man fixing the chicken house but did not know what he was doing. When asked if he ever complained to Mr. Kochergen or any member of his family or any person about these buildings being on his property before June, 1954, he replied that he "complained to him after he had surveyed it and found that they were on his property."

From this evidence the trial court found that plaintiffs observed defendant and plaintiffs' predecessors in interest making improvements upon the northerly 46.95 feet of said property in dispute and that plaintiffs made no protest as to said improvements and did not assert any claim in or to said property at any time when such improvements were being made; that plaintiffs' predecessors in interest accepted as true the north boundary line of said property, marked by the surveyor's stakes at a point 316.95 feet from the southerly edge of said property; that at the time the surveyor's stakes were placed at the northwest and northeast corners of said property by the agent of plaintiffs' predecessors in interest, said stakes were so placed to resolve an uncertainty existing with respect to the northerly boundary line of said property and that said boundary line was thereafter accepted by the plaintiffs and their predecessors in interest and by the defendant and her predecessors in interest as the true northerly boundary line of said property.

Appellants contend that the court erred in admitting evidence as to adverse possession and to vary the terms of a written instrument; that the deeds fixed the boundary lines and that there was nothing to be the subject of an implied agreement. Respondent's counsel states in his brief that "Defendant herein did not rely and does not now rely on any element of adverse possession to establish her case in this instance.", and at the trial stated his position to the court as follows:

> "The Court. Just a minute. What is your position?
>
> "Mr. Thompson. My position is this: We are not pleading adverse rights. We are proving an acquiescence and an implied agreed line establishing the North line of that property under authority of such cases as Mello v. Weaver, 36 Cal.2d 456 [224 P.2d 691], which whole line of cases hold that where there is an implied agreement as to a line, you don't have to establish it by adverse position (possession) or any such similar doctrine. You establish it by an acquiescence.
>
> "The Court. And that is provable by quiet title?
>
> "Mr. Thompson. That's right."

In Mello v. Weaver, supra, 36 Cal.2d 456, 224 P.2d 691, it is held that the requirements of proof necessary to establish a boundary by agreement are well settled; that mere agreement to locate a boundary known to be different from that called for by the deeds is insufficient, since such an agreement would be tantamount to a conveyance by parol, an unrecognized method of transfer of real property; that as early as Sneed v. Osborn, 25 Cal. 619, where the position of the initial point in the description was uncertain, a division of land between coterminous owners as in accordance with the deed description, and mutual acquiescence in their practical location of the common boundary over a long period of time, was held to constitute the location of the true boundary as called for by the deed; that the agreement need not be express, but may be implied from long acquiescence, but since it is valid only for the purpose of settling an uncertainty in a common boundary, the implied agreement must have been based on a doubtful boundary line; that a doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made; and if in good faith the parties resolve their doubt by the practical location of the common boundary it will be considered the boundary called for by the deed.

[1] In the instant case there is no evidence of an agreement to locate the north boundary line of the property described in the exception as being at a point 46.95 feet north of the north line shown in the deeds. There is no evidence that the stakes or pipes shown in the photographs (Defendant's exhibits B and C) were in fact 46.95 feet north of the north line shown in the deeds and no evidence that the defendant ever discussed the question of the boundary line with the plaintiffs or with Arpiar Markarian. While the witness John Kochergen testified that Markarian put the stakes shown in the photographs on the property, there is no testimony that he agreed to the establishment of a boundary line other than that called for in his deed. Markarian and the defendant Anna Kochergen were not called as witnesses and there was no testimony of an agreement, express or implied, that they agreed to a different boundary line than shown in the deeds. It clearly appears that there was no uncertainty in the description in the two deeds and that the boundary line between the two properties was readily ascertainable by reference thereto. While there was testimony that plaintiff Peter Meacci at one time saw an old man fixing the chicken house, the record is silent as to when this occurred and it does not appear that the parties ever discussed the improvements on the property or the right to make them. Plaintiffs obtained their property by the deed of December 29, 1949, and Meacci testified that he saw one building on the property but never discussed the building with anyone

until after June, 1954, when he caused a survey to be made by Karr-Walker, licensed surveyors.

Defendant's position that the north boundary line of the property described in the exception was fixed by the stakes put there by surveyor Ross and acquiesced in by plaintiffs is not supported by the evidence. In Pra v. Bradshaw, 121 Cal.App.2d 267, 269, 263 P.2d 52, 53, the court said:

> "Inasmuch as the boundary was properly described in the deeds of both parties, there had been no dispute as to the boundary prior to the survey. There had been only a mistaken acquiescence in what was believed to be the true boundary. In such situation, appellant asserting the south side of the wall to be the south boundary of Lot 38 and respondents' acquiescing in such assertion, such acquiescence by respondent in a wrong boundary is considered in both law and equity as a mistake and either party is free to claim the true line. Rast v. Fischer, 107 Cal.App.2d 129, 133, 236 P.2d 393; 4 Thompson on Real Property, p. 210, sec. 3115. See Fallert v. Hamilton, 109 Cal.App.2d 399, 402 et seq., 240 P.2d 1007; Lentell v. McBride, 7 Cal.2d 263, 264, 60 P.2d 289.
>
> "In Rast v. Fischer, supra * * *, where it was found that there had been no agreed boundary 'but rather a mistaken acquiescence in what was believed * * * to be the true boundary' and the prevailing party had paid taxes on his property as described in his deed, the court said: 'Thus we have at the outset a situation in which there was no disputed boundary, but a mistake as to the true boundary by the parties concerned. As was said in Pedersen v. Reynolds, 31 Cal.App.2d 18, 28, 87 P.2d 51, quoting from 4 Thompson on Real Property * * * "An agreement or acquiescence in a wrong boundary when the true boundary is known, or can be ascertained from the deed, is treated both in law and equity as a mistake, and neither party is estopped from claiming the true line." * * * So here, the parties, instead of having a survey according to the descriptions of their deeds, assumed that the stakes found by them denoted the true line and accepted it. In such circumstances their acquiescence is treated as a mistake and neither party is estopped from claiming the true line. Pedersen v. Reynolds, supra; Janke v. McMahon, 21 Cal.App. 781, 133 P. 21; Garrett v. Cook, 89 Cal. App.2d 98, 200 P.2d 21.'"

In the instant case apparently there was no dispute as to the boundary line until plaintiffs had the property surveyed in 1954. They then filed their action to quiet title on June 25th of that year. The record shows that plaintiffs made no effort to establish the line until the filing of the action. While the evidence shows that stakes were put in by surveyor Ross, there is no evidence that plaintiffs assume that these stakes denoted the true boundary line.

[2, 3] The rule that coterminous owners may by agreement, implied from acquiescence, establish and fix their mutual boundary line, is applicable only where the true line is otherwise unknown or uncertain. The boundary is considered definite and certain when by survey it can be made certain from the deed, and a requisite to make applicable the doctrine of agreed boundary line is that the line acquiesced in by adjoining property owners must be specific, definite and certain. Williams v. Barnett, 135 Cal.App.2d 607, 612, 287 P.2d 789. In the instant case there was no uncertainty as to the true boundary line. The true boundary line was readily ascertainable from the survey made, and the line sought to be established by the defendant was not certain. We conclude that, under the circumstances shown, plaintiffs were free to claim the true boundary line as shown in their deed.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

141 Cal.App.2d 213

Sydney M. WILLIAMS, Plaintiff, Cross-Defendant, and Respondent,

v.

Claude S. SPENCE, Defendant, Cross-Complainant, and Appellant.

Civ. 21738.

District Court of Appeal, Second District,
Division 1, California.
May 1, 1956.

Rehearing Denied May 10, 1956.

Action for accounting. Defendant filed cross complaint for declaration of rights against plaintiff and corporation with which plaintiff and defendant had a contract. The court rendered judgment. Defendant appealed and applied for writ of supersedeas. The District Court of Appeal, Nourse, J. pro tem., held that where appeal presented substantial question, and defendant, if successful on appeal, might loose fruits of appeal if fund in hands of cross defendant should be turned over to plaintiff who was now a resident of foreign county, District Court of Appeal would grant a stay of proceedings.

Writ of supersedeas issued.

1. Appeal and Error ⚷437

Appeal stays declaratory judgment. West's Ann.Code Civ.Proc. § 949.

2. Appeal and Error ⚷458(1)

Where plaintiff recovers money judgment against cross defendant and not against defendant and defendant appeals and cross defendant does not appeal, defendant's appeal will not stay the judgment and defendant cannot stay judgment by giving bond. West's Ann.Code Civ. Proc. § 945.

3. Judgment ⚷526

In determining scope and effect of judgment, court may look to entire judgment roll.

4. Execution ⚷7

Where pleadings of plaintiff and defendant sought no affirmative relief against cross defendant but merely a declaration of their rights under their contract with cross defendant, judgment that plaintiff and defendant were entitled to distribution from cross defendant of certain amounts of money then in cross defendant's hands was not such a money judgment for plaintiff against cross defendant as to entitle plaintiff to writ of execution. West's Ann.Code Civ.Proc. § 945.

5. Appeal and Error ⚷479(1)

Even though execution to enforce judgment in determining manner in which funds in hands of cross defendant should be distributed as between plaintiff and defendant was issued and served on cross defendant before District Court of Appeal issued temporary stay, where cross defendant had not paid money over to sheriff nor made a return to sheriff upon the garnishment, District Court of Appeal could by supersedeas stay sheriff from collecting fund from cross defendant and turning it over to plaintiff and could stay any proceedings supplemental to execution and thus hold matter in statu quo until disposition of appeal. West's Ann.Code Civ. Proc. §§ 717–721.

6. Appeal and Error ⚷479(1)

Where appeal presented substantial question, and defendant, if successful on appeal, might lose fruits of his appeal if fund in hands of cross defendant should be turned over to plaintiff who was now a resident of foreign county, District Court of Appeal would grant a stay of proceedings. West's Ann.Code Civ.Proc. § 957.

7. Appeal and Error ⚷460(4)

On issuance of supersedeas, defendant-appellant would not be required to give bond upon any theory that cross defendant might be judgment proof on determination of appeal, where cross defendant had offered to deposit funds in its hands to await determination of appeal and defendant-appellant acquiesced in such procedure but plaintiff-respondent did not.

◆

Robert C. McMahon and James A. Broderick, Jr., Los Angeles, for appellant.

Morton R. Goodman, Beverly Hills, for respondent.

NOURSE, Justice pro tem.

This is an application by the defendant and appellant for a writ of supersedeas to prevent the levy of a writ of execution upon a fund held by another party to the action, but who is not a party to this appeal.

The respondent brought suit against the appellant, and by his complaint sought an accounting of moneys which he alleged defendant had collected for his use and benefit, and prayed a money judgment against the defendant for all moneys which the accounting showed the defendant had collected or received from Quality Films, Inc., in excess of the sum of $6,000.00, under a contract between plaintiff and defendant on the one hand and Quality Films on the other for the distribution for television exhibition of a motion picture entitled "The Big Show-Off." He did not seek any judgment against Quality Films, and did not make it a party defendant.

The defendant answered, and by his answer admitted that he had collected $10,000 from Quality Films from the proceeds of the distribution of the motion picture above mentioned, but alleged that he was the owner of said motion picture and that the plaintiff had no right, title or interest therein or in the contract with Quality Films or in the proceeds from the distribution of the film. He further alleged that the plaintiff had assigned to him all his right, title and interest in the film and in the agreement and in the proceeds under the agreement, in consideration of the release by him of all claims against the plaintiff.

The defendant also filed a cross-complaint in which he joined as cross-defendants the plaintiff and Quality Films, Inc. This cross-complaint was entitled "Cross-Complaint (Declaratory Relief)". By this complaint he alleged that a controversy existed between the plaintiff and the defendant as to their ownership of the motion picture and of their rights under the contract with Quality Films, and by the prayer of the complaint sought a declaration of the rights of plaintiff and defendant in and to said motion picture and under said contract. Defendant did not, by his complaint, seek a money judgment against either of the cross-defendants, but did pray that the court make such orders as would make effective its declaration of the rights of the parties and prevent further litigation.

In his answer to this cross-complaint, the plaintiff did not deny that a controversy existed between him and the cross-complainant, but did deny that a controversy existed involving the interest, right, or duty of Quality Films, and alleged that said firm was in the position of a mere stake-holder awaiting settlement or adjudication of the rights of plaintiff and defendant; he did not pray for any judgment against Quality Films, but prayed only for the relief prayed for in his complaint.

By its answer to the cross-complaint, Quality Films alleged that it was a stakeholder of certain funds which it was willing to turn over to the party entitled thereto. It prayed that judgment be entered directing the names of the persons to whom the moneys held by it should be paid, and further prayed for attorney's fees in accordance with the terms of its contract with the plaintiff and the defendant.

By its findings the court, among other things, found that the present and future interests of the plaintiff and the defendant in the motion picture were, respectively, 85 per cent in the plaintiff and 15 per cent in the defendant; that Quality Films had on hand and available for distribution to plaintiff and defendant the sum of $3,849.98; that the assignment made by the plaintiff to the defendant was an assignment given as security for the payment to the defendant of the sum of $10,000 and that the defendant had collected $573.95 in excess of that amount and had withheld that sum from the plaintiff.

As conclusions of law the court found the plaintiff entitled to a judgment decreeing that he was the owner of 85 per cent of said motion picture, and that the defendant was the owner of 15 per cent; that the plaintiff and defendant were entitled to judgment against the cross-defendant Quality Films as follows:

"A. That the distribution proceeds under the contract dated December 12, 1951, on hand as of January 15, 1956, shall be distributed as follows:

To Sydney M. Williams	$3547.84
To Claude S. Spence	$ 52.14

"B. That all future proceeds under said contract shall be distributed to said parties in the following proportions:

To Sydney M. Williams	85%
To Claude S. Spence	15%"

By its judgment it decreed that plaintiff was the owner of 85 per cent of the motion picture and the defendant of 15 per cent, and further decreed:

"5. Plaintiff Sydney M. Williams shall recover from the cross-defendant Quality Films, Inc., from funds in the possession of said cross-defendant as of January 15, 1956, and belonging to plaintiff Sydney M. Williams and defendant Claude S. Spence, the sum of $3,547.84.

"6. Defendant Claude S. Spence shall recover from the cross-defendant Quality Films, Inc., from funds in the possession of said cross-defendant as of January 15, 1956, and belonging to plaintiff Sydney M. Williams and defendant Claude S. Spence, the sum of $52.14.

"7. Cross-defendant Quality Films, Inc., shall hereafter distribute all net proceeds received from the television distribution of the motion picture entitled "The Big Showoff", received after January 15, 1956, in the following proportions:

A. To plaintiff Sydney M. Williams 85%
B. To defendant Claude S. Spence 15%."

After entry of the judgment plaintiff caused execution to issue against Quality Films, Inc., to enforce paragraph 5 of the judgment, which is above quoted. The sheriff has served this writ upon Quality Films, but by reason of the temporary stay issued by this court upon the filing of the Petition now under consideration, the sheriff has not collected from Quality Films the amount in which, on the face of the judgment, it is indebted to the plaintiff, to-wit: the sum of $3,547.84.

[1, 2] Defendant has appealed from the judgment entered by the court, and the whole thereof. This appeal stays the judgment insofar as it declares the rights of the parties, Code Civ.Proc. § 949. If, however, paragraph 5 of the judgment does in fact constitute a money judgment in favor of the plaintiff and against Quality Films, defendant's appeal will not stay that judgment nor can he stay it by filing a bond, for there is no money judgment against him and any stay bond given by him would be without consideration and unenforceable, Halsted v. First Savings Bank, 173 Cal. 605, 608, 160 P. 1075. Quality Films is the only party which could stay the judgment pursuant to the terms of section 945, Code of Civil Procedure, and it has not appealed from the judgment.

[3, 4] We have reached the conclusion, however, that paragraph 5 does not in fact constitute a money judgment against Quality Films. In determining the scope and effect of that judgment and its meaning, we may look to the entire judgment roll for the purpose of interpreting it. Freeman v. Donohoe, 188 Cal. 170, 172, 204 P. 593.

Looking at the judgment roll we find that neither plaintiff nor defendant, by their pleadings, prays any affirmative relief against Quality Films. There is, therefore, no basis for a money judgment against it. Further, the court, by its conclusions of law, did not direct a money judgment against Quality Films, but only found and concluded that the plaintiff and defendant were entitled to distribution from Quality Films of certain amounts of money from the funds then in its hands, and for distribution of future proceeds coming into its hands under its contract with the parties, in certain proportions.

It is evident that the findings of the trial court and its conclusions of law as to the amounts in the hands of Quality Films were only a part of its declaration of the rights of the plaintiff and the defendant made pursuant to the prayer of the cross-complaint for declaratory relief and the prayer of the plaintiff's answer to that cross-complaint that Quality Films, Inc., be declared a stake-holder.

It is self-evident that if appellant should prevail on his appeal and it should be ultimately held that he was the owner of all or a greater portion of the motion picture and the rights under the contract with Quality Films than he was given by the present judgment, that paragraphs 5 and 6 of the judgment could not stand, for the amounts which Quality Films is, by these paragraphs, ordered to pay to plaintiff and defendant, respectively, are dependent entirely upon the court's findings as to their respective percentages of ownership of the film and under the contract.

The true nature of paragraphs 5 and 6 is also indicated by the fact that the court, in paragraph 7, fixes the rights of the parties as to future payments.

We are convinced that it was the intent of the trial court by paragraphs 5 and 6 to merely declare the rights of the parties in the funds held by Quality Films, Inc., just as it declared their rights to future proceeds from the distribution of the picture, in accordance with the pleadings of the parties and the prayers of their pleadings; and that it was not its intent to grant relief beyond that sought by the pleadings or permissible thereunder.

We hold, therefore, that paragraph 5 does not constitute a money judgment in favor of the plaintiff and against Quality Films, and that the plaintiff is not entitled to a writ of execution to enforce the provisions of that paragraph.

[5] Respondent contends that inasmuch as a writ of execution had been issued and served upon Quality Films before issuance of this court's order temporarily restraining proceedings in the court below, a writ of supersedeas cannot issue inasmuch as that writ may only be used to hold matters in abeyance pending the determination of the appeal and cannot be used to undo that which has already been done. Messenkop v. Duffield, 211 Cal. 222, 225, 294 P. 715. In the case at bar, however, while the execution was levied by service upon Quality Films before our restraining order issued, Quality Films has not paid the money over to the sheriff nor made a return to the sheriff upon the garnishment. We may, therefore, by a supersedeas, stay the sheriff from collecting the fund in question from Quality Films and turning it over to plaintiff; and stay any proceedings supplemental to execution pursuant to sections 717, 718, 719, 720 or 721 of the Code of Civil Procedure, and thus hold the matter in statu quo until the appeal has been disposed of.

[6] It appears to us that the appeal does present a substantial question, and that if a stay of proceedings is not granted defendant might lose the fruits of his appeal should he be successful in it; for we cannot now say that if upon the appeal or a retrial of the action it should be held that defendant was the owner of the motion picture and therefore entitled to the entire proceeds from it, that he could compel Quality Films, Inc., to pay him the amount which, under the execution now outstanding, it had paid to the plaintiff. see Halsted v. First Savings Bank, supra, 173 Cal. at page 610, 160 P. 1075. It also appears improbable that appellant could have any relief as against the respondent under the provisions of section 957 of the Code of Civil Procedure, and that as respondent is now a resident of a foreign country that such relief, even if it could be given, would prove ineffective to give appellant the fruits of his appeal.

[7] Respondent also asks that if we issue a writ, we require the appellant to give a bond such as was required by the court in Halsted v. First Savings Bank, supra. We are not so inclined. At the oral argument counsel for Quality Films appeared and offered to pay the entire fund in its hands into court to await the determination of the appeal and then be distributed by the clerk pursuant to the terms of the final judgment entered, or to deposit these funds in any other depository that might be agreed to by the parties in such manner that it would bear inter-

est pending final judgment. To such a procedure appellant acquiesced, but respondent did not. We cannot, therefore, believe there is much substance in his professed fear that Quality Films may be judgment-proof when a judgment in the pending action becomes final.

Let a writ of supersedeas issue as prayed.

WHITE, P. J., and FOURT, J., concur.

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141 Cal.App.2d 251

Fred J. BONESS, Ruth E. Boness and Tony Ponciano, Plaintiffs and Appellants,

v.

RICHARDSON MINERAL SPRINGS, a corporation, Ben M. Dettling and Martha Dettling, Defendants and Respondents.

Civ. 8729.

District Court of Appeal, Third District, California.

May 2, 1956.

Rehearing Denied May 28, 1956.

Hearing Denied June 27, 1956.

Action by judgment creditors of grantor to set aside deed. The Superior Court, Butte County, Dudley G. McGregor, J., denied the relief sought, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that evidence sustained findings that grantee had not been aware of any fraudulent intent on part of grantor, that grantee had not had notice of such facts and circumstances as would induce a prudent man to inquire into such a purpose, that consideration paid had been adequate and fair, and that entire transaction, which included concomitant lease by grantee to grantor, had not been entered into for purpose of defrauding creditors or with intent on part of grantee to hold property in secret trust for grantor.

Affirmed.

1. Appeal and Error 🔑1001(1), 1010(1)

In determining sufficiency of evidence to support judgment, test to be applied by reviewing court is whether or not there is any substantial evidence to support findings of jury or trial court.

2. Appeal and Error 🔑994(2, 3), 1001(1), 1003, 1010(1), 1012(1)

All questions of weight of evidence and credibility of witnesses are for jury and trial court, and if there is any substantial evidence to support verdict or finding it cannot be set aside by reviewing court, even though said court may believe that great preponderance of evidence was other way.

3. Appeal and Error 🔑930(1), 989

Power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion of trier of facts, and all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold verdict if possible.

4. Appeal and Error 🔑996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial judge or jury.

5. Fraudulent Conveyances 🔑299(8), 300(1), 301(1)

In action by judgment creditors of grantor to set aside deed, evidence sustained findings that grantee had not been aware of any fraudulent intent on part of grantor, that grantee had not had notice of such facts and circumstances as would induce a prudent man to inquire into such a purpose, that consideration paid had been adequate and fair, and that the entire transaction, which included a concomitant lease by grantee to grantor had not been entered into for purpose of defrauding creditors or with intent on part of grantee to hold property in secret trust for grantor.

6. Fraudulent Conveyances 🔑110(1)

Neither fact that lease given by grantee to grantor was not recorded, nor fact that it contained clause permitting termination in event of grantor's bankruptcy, etc., compelled finding of fraud against grantors' creditors.

7. Fraudulent Conveyances ⚷308(1)

Whether transfer is in fraud of creditors is a question of fact.

8. Fraudulent Conveyances ⚷273

Where there is consideration for transfer, burden is on party attacking it to establish an actual fraudulent intent, but burden may shift when prima facie case is made out.

9. Fraudulent Conveyances ⚷295(1)

Party alleging that conveyance was fraudulent must prove fraud by preponderance of evidence.

◆

Laughlin, McKalson & Crable, Chico, and James O. Kibby, Orland, for appellants.

Price & Morony, Chico, for Richardson Mineral Springs.

W. E. Rothe, Chico, for Dettling.

SCHOTTKY, Justice.

On February 26, 1951 Fred J. Boness, Ruth E. Boness and Tony Ponciano, as judgment creditors of Ben M. Dettling and Martha Dettling, his wife, filed an action in the Superior Court in Butte County against the Dettlings and also against Richardson Mineral Springs, a corporation, seeking to set aside a deed dated March 30, 1949, conveying certain range lands from the Dettlings to Richardson Mineral Springs. The material allegations of the complaint were denied by all of the defendants and the action was tried by the court sitting with a jury in an advisory capacity, a jury having been demanded by the plaintiffs. The jury returned a general verdict in favor of the defendants and against the plaintiffs and in addition returned a special verdict in which they gave the following answers to the interrogatories submitted to them:

1. The defendants Dettling did make the conveyance of their range property to Richardson Mineral Springs with actual intent to hinder, delay or defraud their creditors.

2. At the time of the conveyance defendant Richardson Mineral Springs was not aware of the fraudulent intent of the Dettlings in making the conveyance of their range land to Richardson Mineral Springs.

3. The defendant Richardson Mineral Springs did not have notice of such facts and circumstances as would induce an ordinarily prudent man to inquire into the purpose actuating the Dettlings in making the conveyance.

4. Irrespective of any consideration which the Dettlings may have subsequently received, the consideration received by the Dettlings at the time they conveyed their range land to Richardson Mineral Springs was not disproportionately small as compared to the true and reasonable value of the property.

Thereafter the court made and entered its findings of fact and conclusions of law which were in accordance with the general and special verdicts of the jury, and judgment was entered in favor of defendants. Plaintiffs' motion for a new trial was denied and they have appealed from the judgment.

[1-4] Appellants make a vigorous attack upon the judgment, the burden of their argument being that the record does not sustain the verdicts of the jury and the findings of the trial court. Before discussing the specific contentions of appellants it is well to point out once more that in reviewing the sufficiency of evidence to support a judgment, the test to be applied by an appellate court is whether or not there is any substantial evidence to support the findings of the jury or trial court. All questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there is any substantial evidence to support the verdict or finding it cannot be set aside by the reviewing court, although said court may believe the great preponderance of the evidence was the other way. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.

Bearing in mind the familiar rule just stated, which we are constrained to say is too often disregarded by many counsel who pay lip service to the rule and then proceed to argue the weight of conflicting evidence before an appellate tribunal, we shall summarize briefly the factual situation as disclosed by the record.

The record shows that the land involved in the instant case consists of approximately 2,485 acres of range land located in a foothill canyon generally northeast some distance from the Chico Municipal Airport in Butte County. The terrain for the most part is rough, rocky, brushy and steep. It is entirely unfenced on three sides and on the fourth side there is a neighbor's fence for a short distance. Approximately 1,870 acres of this land was originally owned by a man named Darge, who in 1933 borrowed $3,500 on it from the Federal Land Bank. In 1938 the Federal Land Bank foreclosed on the loan and acquired title, and in 1939 the bank sold the 1,870 acres on a conditional sales contract to one Simmons. In the same year Simmons sold the land to Ben Dettling. In 1945, approximately half of the contract price had been paid and the remaining half was unpaid and delinquent. The Federal Land Bank thereupon notified the Dettlings in 1945 that it intended to foreclose because of the delinquency.

When the Federal Land Bank started to foreclose, Dettling contacted Bob Richardson as he wanted to borrow money to pay off the amount owed to the Federal Land Bank which, at that time, amounted to approximately $2,073.04, in addition to interest. Bob Richardson did not handle the loaning of money by the Richardsons, so Dettling was referred to Ned Richardson. However, it occurred to Bob Richardson that this might be a good opportunity to effect an exchange of properties as an inducement for the loan. Richardson Mineral Springs had approximately 900 acres known as the Noes place which it had been unable to sell in 1945–1946, although it had been listed for some time at $2 per acre. The Noes' acreage was adjacent to the Dettlings' range, but it was not contiguous to the Richardson ranges. On the other hand, Dettling had approximately 320 acres of range land (being part of the Darge 1,870 acres) which land was adjacent to the Richardson ranges, but not contiguous to the Dettling range.

Richardson Mineral Springs, a corporation, hereinafter referred to as the "Richardsons" agreed to loan the Dettlings $4,000 to be secured by the lien of a deed of trust on their range lands, provided that as a part of said transaction the Dettlings would exchange the aforementioned 320 acres of the Darge place for 900 acres of the Richardsons. Thereupon, the Richardsons loaned the Dettlings the sum of $4,000 cash evidenced by a note, dated November 30, 1946, from the Dettlings to the Richardsons in the sum of $4,000, bearing interest at 4½% payable quarterly beginning February 1, 1947, with the principal payable in installments of $400 per year beginning November 1, 1947. The Dettlings paid off the Federal Land Bank with part of the cash loan proceeds and received a deed to said range lands. The revenue stamps on the deed indicated the consideration therefor in the sum of $3,500. Simultaneously therewith, Dettlings deeded the 320 acres to the Richardsons, the Richardsons deeded the 900 acres to the Dettlings, and the Dettlings executed and delivered to the Richardsons a deed of trust (as security for said loan) on their then total range constituting about 2,485 acres. All these instruments were recorded on December 13, 1946. Subsequently, the Dettlings borrowed, on or about January 17, 1948, from D. W. Ramme the cash sum of $1,500 evidenced by a promissory note and secured by a second deed of trust on the same range lands which were already subject to the first lien of the Richardsons' deed of trust.

It appears that Dettling was about 63 years of age, suffering from heart trouble and that his wife had been in poor health for some time. It appears also that he was not very successful in a business way and that he had contracted a number of financial obligations which he was unable to meet, among them being an unsecured promissory note in the sum of $7,898.32 in favor of appellants Fred Boness and Ruth Boness, his wife, and another unsecured promissory note in the sum of $4,781.64 in favor of appellants Fred Boness and Tony Ponciano. Appellants, through their attorney James O. Kibby of Orland in Glenn County, were pressing the Dettlings for payment. On February 10, 1949, Mrs. Dettling wrote the Bonesses requesting further time to pay the notes, and receiving no reply wrote a similar letter on March 3, 1949. On March 3, 1949, prior to receiving Mrs. Dettling's second letter, attorney Kibby, on behalf of appellants, filed two actions in the Superior Court in Glenn County on said promissory notes. The summonses in said actions were served on the Dettlings in Butte County on March 5, 1949, but no attachment was issued in either action.

Meanwhile, the Dettlings' obligations to the Richardsons and to Ramme were delinquent, and the Richardsons and Ramme wanted to foreclose their respective deeds of trust. Kibby had never notified the Richardsons of any of the claims of appellants herein. The Dettlings had never told the Richardsons about their debts to the appellants herein and, furthermore, the Richardsons knew nothing whatsoever about the Dettlings' obligations to the appellants herein, although appellants were aware of the deeds of trust against the Dettling property and had tried to help the Dettlings obtain a new loan. The Richardsons had advised Rothe, an attorney for the Dettlings, that it would be necessary to foreclose on the two deeds of trust and a meeting was held at Richardson Springs on March 29 or 30, 1949. At this meeting no mention was made whatsoever by any one of Dettlings' obligations to the appellants herein, nor did Dettling nor any one else make any mention of the suits then pending against the Dettlings in the Glenn County Superior Court. It was agreed that, in lieu of the Richardsons foreclosing the Dettling trust deed, the Dettlings would deed the range lands to the Richardsons in consideration of (1) the cancellation of the unpaid principal and interest under their note secured by the first deed of trust, (2) the payment by the Richardsons of Dettlings' obligation to Ramme secured by a second deed of trust on said range lands, (3) the payment of certain delinquent real and personal property taxes owing and unpaid by the Dettlings, and (4) the leasing of said range lands by the Richardsons to the Dettlings. Rothe wanted the Richardsons to pay $1,000 additional cash at that time, but the Richardsons refused to do so, stating that they did not think that the range land was worth it. The range lands were conveyed by the Dettlings to the Richardsons by deed dated March 30, 1949, which was recorded on March 31, 1949.

At that time, the Richardsons paid to the Dettlings a consideration equivalent to $5,752.37 as follows: (1) the Richardsons cancelled Dettlings' obligation under the note dated November 30, 1946, secured by a first deed of trust on the range lands, which unpaid obligation amounted to $3,600 principal, plus $288.18 interest, (2) Richardsons paid and discharged the Dettlings' obligation to Ramme evidenced by the note dated January 17, 1948, secured by a second deed of trust on said range lands and under which the total unpaid principal and interest amounted to $1,053.09, and, in addition, the Richardsons paid $4 for the reconveyance and $2 for recording the same, and (3) the Richardsons paid and discharged delinquent real and personal Butte County property taxes owing by the Dettlings in the sum of $805.10. The trial court found that, on March 30, 1949, the market value of said range land was $5,650 on the capitalization theory, $6,200 on the comparison approach theory, and $5,200 on an animal unit basis.

Following the meeting, a lease was prepared by Rothe as attorney for the Dettlings, but it was subsequently altered by Mr. Charles Wetmore as attorney for the Richardsons. This lease agreement dated March 31, 1949 was signed on April 1, 1949. It was not recorded and no one requested that it not be recorded. The lease was for a term of 15 years at an annual cash rental of $540 per year with an option to renew for a further like term on the same conditions, subject to cancellation, however, in the event of the death of the lessees. It contained provisions as to nonassignability without the consent of the lessor and the right of the lessor to terminate in the event of bankruptcy or assignment for the benefit of creditors or upon the appointment of a receiver for the lessees. The trial court found that the annual rental value of said range lands, as of March 30, 1949, was $700 on an animal unit or share crop basis, and $630 on a cash rental basis.

Following the overruling of demurrers by Rothe, as attorney for the Dettlings in the two actions filed by appellants in Glenn County, those actions went to trial on June 8, 1949, no one appearing for the Dettlings at the trial, and judgments were entered against them in the two actions, one judgment being for $8,143.33 and the other being for $5,131.24. A writ of execution was issued in each action, which writs were sent to the Sheriff of Butte County with instructions to serve the same upon the Richardsons so as to levy on the proceeds from the sale of this range land under the deed recorded March 31, 1949. The writ was returned unsatisfied. This was the only writ of execution which was ever issued in either of said actions.

The Dettlings' range lands had not been subjected to the lien of any writ of attachment during the pendency of these Glenn County suits on the appellants' promissory notes, and said range lands were never attempted to be subjected to the lien of the judgments entered in said actions because no execution was ever levied thereon nor any abstract of judgment recorded. Dettling was brought in twice by appellants on orders of examination of judgment debtor. He was first examined on September 20, 1949. He was again examined on October 16, 1950. The lease by the Dettlings to the Richardsons was brought to the attention of the appellants.

By the fall of 1950, the Dettlings were still unable to operate the leased range lands by keeping them stocked with cattle and by this time the Dettlings were in default under the provisions of the lease for the payment of rental. Meanwhile, all taxes thereon had been paid by the Richardsons. The Richardsons decided to terminate said lease, since the Dettlings were in default, because an opportunity presented itself to exchange these range lands for other more useful property. In order to obtain immediate possession without litigation, a lease cancellation agreement was made between the Richardsons and the Dettlings. This agreement cancelling the lease was dated January 6, 1951. The instant action was filed on February 26, 1951, and a lis pendens was recorded on February 27th.

Appellants first contend that "the transaction, as shown by the pleadings and in the undisputed evidence, is fraudulent upon its face".

Appellants argue that where the owner accepts a grant of property from the lessee and as part of the consideration and an integral part of the transaction, gives back a lease of the same property, expressly made inaccessible to the lessee's creditors, present or future, he enables the lessee to divest himself of his assets and to reserve a benefit personal to himself of the very sort frowned upon by the law. They argue that the clause making the lease inaccessible to the lessee's creditors, which, they assert, shows conclusively actual intent on the part of both parties to the lease to hinder, delay and defraud creditors, was inserted at the insistence of Richardson Mineral Springs and that Richardson should not be permitted to indulge its desire to be charitable and to know who its neighbors were going to be, at the expense of the creditors, who lost their right to bid in the property at the trustee's sale because Richardson, rather than foreclose its deed of trust, chose to benefit the Dettlings with an interest in their land which was immune from creditors' claims.

Appellants contend that the reservation by a grantor of any interest in the property or benefit to him or his family in the conveyance thereof, whether manifest or concealed, with intent to defraud his creditors, is fraudulent and void as to creditors. Appellants urge that an absolute conveyance of attachable property, whether real or personal, with a secret reservation for the benefit of the vendor, is fraudulent in law whether the interest reserved is of great or small value, and whether the intention of the parties is honest or fraudulent. Appellants argue that since the lease was not recorded and since on order of examination, both Mr. Dettling and Mr. Rothe stated that the lease ran from year to year instead of fifteen years with an option for another fifteen years, to all intents and purposes this part of the transaction was kept secret.

Appellants contend that the special verdict of the jury and the finding of the court that the Dettlings, by means of the transfer, actually intended to hinder, delay and defraud their creditors are amply supported by the evidence. Appellants assert that the transaction was consummated three weeks after the Dettlings had been served in the two actions and they had been writing asking for grace to pay off the notes. The only way Dettling could keep his land was by divesting himself of title and taking back a lease which his creditors could not reach.

As hereinbefore stated, the verdict of the jury and the finding of the trial court was that the Dettlings by means of the deed to the Richardsons intended to hinder, delay or defraud their creditors. Respondents dispute the correctness of this finding, but concede that there is support for it in the evidence. However, we do not believe that it can be held upon the record here that the transaction was fraudulent upon its face so far as respondent Richardson Mineral Springs is concerned, as we shall point out hereinafter in discussing the further contentions of appellants.

Appellants also contend that the special verdict of the jury and the finding of the court that defendant Richardson Mineral Springs was not aware of the fraudulent intent of the Dettlings in making the conveyance and that Richardson did not have knowledge of facts sufficient to put a reasonable man on notice of the fraudulent intent of the Dettlings are not supported by the evidence. Appellants argue that there was testimony of Mr. Rothe that he had told Ned Richardson of pressing obligations of the Dettlings and that he tried to get another $1,000 from Richardson for the Dettlings to pay these obligations. Mr. Richardson testified to the effect that Dettling had told him he was having financial troubles. Appellants call attention to the fact that on the same day Dettling's attorney prepared a demurrer in one of the actions, he and Richardson signed the lease, and that Mr. Rothe, who was aware of the pendency of the actions, was present at the meeting at Richardson Mineral Springs held a day or two before the transaction was consummated.

Appellants further contend that the special verdict of the jury and the finding of the court that irrespective of any consideration which the Dettlings may have subsequently received, the consideration received by the Dettlings at the time they conveyed their range land to Richardson was not disproportionately small as compared to the true and reasonable value of the property, are not supported by the evidence. Appellants assert that the "fair consideration" referred to in the Uniform Fraudulent Conveyance Act, does not mean "fair to the debtor", but means "fair to the creditors" in that the property or its fair equivalent remains available to satisfy the claims of creditors. Appellants argue that with regard to the adequacy of the consideration paid by way of liens and encumbrances against the property, amounting to $5,752.37, there is a great range in the evidence elicited from both plaintiffs and defendants as to the value of the property, all of which are greater than the amount paid.

Appellants also contend that where there exists an actual intent to hinder, delay or defraud creditors, it is immaterial whether the debtor is rendered insolvent by the transfer, and it is also immaterial whether consideration was given for the transfer.

Respondents, in reply, argue that there is sufficient evidence to support the special verdict and the findings that Richardson Mineral Springs was a purchaser for fair consideration without knowledge of the fraud at the time of the purchase on

March 30, 1949, and without knowledge of sufficient facts to put a reasonable person on notice. They point to evidence in the record by one of the expert witnesses who testified as a land appraiser that the market value of the land was $6,000 on the date the deed was executed and to other evidence to the effect that it was worth less. They concede that there was evidence giving a much higher valuation, but argue that such evidence merely created a conflict and there was ample support in the record for the court's finding that on March 30, 1949, the market value of said range land was $4,650 on the capitalization theory, $6,200 on the comparison approach theory, and $5,200 on an animal unit basis.

Respondents point out further that the record shows the following as to the situation at the time the deed was executed:

1. The Richardsons knew nothing whatsoever about the Dettlings' obligations to the appellants herein. Furthermore, no one had ever told the Richardsons that the appellants herein were after the Dettlings for money.

2. The Dettlings had never told the Richardsons that they were indebted to the appellants herein.

3. Mr. Kibby, the counsel for appellants herein, never communicated with or notified the Richardsons concerning the indebtedness of the Dettlings to the appellants herein.

4. At the time of the show-down meeting at Richardson Springs on the 29th or 30th of March, 1949, no mention was made whatsoever by anyone of the Dettlings' obligations to the appellants herein and, furthermore, neither Dettling nor any one else made any mention of the suits then pending against the Dettlings brought by the appellants herein in the Glenn County Superior Court.

5. Ben Dettling had discussed with his attorney, Mr. Rothe, all of his outstanding debts and obligations and all that Rothe can remember Dettling mentioning to him were his debts to Richardsons, Ramme, Butte County for taxes, and approximately $1,000 worth of miscellaneous debts.

6. The Richardsons knew that the Dettlings owed it money secured by the first deed of trust; that the Dettlings owed Ramme money secured by the second deed of trust; and that some of their Butte County taxes were delinquent and unpaid. In addition, the Richardsons knew that the Dettlings owed some doctor bills. Ned Richardson testified that doctor bills were the only thing that Ben Dettling ever told him about along this line. Mr. Rothe, the attorney for the Dettlings, attempted to get the Richardsons to pay an additional $1,000 in order to enable the Dettlings to clear up some miscellaneous bills. The Richardsons refused to pay the additional $1,000 on the basis that the range land was not worth the additional amount requested.

While appellants have made an able and earnest argument in support of their contentions, it is apparent that the entire argument is predicated upon their assumption that the evidence in the case can only be given the construction that the deed from the Dettlings to the Richardsons was not only fraudulent on the part of the Dettlings, but that the Richardsons were aware of its fraudulent purpose or had notice of facts sufficient to put it on notice of such purpose.

[5, 6] We are unable to agree with appellants' contention that the evidence is only susceptible of such construction. We believe that there is ample support in the record for the conclusions reached both by the jury and the trial court that respondent Richardson Mineral Springs was not aware of any fraudulent intent on the part of the Dettlings; that said respondent had no notice of such facts and circumstances as would induce a prudent man to inquire into such purpose; and that the consideration paid by said respondent to the Dettlings was adequate and fair. We believe also that the record supports the finding of the court that the lease agreement from respondent Richardson Mineral Springs to the Dettlings was not made for the purpose of defrauding creditors or with the intent on the part of said respondent to hold the property in a secret trust for the

Dettlings. Neither the fact that the lease was not recorded nor that it contained a clause that it could be terminated by the lessor "if the lessees shall make any assignment for the benefit of creditors or shall be adjudged a bankrupt, or if a receiver is appointed for the lessees or their assets or of their interest under the lease" compelled a finding that the lease was executed with fraudulent intent because it is not unusual for leases not to be recorded nor is it unusual for a lease to contain such a clause. These facts, as well as all other evidence, were for the consideration of the trier of facts and we cannot say upon the record in the instant case that the findings of the jury and the trial court are not supported by substantial evidence.

It would serve no useful purpose to discuss the authorities cited by appellants as the law with reference to fraudulent conveyance is well settled. If the evidence could be given no other interpretation than the one which appellants give it we would, of course, be compelled to reverse the judgment, but unfortunately for appellants there is considerable conflict in the evidence, and we are bound by the findings of the jury as adopted by the trial court.

[7–9] What was said by the court in Arnold v. Hadgis, 102 Cal.App.2d 88, at page 93, 226 P.2d 641, at page 643, is quite applicable to the instant case:

> "Whether a transfer is in fraud of creditors is a question of fact and not of law, and where there is a consideration for the transfer the burden is on the party attacking it to establish an actual fraudulent intent. Though the burden may shift when a prima facie case is made out, fraud must ultimately be proved by a preponderance of the evidence. Asadoorian v. Kludjian, 210 Cal. 564, 565, 292 P. 644. Defendant did not make out a prima facie case of fraud and did not sustain the burden resting upon him.
>
> "Defendant's assertion of fraud is based on inferences which he alone has drawn from the evidence. The trial court drew contrary inferences and made its findings thereon. The evidence and the inferences to be drawn therefrom must be regarded in the light most favorable to the support of the judgment. [Citing cases.]" (See, also, Jackson v. Burke, 124 Cal. App.2d 519, 269 P.2d 137.)

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

141 Cal.App.2d 293

J. E. COOLEY, doing business as Valley Funeral Home, Petitioner and Appellant,

v.

STATE BOARD OF FUNERAL DIRECTORS AND EMBALMERS of the State of California, George L. Nielsen, et al., Respondents.

Civ. 5337.

District Court of Appeal, Fourth District, California.

May 3, 1956.

Action against State Board of Funeral Directors and others to obtain review of board's order revoking petitioner's license as funeral director. The Superior Court, Fresno County, Philip Conley, J., denied writ of mandate, and petitioner appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to sustain Superior Court's denial of writ of mandate.

Order affirmed.

1. Searches and Seizures 🔑7(1)

Looking through a window and taking pictures of what can be seen does not constitute an unreasonable search. West's Ann.Const. art. 1, § 19.

2. Stipulations ⚿14(7)

Where, in action to obtain review of order of State Board of Funeral Directors revoking petitioner's license as funeral director, it was stipulated that certain exhibits and photographs were to be received in evidence and considered by the court, petitioner, who was represented by counsel, and who did not object when such exhibits and photographs were offered and received in evidence, would not be heard to complain thereof on appeal. West's Ann. Code Civ.Proc. § 1094.5.

3. Evidence ⚿83(1)

In absence of evidence to the contrary, it would be presumed that officers acted legally.

4. Licenses ⚿21

State and federal governments have right of reasonable inspection of premises operated under license from state or federal government. West's Ann.Bus. & Prof. Code, §§ 7606, 7607, 7703.

5. Mandamus ⚿168(4)

In action against State Board of Funeral Directors and others to obtain review of board's order revoking petitioner's license as funeral director, evidence was sufficient to sustain Superior Court's denial of writ of mandate. West's Ann.Code Civ.Proc. § 1094.5; West's Ann.Bus. & Prof.Code, §§ 7606, 7607, 7703.

6. Licenses ⚿22

Where, at outset of hearing before State Board of Funeral Directors, petitioner waived his rights to an attorney but had aid of counsel in action, by which petitioner sought to obtain review of Board's order revoking petitioner's license as funeral director, and in which the same issues were again presented, prejudicial error did not result from hearing officer's denial, during hearing before the administrative body, of petitioner's request for services of an attorney. West's Ann.Code Civ.Proc. § 1094.5.

L. Kenneth Say and Lewis W. Boies, Jr., Fresno, for appellant.

Edmund G. Brown, Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., and Frank Bottaro, Sacramento, for respondents.

GRIFFIN, Justice.

This action, under Section 1094.5 of the Code of Civil Procedure, was commenced by petitioner and appellant, doing business as Valley Funeral Home, against respondents State Board of Funeral Directors, et al., to review its order revoking petitioner's license as a funeral director after hearing by respondent Board. The accusation is that prior to and on February 28, 1955, petitioner violated Rule 1218 of the California Administrative Code, Title 16, Chapter 12, State Board of Funeral Directors and Embalmers, in that he kept and maintained his embalming table, preparation room and appliances used in embalming human dead bodies in an unclean and unsanitary condition, and that his mortuary was generally unclean and unsanitary.

Petitioner appeared at the hearing before the Board without counsel on April 11, 1955. He was informed of his right to counsel and he elected to proceed without any. Thereafter, witnesses were sworn and examined and petitioner cross-examined the witnesses at great length. The field representative of the Board testified that he visited petitioner's place of business on many occasions beginning with September 28, 1954, and that on one occasion Mrs. Cooley gave him permission to enter the office but claimed she could not find the key to the preparation room. After waiting in the chapel for some time he sensed a powerful odor of decomposition so tried the door to the preparation room and found it unlocked. Accompanied by an attendant of petitioner he proceeded into the room and found maggots on the floor which had been coming from a decomposing infant's body. The embalming table, hopper and wall surrounding it were in a very dirty condition. He was unable to contact petitioner that day due to his absence. He left a warning note that if the conditions were not corrected by 8 a. m. the following day it would be brought to the attention of the local health authorities. The next morning he found petitioner in the process of cleaning it up and advised him the room was extremely unsanitary and did not meet the requirements of the Board. He inspected it again on October 18th. Petitioner was not present. He inquired about the key and was told it was not available so he inspected the chapel and it appeared to be in a "very dirty and disorderly condition". He was unable to gain admission into the preparation room so he acquired the services of a police photographer who took pictures of it through one of the back windows. About that time petitioner appeared on the scene and refused to open the preparation room to the inspector claiming that he was suspicious of the inspector taking the pictures and stated that he did not have the key. The inspector offered to pay for a new lock if he would break it but petitioner refused. The pictures were then identified and received in evidence without objection. According to the testimony these photographs showed what appeared to be brown blood stains on the wall, newspapers scattered around, a dead body under a covering, cosmetics used in the profession scattered around, and a dresser "mussed up" and "quite dirty". The picture of the anteroom showed cardboard boxes littered with various items and rags on the floor. In the chapel there appeared to be considerable dirt on the floor such as flower petals, etc. In the anteroom were very dirty extra caskets in storage.

After several previous inspections, the inspector returned and on February 23, 1955, entrance to that room was refused by an employee in the absence of petitioner, claiming that the key could not be found. By the aid of the police and the photographer the door was unlocked, and in the presence of petitioner's employee photographs were taken. One dead human body was found stacked on top of another. Empty bottles and other things were lying around, and this room appeared to be in the same cluttered condition as before depicted. On the pulpit was found a bloody or filthy knife and a dirty gauze mask. No water was in the hydrant and no facilities were available for washing one's hands. The instruments lying around did not appear to have been cleaned between one case and another.

A licensed physician and pathologist testified that on the 10th day of February he went to the premises and performed an autopsy; that the place was so dirty he changed his clothes in his car and used his own instruments; that there was no water with which he could wash his hands and this condition existed on several prior occasions.

Petitioner, at the hearing and after being informed of his rights, testified that on occasions the inspector came to the parlor for inspection; that he was so busy with his turn at coroner cases he did not have time to give proper attention to it; and that all of his employees knew where the key to the property room was kept but sometimes they took it with them on calls. He identified the photographs as representing the general conditions on the days they were taken but claimed rush of business for the dereliction. He admitted that the inspector had warned him on previous occasion and that he had promised to install an exhaust fan and screens on the windows to prevent the flies from coming in but had not done it. Upon this evidence and with the consent of petitioner, the matter was submitted with the result indicated.

On the hearing before the Superior Court, the transcript and exhibits, including all photographs, were received in evidence by stipulation. Petitioner was represented by counsel at the time. Petitioner then produced a witness for the claimed purpose of showing that the evidence against him was obtained by illegal search and seizure under Article I, § 19 of the Constitution of California. People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, and People v. Berger, 44 Cal.2d 459, 282 P.2d 509.

Further showing by petitioner was made that neither he nor his employees nor the embalmer had knowledge that the two corpses were stacked one on top of the other, as depicted in the picture. One of petitioner's employees testified the inspector asked to inspect the preparation room on February 23, 1955, and that he went for the key to let him enter but the inspector had already unlocked the door. Apparently, acquiescence to enter the room was given by the employee.

No constitutional objections were made by petitioner at the hearing to the introduction of the photographs in evidence or the evidence based thereon. However, no such objections need be there made since this hearing was had prior to the decision in People v. Cahan, supra, and People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17.

[1] Looking through a window, taking pictures of what can be seen, does not constitute an unreasonable search. People v. Martin, 45 Cal.2d 755, 290 P.2d 855.

[2, 3] It appears that at the trial on July 14, 1955, when petitioner was represented by counsel, and subsequent to the Cahan decision, no such objections were made when the transcript, exhibits and photographs were offered and received in evidence. In fact, it was stipulated they might be received and considered by the court. Under these circumstances, petitioner should not be heard to complain. People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. In the absence of evidence to the contrary, it will be presumed that the officers acted legally. People v. Farrara, 46 Cal.2d 265, 294 P.2d 21. Regardless of the conclusions here reached the trial court fully considered the evidence on this subject and specifically found that none of the evidence introduced at the hearing or at the trial was obtained in violation of any constitutional right of the petitioner; that applying for and receiving a license to carry on the business at that address implied a consent to allow the investigator to make a reasonable inspection of the premises, which was done, and he accordingly waived his right to object under the circumstances related; that petitioner was afforded a full and fair hearing and there was sufficient competent evidence that he violated Section 7703 in relation to Section 7606 of the Business and Professions Code, and Rule 1218, supra. Section 7607 of the Business and Professions Code provides:

> "The board may inspect the premises in which the business of a funeral director is conducted or where embalming is practiced."

[4] The great weight of authority in this country, including the federal courts, upholds the right of reasonable inspection on the part of the state and federal governments, of premises operated under a license from the state or federal government. Maloney v. American independent Medical and Health Ass'n, 119 Cal.App.2d 319, 326, 259 P.2d 503; Financial Indemnity Co. v. Superior Court, 45 Cal.2d 395, 289 P.2d 233; Paladini v. Superior Court, 178 Cal. 369, 373, 173 P. 588; Bartlett Frazier Co. v. Hyde, 3 Cir., 65 F.2d 350, 352; Karr v. Baldwin, D.C., 57 F.2d 252, 255; Bowles v. Misle, D.C., 64 F.Supp. 835, 843; and cases cited in 88 A.L.R. 351, 353–358; Shapiro v. United States, 335 U.S. 1, 23, 68 S.Ct. 1375, 92 L.Ed. 1787; Plainos v. State, 1937, 131 Tex.Cr.R. 516, 100 S.W.2d 367.

[5] The evidence fully supports the finding of the trial court. Even if it could be sufficiently maintained that some of the photographs taken and evidence produced at the trial were not rightfully admitted before the Board of Funeral Directors or the trial court there was sufficient evidence to support the finding without the use of this evidence. Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 69, 268 P. 1073; Minaker v. Adams, 55 Cal.App. 374, 377, 203 P. 806.

It appears that during the hearing before the administrative body, after waiving his right to an attorney, and after consenting to proceed without the services of one, petitioner then stated: "I think I am getting in deep water and I think I need an attorney." Thereupon, the hearing officer informed petitioner that he was sorry but it was too late now, and he would not be permitted to change his mind because that was something he should have considered before he came into the hearing, and the respondent replied: "Yes, sir", and continued to further cross-examine the witness.

[6] At the outset, petitioner waived his right to an attorney. He had the aid of

counsel in his hearing before the trial court where the same issues were again presented. No prejudicial error resulted. Jones v. Della Maria, 48 Cal.App. 171, 191 P. 943.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

141 Cal.App.2d 233

Judith Kelly HOWARD, Plaintiff and Respondent,

v.

Lindsay Coleman HOWARD et al., Defendants.

Lindsay Coleman Howard, Appellant.

Civ. 19730–19733, 19834.

District Court of Appeal, Second District, Division 2, California.

May 2, 1956.

Rehearing Denied May 25, 1956.

Hearing Denied June 27, 1956.

Divorce action. The Superior Court of Los Angeles County, Stanley Mosk, J., entered various orders relating to allowance to wife of attorney fees to prosecute and defend appeals, and husband appealed from such orders. The District Court of Appeal, Ashburn, J., held, in part, that allowance of $10,000 to wife to prosecute her appeal and resist that of her husband, was not, under circumstances, an abuse of discretion; but that allowance to wife of attorney fee of $1,000 to defend appeal by husband from order allowing $250 attorney fee was excessive, and would be reduced to $250.

Orders modified and affirmed.

See also 128 Cal.App.2d 188, 275 P.2d 93.

1. Divorce 🔑221

The wife is not required to expend her principal in litigating divorce matters with her husband.

2. Divorce 🔑182

The right to attorney fee on appeal in divorce action does not depend upon the outcome of the appeal.

3. Divorce 🔑224

Wife's good faith in prosecuting or defending appeal in divorce action is essence of her right to allowance of attorney fee for prosecuting or defending the appeal.

4. Divorce 🔑226

The making of the award to wife of attorney fee to prosecute or defend appeal in divorce action carries implied finding that appeal presents substantial questions and is being pursued in good faith.

5. Divorce 🔑226

The trial judge's experience and knowledge afford sufficient basis for fixing amount of lawyer's fee to wife in prosecution or defense of appeal in divorce action, even in absence of specific evidence on subject.

6. Divorce 🔑286

Award of attorney fee to wife for prosecution and defense of appeal in divorce action cannot be set aside in absence of clear abuse of discretion.

7. Divorce 🔑223

Allowance of $10,000 to wife to prosecute her appeal and resist that of her husband, in divorce action in which wife obtained $1,750 monthly alimony, was not, under circumstances, an abuse of discretion.

8. Divorce 🔑227(1)

Awards of $250 to wife for attorney fee for defense of each of three frivolous appeals taken by husband from orders allowing such fees, after abandonment of appeal from alimony award in each case, was proper.

9. Costs 🔑260(6½)

Where attorney for husband prosecuted three frivolous appeals from orders allowing wife attorney fee of $250 to defend each of three appeals from alimony order, later abandoned by husband, fine of $100 for each such appeal would be imposed upon husband's attorney.

10. Divorce ⚷227(2), 287

Allowance to wife of attorney fee of $1,000 to defend appeal by husband from order allowing $250 attorney fee was excessive, and would be reduced to $250. West's Ann.Rules on Appeal, rule 19(a); West's Ann.Code Civ.Proc. § 955.

◆

Franklin W. Peck, Los Angeles, for appellant.

Edward M. Raskin, Los Angeles, for respondent.

ASHBURN, Justice.

Five appeals presented in a single set of briefs require disposition herein. They challenge six orders made after interlocutory judgment of divorce in favor of plaintiff wife, granted on the ground of habitual intemperance and cruelty. Each of the orders awards to plaintiff an attorney fee to enable her to resist an appeal taken by defendant.

The interlocutory judgment was entered on June 9, 1952. It awarded plaintiff, among other things, alimony in the sum of $1,750 a month. On July 3, 1952, defendant appealed from the entire judgment. An amended notice of July 23, 1952, narrowed the scope of the appeal somewhat but it challenged, as had the original, the alimony award of $1,750 per month. Defendant effected a stay of execution through giving appropriate bond. Plaintiff also filed a notice of appeal from certain portions of the judgment on July 31, 1952.

Being without funds to prosecute her own appeal or to resist defendant's attack upon the judgment, plaintiff made a motion for an order awarding her alimony during the pendency of the appeal and for an attorney fee to enable her to carry on that phase of the litigation. Pursuant thereto an order was made on September 5, 1952, allowing plaintiff $1,750 a month as alimony pending the appeal, together with an attorney fee of $250 for presenting the motion in the superior court. Defendant appealed on that same day, September 5th, from both phases of the order (No. 19730) and gave bond to stay execution.

On September 23, the other phase of the motion was decided, the court awarding a $10,000 attorney fee for services upon the appeals from the judgment. Defendant appealed from that order (No. 19732) and stayed execution.

Her first motion having proved a barren victory, plaintiff again applied on September 23 for alimony pending appeal from the September 5 order and an attorney fee for presenting that motion. The court thereupon ordered payment of $1,750 a month as alimony and an attorney fee of $250 for presenting the motion. This order was made on September 23rd and on the next day, the 24th, defendant appealed from the entire order (No. 19731) and stayed execution.

The second order having produced no money, a third motion for the same relief was made, resulting in an order of October 6th awarding alimony of $1,750 a month pending appeal and an attorney fee of $500 for presenting that motion. On October 14th defendant again appealed from the entire order and gave bond to stay execution (No. 19733).

It being necessary to defend the appeal from the order of September 5th (for $1,750 alimony and $250 attorney fee, No. 19730), and plaintiff still being without funds for litigation with her husband (whom the trial judge found to be worth $4,000,000), she applied for an award of an attorney fee to enable her to resist the last mentioned appeal. On October 3rd the court ordered defendant to pay to her an attorney fee of $1,000 for the defense of that appeal (No. 19730). Promptly defendant took another appeal on the same day, and gave bond to stay execution (No. 19834).

In order to defend the appeal from the order of September 23rd awarding $1,750 alimony and $250 attorney fees, another application for an attorney fee on appeal was made and granted on October 10th in the sum of $1,000. Defendant appealed on October 14th (No. 19834) and stayed execution.

On the same day on which he took the last mentioned appeal counsel for defendant dismissed without prejudice his appeal from that portion of each of the orders of September 5th and September 23rd which awarded plaintiff $1,750 monthly alimony pending appeal, thus leaving intact the appeal from the $250 attorney fee award in each instance. This reduced the appeals in Nos. 19730 and 19731 to a defense of the two attorney fee orders of $250 each. The fees awarded for that defense stood at $1,000 each. (Appeal No. 19834 covers both of those orders.) Thereupon counsel for defendant on November 28, 1952 filed in the superior court a total abandonment of the appeal (No. 19834) challenging both of those $1,000 orders, which abandonment was expressly "without prejudice." Then defendant moved the superior court to vacate said $1,000 allowances upon the ground that, his appeal from the $1,750 alimony award having been abandoned, "said attorney for plaintiff will not be called upon in the future to render or perform the legal services for which said attorney's fees were allowed." The motion was denied on November 28th. Defendant did not appeal from that order but promptly renewed his appeal from the $1,000 orders of October 3 and 10, this by notice filed on December 1, 1952. Of course he again stayed execution.

Appeal No. 19732. Attorney Fee of $10,000.

Appellant argues that this fee, designed to enable the wife adequately to prosecute her own appeal and resist that of her husband, is excessive to the point of an abuse of discretion.

The hearing was held on September 23, 1952. It was stipulated that the court consider all evidence received at the trial as well as that which had been heard on the application of September 5th for alimony pending appeal. There was also an examination by opposing counsel of plaintiff's attorney, Mr. Raskin, as a witness. Plaintiff and her attorney had presented affidavits, but defendant filed none and called no witnesses. Counsel for defendant made these statements near the close of the hearing: "I am aware of the fact that your Honor, in his sound discretion should award Mr. Raskin a fee. We don't question that for a minute. * * * One thing further; Mr. Raskin is a very able lawyer. I don't dispute that. He did a first class job for his client when he tried this case. Mrs. Howard was ably represented. By the questions I put to Mr. Raskin I did not mean to imply or even suggest that he is not a man of great ability, because he is. * * * Your Honor, in his own experience as a member of the bar and as a Judge sitting in this court, is personally capable of formulating a fair determination of how much Mr. Raskin is entitled to. Mr. Raskin makes point of the fact that we didn't file a counter affidavit here in response to his affidavit or to the affidavit of Mrs. Howard. There isn't any need to file an affidavit in response to the affidavit of Mrs. Howard because your Honor is familiar with all the facts and her financial condition. * * * [Y]our Honor is perfectly capable of determining what a fair fee should be in the absence of a counter affidavit. We are perfectly willing to confide this matter to the sound judgment of the court, but I suggest in conclusion that to make a fee of $30,000 or any substantial part thereof for prosecuting this appeal would be an abuse of the court's discretion." The court remarked: "In this case we have had a pendente lite order plus an award at the time of trial. Of course, there are going to be numerous issues and complications on appeal. I think the defendant has clearly indicated by his posting of bonds and his appeal from a subsequent order pending appeal that his resistance is going to be thorough and uncompromising, which he has a right to do," and ordered payment of a $10,000 fee.

[1-5] Certain elementary considerations are generally recognized in these matters. The wife is not required to expend her principal in litigating divorce matters with her husband. Baldwin v. Baldwin, 28 Cal.2d 406, 417, 170 P.2d 670. The right to attorney fees on appeal does not depend upon the outcome of the same. Weil v. Weil, 37 Cal.2d 770, 790, 236 P.2d 159. Appellant's good faith is the essence of the right, Weil v. Weil, supra, 37 Cal.2d at page 790, 236 P.2d at page 170. The making of the award carries an implied finding

that the appeal presents substantial questions and is being pursued in good faith. Gay v. Gay, 146 Cal. 237, 240–241, 79 P. 885. It "is common knowledge that legal charges are far from being standardized." Newbauer v. Newbauer, 95 Cal.App.2d 36, 40, 212 P.2d 240, 243. "Obviously, the factors involved differ in each case. Certainly, neither the trial nor appellate courts should attempt to fix a flat fee identical in all cases. Such an approach would be unrealistic, unsound, and unjustified." Pope v. Pope, 107 Cal.App.2d 537, 540, 237 P.2d 312, 315. The judge's experience and knowledge afford sufficient basis for fixing the amount of the lawyer's fee even in the absence of specific evidence on the subject. Jones v. Jones, 135 Cal.App.2d 52, 64, 286 P.2d 908; Lewis & Queen v. S. Edmondson & Sons, 113 Cal. App.2d 705, 708, 248 P.2d 973; Libby v. Kipp, 87 Cal.App. 538, 544, 262 P. 68, 71. In the last cited case it is said: "It is perhaps difficult to conceive of any record that could be presented to the appellate court which would give less light upon the subject to be determined than a transcript relating to the fees or compensation that should be awarded for professional services, for the simple reason that only a few pages of testimony or a few simple statements contained in the record may be necessary to state the proceedings taken and had so far as the court records are concerned, whereas the time required to ascertain and determine the proceedings that should be taken or the skill required to determine the proper proceedings to be taken are the real elements which enter into the value of the services for which compensation is properly awarded, cannot be placed upon, and never do appear on a typewritten or printed page. It is for this reason that the matter of awarding compensation for professional services, when that service is rendered by an attorney, is left, to so great a degree, in the judicial discretion of the trial court, so much so that, unless the sum allowed is plainly and palpably exorbitant and such as shocks the conscience of an appellate court, the determination of the trial court will not be disturbed."

[6] Matters properly taken into consideration by the trial judge are thus enumerated in Pope v. Pope, supra, 107 Cal.App.2d 537, 539, 237 P.2d 312, 314: "In determining the amount of a reasonable fee the trial court is permitted to consider various factors: The nature of the litigation, its complexity, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife, are some of the relevant matters to be considered. [Citing cases.] The trial court is not required to disregard entirely the financial status of the husband and his ability to pay in fixing the amount of fees. [Citing cases.] Where the husband possesses great wealth he has the ability to secure the services of able counsel. The allowance to the wife must give her the power to hire counsel of equal standing in order to equalize the contest, and to protect her rights." The award thus reached cannot be set aside in the absence of a clear abuse of discretion. On the former appeal of this case, 128 Cal.App.2d 188, this court said at page 190, 275 P.2d 93, at page 95: "Abuse of discretion is never presumed. It must be affirmatively established. A reviewing court is not authorized to revise the lower court's judgment even if it should be of the opinion that it would have made a different award had the matter been submitted to its judgment in the first instance, in the absence of a clear abuse of discretion." In Newbauer v. Newbauer, supra, 95 Cal.App.2d 36, 40, 212 P.2d 240, 243, the court put it thus: "The discretion was the trial judge's, not ours; and we can only interfere if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did."

The interlocutory judgment of divorce was affirmed by this division of this court in two opinions found at pages 180 and 188 of 128 Cal.App.2d, 275 P.2d 88 and 93. In approving an attorney fee of $15,690, allowed on account of services in the trial of the case, it was pointed out that the clerk's transcript consisted of 685 pages, reporter's transcript, 1,394 pages, that there were 94 exhibits, numerous depositions and "innumerable applications and proceedings" prior to trial, that there were nine days of court proceedings prior to trial and eleven days of trial. After those rulings were made, petitions for rehearing and answers thereto, petitions for hearing in the Supreme Court and answers thereto, swelled the volume of briefs and petitions to 451 pages. With all these voluminous documents Mrs. Howard's attorney had to be familiar, and a general recollection of the same would not suffice for advancing or resisting points on appeal. Meticulous care in finding and citing transcript references and in discovering and presenting apt authorities was necessary to a workmanlike job. The briefs of the wife's attorney reflected that type of care on his part. The questions presented were not frivolous and their presentation was not unduly elaborate. The foregoing statement is based upon a re-examination of the record of the prior appeals.

Counsel for appellant argues, however, that the award was necessarily an approximation of the reasonable value of prospective services, that the issues on appeal were considerably narrowed after the amount of the fee was fixed, and therefore the sum of $10,000 now represents more than adequate compensation for services actually required of the wife's attorney. At page 39 of appellant's opening brief counsel says: "It is submitted that although the $10,000.00 fee awarded on September 23, 1952 (Appeal No. 19732) may not, in view of the elaborate showing made by plaintiff, have constituted an abuse of discretion in the first instance, it should, in view of the limited matters which were actually submitted to this Court for determination, be substantially reduced."

Although defendant's original appeal challenged the entire judgment, his amended notice of July 23, 1952, attacked eight specific portions thereof, including the award of permanent alimony of $1,750 a month, the award to plaintiff of the furnishings at 1230 Benedict Canyon Drive, Beverly Hills, and the furnishings at 1134 San Ysidro Drive, Beverly Hills, also certain other personal property at 1230 Benedict Canyon Drive and a 1947 Buick automobile. As to all of the items just enumerated the appeal was ultimately abandoned through statements made in defendant's opening brief which was filed on February 16, 1954. The amended notice of appeal also enumerated as erroneous rulings the award to the wife of the real property known as 1134 San Ysidro Drive, the award of an attorney fee for trial services in the sum of $15,690, and certain cost items aggregating $5,349.45. The items last enumerated are those which were argued in this court. It is to be noted that there was no receding from the attack on the alimony award until the brief was filed on February 16, 1954, and that is also true of the abandonment of the other items just mentioned. The reason for ceasing to contest the alimony appears from a quotation of appellant's reply brief, later set forth herein. With respect to the other matters, counsel in the same brief, after concluding that the problem of demonstrating the alimony to be excessive was "virtually insuperable," said this: "This is also true of the furniture, furnishings and household effects in the Benedict Canyon home and in the house located on the San Ysidro property, all of which was awarded to plaintiff. A very large amount of the furniture and furnishings was acquired by inheritance by defendant from the estate of his deceased mother. Again defendant generously gave plaintiff carte blanche in having the furniture and furnishings refurbished, recovered and otherwise altered, concerning which the trial court made specific findings. It would be humanly impossible, in the absence of an extended reference, to conclusively trace all of the furniture and furnishings which defendant acquired from the estate of his deceased mother. This is likewise true of a large number of articles of personal property belonging to defendant acquired by gift or inheritance, which did not constitute an integral part of the Benedict Canyon home." It thus appears that the narrowing of plaintiff's appeal did not substantially reduce the necessary labors of the wife's attorney.

Plaintiff's notice of appeal at all times challenged the ruling that certain valuable jewelry which she claimed had been given to her by her husband belonged to him, the finding that a certain ranch known as the Moorpark Ranch belonged to the husband except a certain "undefined and unsubstantial interest * * * of an indefinite if not nominal value" which was held to be community property and awarded to the husband. Plaintiff also complained of that portion of the custody award which permitted defendant to have the two children for certain limited periods of time, general custody being in the plaintiff. It appears that these appeals involved property of a valuation of several hundred thousand dollars. Plaintiff's attorney computes it at $1,200,000, which sum includes alimony at the rate of $1,750 a month for the full life expectancy of plaintiff. This figure is doubtless much too high, but it remains a fact that the subject matter of the two appeals was worth several hundred thousand dollars. The questions presented were adequately briefed and were by no means frivolous.

[7] Though it is appropriate for the trial court, Warner v. Warner, 34 Cal.2d 838, 841, 215 P.2d 20; Barker v. Barker, 139 Cal.App.2d 206, 293 P.2d 85, or an appellate tribunal, Bancroft v. Bancroft, 9 Cal.App.2d 464, 473, 50 P.2d 465; Nelson v. Nelson, 96 Cal.App.2d 210, 212, 215 P.2d 48, to reduce an attorney fee allowed in advance of rendition of services when subsequent events show the same to be excessive, that does not appear to be the case at bar. An award of $10,000 if made after the conclusion of both appeals would have been the exercise of a reasonable discretion. It should not be forgotten that the intrinsic value of the dollar has substantially decreased in recent years. (See Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 187, 195 P.2d 427; Autry v. Republic Productions, Inc., 30 Cal.2d 144, 154, 180 P.2d 888.) We cannot disturb the order in question.

Appeals Nos. 19730, 19731 and 19733. Attorney Fee Awards of $250, $250 and $500.

Each of these appeals initially attacked an award of $1,750 alimony pending appeal and a modest attorney fee for presentation of the particular motion in the trial court. These appeals were frivolous in their inception and remain so to date. The quality of the assault upon the alimony award is revealed by appellant's reply brief at bar. It is quoted: "Plaintiff having been granted a decree of divorce from defendant, which was not questioned on appeal, it was a foregone conclusion that she was entitled to and would receive a substantial alimony award. The very most that defendant could have hoped to accomplish would be to reduce the amount of the award, and hence the entire amount thereof based on her life expectancy was not in jeopardy. * * * The trial court found that defendant was worth $4,000,000.00. He did not contend on appeal that this finding was not supported by the evidence. It was stated in defendant's opening brief on appeal in the divorce case respecting the alimony and personal property award to plaintiff: 'We believe, after a careful review of the entire record in this case in the light of the wide discretion with which the trial court is invested in such matters, that we would subject the defendant to the claim that he is guilty of straining gnats and swallowing camels if he undertook to show that the award of $1750.00 a month for the support of his wife is excessive. We believe that the allowance, dispassionately and objectively viewed, is liberal in the extreme, if it is not excessive, but the lavish generosity of the defendant during the marriage toward his wife makes our problem of demonstrating that fact virtually insuperable. * * *'"

When appellant abandoned the attack upon the alimony orders of September 5th and September 23rd, he reduced each of appeals Nos. 19730 and 19731 to a defense to an appeal from an award of $250 for attorney's services. The amount of the attorney fee included in each order rested so clearly within the discretion of the trial judge that the propriety of these modest awards cannot be gainsaid. This is true of the $500 item of October 6th as well as the earlier amounts of $250. All three awards could have been made in the sum of $500 without any abuse of discretion.

Counsel refer to a memorandum of the trial judge which was filed in connection with the order of October 6th. It is not a part of the record herein but, as both sides tacitly vouch for its verity by quoting it, we consult the memorandum and find this language: "Plaintiff maintains defendant is pursuing his present tactics for the purpose of starving her into submission. It is difficult to ascertain whether that is his motive, or whether he is congenitally litigious, immaturely mischievous, seeking contention out of sheer boredom with his rather unproductive existence, or whether he is the victim of unsound and costly advice by his counsel.

"But it does seem demonstrably clear that defendant is bringing a continuing series of frivolous appeals that result in rendering the judicial process ineffectual. Query, is there any judicial remedy?" Again, "[b]ut none of the proposals suggested herein get to the root of the evil, and this multimillionaire defendant is able to continue posting bonds and filing new appeals, making a mockery of Court orders." The judge's reasoning is not binding, Kalmus v. Kalmus, 103 Cal.App.2d 405, 421, 230 P.2d 57, but his trenchant remarks were not misplaced. As stated in Pope v. Pope, supra, 107 Cal.App.2d 537, 540, 237 P.2d 312, 314: "Where the husband possesses great wealth he has the ability to secure the services of able counsel. The allowance to the wife must give her the power to hire counsel of equal standing in order to equalize the contest, and to protect her rights."

[8, 9] The order should be affirmed in each of these instances and a fine imposed upon appellant's attorney for frivolous appeal.[1]

Appeal No. 19834. Two Attorney Fees of $1,000 Each.

On October 3, 1952, the court granted plaintiff's motion for an attorney fee to enable her to resist the appeal from the order of September 5th covering $1,750 alimony pending appeal and a $250 attorney fee. The amount fixed was $1,000. On October 10, 1952, a like motion was granted to care for the defense of the appeal from the order of September 23rd and the attorney fee was fixed at $1,000. Appeals from these two orders were promptly taken and execution was stayed on each. On October 14th, the date of the appeal from the order of October 10th, counsel for appellant filed an abandonment of that portion of each of the orders of September 5th and 23rd which related to alimony, thus reducing each of those appeals (Nos. 19730 and 19731) to an attack upon the $250 attorney fee. It followed that the $1,000 fee for defending each of those appeals henceforth applied only to the defense of a $250 attorney fee. So counsel for appellant, on November 28, 1952, filed an abandonment of each of the appeals from the $1,000 orders, expressly making same "without prejudice." This was done for the purpose and with the effect of revesting jurisdiction in the superior court (see Rule 19(a) of Rules on Appeal; Code Civ.Proc. § 955; Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 281, 153 P.2d 714). Defendant then moved the trial judge to vacate the two $1,000 awards upon the ground that subsequent events had disclosed that the attorney's services would no longer be necessary. The motion was denied. Thereupon, within the statutory sixty-day period and on December 1, 1952, defendant appealed again from said orders of October 3rd and October 10th, the $1,000 orders. (That appeal is No. 19834, now before us.)

No appeal was taken from the order denying the motion to vacate but that is of no moment. It is immaterial whether that order was appealable, as respondent's counsel urges (see 3 Cal.Jur.2d, § 57, p. 491). A ruling upon a motion does not become res judicata unless there has been a full hearing upon the merits, as in Lake v. Bonynge, 161 Cal. 120, 129, 118 P. 535 (see 15 Cal.Jur. § 177, p. 112), and we do not have that situation here.

This appeal, No. 19834, assails the validity of two orders made to cover future services on appeal which are claimed to be now excessive in view of subsequent happenings rendering the major portion of the contemplated services unnecessary. In other words, an allowance of $1,000 for the defense of an appeal from a $250 attorney fee order is claimed by appellant to be excessive. We agree.

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[1] Not to be outdone, plaintiff has five appeals pending in this court, taken from orders denying requests for attorney fees. Those appeals are not ready for the calendar, and the question of whether they, or any of them, possess merit is an open one.

In Warner v. Warner, supra, 34 Cal.2d 838, 841, 215 P.2d 20, 22, the court said, as to the power of the trial court in such circumstances: "The possibility that contingencies might occur that would make the anticipated services unnecessary does not preclude the court from making the allowance in the first instance. After a pendente lite award has been made, the trial court retains jurisdiction to modify the award at any time during the pendency of the action when a change of circumstances occurs that alters the extent of the services required. * * * Should any of the contingencies occur that would preclude rendition of the anticipated services, the trial court could reduce the award to an amount necessary to compensate the attorney for services actually rendered." That like power resides in the appellate court we do not doubt. It was exercised in Bancroft v. Bancroft, supra, 9 Cal.App.2d 464, 472, 50 P.2d 465. It there appeared that an order of $1,750 attorney fees upon appeal had been made in advance and that the necessary services proved to be actually worth much less, and the court modified the order by reducing the fee from $1,750 to $750 and affirmed the order as so modified. In Nelson v. Nelson, supra, 96 Cal.App.2d 210, 212, 215 P.2d 48 it appeared that an advance award for costs upon appeal had proved to be excessive and this court reversed the order with directions to the lower court to modify the same by reducing the amount to the actual expense incurred. Similar treatment was accorded the order of the trial court in Barker v. Barker, 139 Cal.App. 2d 206, 293 P.2d 85. In that instance the matter was remanded to the trial court with instructions to rehear the petition for attorney's fees on appeal and to grant such fees, if any, as it might find the attorneys for appellant entitled to have.

[10] At bar there is no dispute about the factual situation and further multiplication of proceedings in this case should be avoided. This appears to be a proper instance in which the court should make an order putting an end to the particular appeal. We find that the sum of $250 is adequate compensation for the defense of an appeal from a $250 attorney fee award. In fixing this amount we have taken into consideration the work done by plaintiff's attorney before the abandonment of the attack upon the alimony item. Each of the $1,000 orders will be reduced accordingly.

By way of summary, our rulings are:

Appeal No. 19732, the order of September 23, 1952, awarding an attorney fee of $10,000, is affirmed.

Appeal No. 19730, order of September 5, 1952, for payment of $250 attorney fee, is affirmed, and attorney for appellant is fined the sum of $100 for frivolous appeal, said amount to be added to respondent's costs on appeal.

Appeal No. 19731, order of September 23, 1952, for payment of $250 attorney fee is affirmed. Attorney for appellant is fined the sum of $100 for frivolous appeal, said amount to be added to respondent's costs on appeal.

Appeal No. 19733, order of October 6, 1952, for payment of $500 attorney fee, is affirmed. Attorney for appellant is fined the sum of $100 for frivolous appeal, said amount to be added to respondent's costs on appeal.

Appeal No. 19834, order of October 3, 1952, for payment of $1,000 attorney fee, is modified by reducing the sum of $1,000 to $250, and as thus modified the order is affirmed.

Appeal No. 19834, order of October 10, 1952, for payment of $1,000 attorney fee, is modified by reducing the sum of $1,000 to $250, and as thus modified the order is affirmed.

MOORE, P. J., and FOX, J., concur.

141 Cal.App.2d 263

Maurice M. DAVIS, Mary Fralm Davis, W. T. Scully and Mary Scully, Plaintiffs and Appellants,

v.

Oscar Wilhelm FRANSON, also known as Oscar Wilhelm Fransen, Defendant and Respondent.

Civ. 4996.

District Court of Appeal, Fourth District, California.

May 2, 1956.

Action for injuries sustained as result of collision which took place when defendant made left turn in front of plaintiff's oncoming vehicle at intersection. The Superior Court, Fresno County, Strother P. Walton, J., entered judgment for defendant and denied a new trial, and plaintiffs appealed. The District Court of Appeal, Conley, J. pro tem., held that the presumption of due care attaching to defendant because of his traumatic amnesia was not eliminated as evidence by his failure to call his guest passenger to witness stand.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

1. Appeal and Error 🔑1001(1)

If there is any substantial evidence supporting jury's finding, its determination is final and reviewing court cannot disturb verdict.

2. Automobiles 🔑242(1)

Defendant who, as result of traumatic amnesia, could not recall any of the events of automobile accident was entitled to presumption of due care. West's Ann.Code Civ.Proc. §§ 1963, subd. 4, 2055.

3. Negligence 🔑121(1)

Presumption of due care attaching to defendant because of his traumatic amnesia was substantial evidence in his favor. West's Ann.Code Civ.Proc. § 1963, subd. 4.

4. Automobiles 🔑244(11, 43)

In action for injuries sustained as result of collision which took place when defendant made left turn in front of plaintiff's oncoming vehicle at intersection, evidence, even apart from presumption of due care attaching to defendant because of his traumatic amnesia, would have been sufficient to sustain findings adverse to plaintiffs on questions of negligence and contributory negligence.

5. Automobiles 🔑171(4)

Where motorist making left turn at intersection approached intersection first, he had right of way if at that time oncoming vehicle was not near enough to constitute "an immediate hazard".

6. Evidence 🔑595

Inferences constituting legitimate indirect evidence may furnish substantial support to a verdict.

7. Automobiles 🔑245(2, 50, 67)
New Trial 🔑13

Process of integrating all of evidence in automobile collision case and, from synthesis of testimony, determining issues of negligence, proximate cause and contributory negligence is primarily duty and right of jury; but trial judge has right and duty to review testimony which he, with jury, has heard in course of trial, and should not hesitate to use that plenary power to right any injustice which in his opinion has resulted.

8. Appeal and Error 🔑994(2)

Mathematical calculations as to relative positions, speeds and courses of two automobiles would not impel reviewing court to reverse judgment in automobile collision case, where primary basis of calculations was assumption not only of truthfulness of certain witnesses, but of their accuracy.

9. Evidence 🔑77(1)

A party to a civil action has not only the right but the duty to exercise discrimination in selecting witnesses, for whom he vouches; and mere failure to call potential witness to stand does not constitute such "willful suppression" of evidence as will give rise to statutory presumption that witness' testimony would have been adverse if produced. West's Ann.Code Civ.Proc. § 1963, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Willful Suppression".

10. Evidence ⚿77(1)

Defendant's failure to call to stand guest who was with him at time of automobile collision giving rise to action did not eliminate presumption of due care attaching to defendant because of his traumatic amnesia. West's Ann.Code Civ.Proc. § 1963, subd. 5.

11. Attorney and Client ⚿86

Statement of counsel, not made as an admission or stipulation, is not absolutely binding on client.

12. Appeal and Error ⚿1060(1)

Notwithstanding defendant's counsel's argument that he would find both drivers negligent if he were on jury, plaintiff passengers, who could not have been guilty of contributory negligence, were not entitled to reversal of judgment for defendant where there was substantial evidence to support jury's finding that defendant had not been guilty of negligence proximately causing collision.

13. Trial ⚿118

A lawyer is not guilty of misconduct merely because he is wrong as to law; and to constitute misconduct in arguing proposition of law, counsel must do so in bad faith.

14. Appeal and Error ⚿969, 978(2)

Good faith of counsel in urging proposition of law is primarily for trial court to determine on motion for mistrial, or on motion for new trial.

15. Trial ⚿133(6)

Giving of admonition to disregard argument is deemed to have cured misconduct except in most extreme cases.

16. Trial ⚿131(1)

Improprieties in argument would be deemed waived, where not objected to.

17. Trial ⚿125(1)

"Janus-faced plea", in which counsel looked in opposite directions at same time by urging that sympathy should not affect jurors' decision but that if there was sympathy it should go to his client, was not to be condoned.

See publication Words and Phrases, for other judicial constructions and definitions of "Janus-Faced Plea".

18. Negligence ⚿122(1)

Burden of proof as to contributory negligence is on defendant throughout case, even though all evidence produced by both sides must be considered by jury in determining such issue.

19. Appeal and Error ⚿930(2)

Jurors are presumed to possess ordinary intelligence and to understand meaning and use of words in their common and ordinary application.

20. Appeal and Error ⚿1067

Refusal to give requested instruction placing burden of proof as to contributory negligence upon defendant in automobile collision case would not require reversal where jury was charged that defendant had burden of proving "affirmative defenses", since quoted words have a well-known meaning in accordance with common usage of the English language.

See publication Words and Phrases, for other judicial constructions and definitions of "Affirmative Defenses".

21. Appeal and Error ⚿110

There can be no appeal from an order denying a motion for a new trial.

Miles & Sears, Fresno, for appellants.

Stammer, McKnight & Barnum, Fresno, for respondent.

CONLEY, Justice pro tem.

Maurice M. Davis, a Texas attorney, and his wife, with their friends Mr. and Mrs. W. T. Scully, were approaching the city of Fresno in the Davis automobile on Highway 99 when the defendant Franson drove his car at a leisurely pace across the roadway in front of them. The resulting collision caused injuries to all of the plaintiffs, ranging in severity from serious for Mrs. Davis to slight for the Scullys.

The two principal questions submitted to the jury were whether the defendant Oscar

Wilhelm Franson was negligent, and whether the plaintiffs were guilty of contributory negligence. The jury brought in a verdict for the defendant and against all of the plaintiffs. Thereafter, the trial judge denied plaintiffs' motion for a new trial. Plaintiffs appeal from the judgment and attempt to appeal from the order denying their motion for a new trial.

The principal contentions made by appellants are: (1) That the evidence is insufficient to sustain the verdict; (2) That counsel for respondent was guilty of repeated and serious prejudicial misconduct; (3) That the court erred in refusing to instruct the jury relative to the burden of proof as to contributory negligence.

In the area where the collision occurred, just south of the overpass at the southern approach to the city of Fresno, Highway 99 is a freeway with double northbound and southbound lanes divided by a wide parkway defined by curbs and planted to lawn. The highway itself, though commonly said to run north and south, actually is laid out in a northwesterly and southeasterly direction, following a course parallel to the Southern Pacific railroad tracks. As a consequence, the east and west highways and roads following the section lines of the government survey meet the highway at angles differing from the 90-degree straight crossings characteristic of a normal western roadway grid. This inevitably leads to some confusion in the operation of safety devices and in the regulation of the actual flow of traffic. For example, in this case, both cars had a green light or "go" signal at the time of the collision, although the pathway of the defendant's car actually crossed that of the plaintiff.

At Church Avenue there is a streetwide break in the parkway dividing the north and southbound lanes of the highway and adjacent to the two southbound lanes and west of the west curb of the parkway there is a third wide lane marked "Left Turn" for vehicles headed south on the highway but intending to cross the northbound lanes of the highway to go easterly on Church. The break in the dividing strip is 140 feet wide and the west edge of the dividing strip is 38.6 feet from the west edge of the northbound traffic lane. The intersection was unobstructed as to visibility. The day was bright and the pavement dry. The intersection was controlled by six traffic lights, and at the time of the wreck, the lights were green for both Mr. Davis and Mr. Franson.

The Davis car, on its way from Texas to San Francisco, where the Scullys planned to attend a life insurance convention and the Davises to spend a vacation, was in the more westerly of the two northbound lanes, traveling at a speed estimated by the driver, Mr. Davis, to be 45 to 50 miles per hour. Mr. Franson, accompanied by a friend, Amil Fosberg, was going south on the highway at about 15 miles per hour, intending to turn east on Church Avenue. As he reached the northerly end of the break in the dividing strip, he started to make a gradual left turn. From that point he went approximately 97.7 feet to the most westerly edge of the two northbound lanes and continued on east. This westerly northbound lane was 13.2 feet wide. The front of the Davis car struck the right front side of the Franson car about two and one-half feet east of the center line dividing the two northbound highway lanes. The Davis automobile moved 18 feet after the impact and the defendant's car came to rest only a few feet from where the plaintiff's Chrysler stopped.

Mr. Davis testified that he saw the defendant commencing to make his left turn. He did not immediately put on his brakes or change direction but blew his horn as a warning. He admitted that if he had put on his brakes then, the accident could have been avoided. He again blew his horn, put on his brakes, turned slightly to the right and the collision occurred. At the instant of impact, the Davis Chrysler had been slowed by the brakes to a speed of about 20 to 25 miles per hour.

A summary of the contentions made by appellants relative to defendant's negligence is that Mr. Franson was negligent in not keeping a vigilant outlook, in failing to give a left turn signal, and in neglecting to yield the right of way inasmuch as the Davis car was near enough to the intersection to constitute an immediate hazard. Vehicle Code, § 551.

Franson, as a result of traumatic amnesia, could not recall any of the events of the accident; he did not take the stand, but his deposition was read into the record; he did not call the guest who had been with him as a witness.

[1] If there is any *substantial* evidence supporting the jury's finding in favor of the defendant, its determination is final and we cannot disturb the verdict. Pfingsten v. Westenhaver, 39 Cal.2d 12, 19, 244 P.2d 395; Rose v. Melody Lane, 39 Cal.2d 481, 487, 247 P.2d 335; Estate of Teel, 25 Cal. 2d 520, 526, 154 P.2d 384; Estate of Trefren, 86 Cal.App.2d 139, 142, 194 P.2d 574.

[2] In the instant case defendant was unquestionably entitled to the presumption of due care. Code Civ.Proc. § 1963(4); Scott v. Burke, 39 Cal.2d 388, 394, 247 P.2d 313; Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590; Anthony v. Hobbie, 25 Cal.2d 814, 819, 155 P.2d 826. He could remember nothing relative to the facts of the accident and he called no witness or witnesses to the stand. In Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809, 814, it is said:

> "Although there is no room for the presumption where the driver or other person whose claimed negligence is at issue himself testifies to his actions at the time involved (See Speck v. Sarver (1942), 20 Cal.2d 585, 587–588, 128 P. 2d 16), the rule is established that if such person be deceased or unable to testify by reason of loss of memory, the fact that other witnesses for the parties testify fully as to the acts and conduct of the allegedly negligent person does not deprive the party relying on the presumption of the benefit thereof unless the testimony which he himself produces 'under circumstances which afford no indication that the testimony is the product of mistake or inadvertence * * * is wholly irreconcilable with the presumption sought to be invoked.' (Westberg v. Willde, (1939), 14 Cal.2d 360, 365–368, 94 P.2d 590; Mar Shee v. Maryland Assur. Corp. (1922), 190 Cal. 1, 9, 210 P. 269; Chakmakjian v. Lowe (1949), 33 Cal.2d 308, 313, 201 P.2d 801.) Plaintiffs' evidence in the present case is not irreconcilable with the presumption."

[3–6] First of all, let us inquire whether the presumption of due care attaching to the defendant because of his traumatic amnesia would be sufficient of itself in the circumstances developed by this record to constitute substantial evidence in his favor. The affirmative answer given to this question by the Supreme Court in Smellie v. Southern Pacific Company, 212 Cal. 540, 299 P. 529, is still the law of California. There a judgment of nonsuit on the ground of contributory negligence was granted when one of the defendants, called for cross-examination under the provisions of section 2055 of the Code of Civil Procedure, testified that the decedent had urged him to cross the railroad tracks where an oncoming passenger train was masked by a passing freight. This judgment was reversed on the ground that the testimony of a party called for cross-examination did not bind the plaintiffs, and that the presumption of due care on the part of decedent was substantial evidence which required that the case go to the jury. But even apart from the presumption of due care in defendant's favor, it is our view that the jury could have legitimately determined the questions of negligence and contributory negligence adversely to appellants. As Franson approached the intersection first, he had the right of way if at that time the Davis car was not near enough to constitute "an immediate hazard". The failure on the part of Franson to give an arm signal for a left turn, if plaintiffs' witnesses were believed on this point, could well have been found not to be a proximate cause of the collision. There were some discrepancies in the testimony concerning the speed of the Davis car and some inferences relative to it which could have led to conclusions unfavorable to him. And the evidence of Mr. Davis himself that the accident could have been avoided if he had applied his brakes to start with instead of blowing his horn was before the jury. Inferences constituting legitimate indirect evidence may furnish substantial support to a verdict.

[7] The process of integrating all of the evidence in an action of this kind, and from a synthesis of the testimony determining the issues of negligence, proximate cause and contributory negligence, is primarily the duty and right of the jury. The trial judge in turn, under our system, has the right and duty to review the testimony which he, with the jury, has heard in the course of the trial. He should not hesitate to use this plenary power to right any injustice which in his opinion has resulted. In this case, the trial judge has approved the verdict, having had in mind, as shown by the complete record, his right to pass on the facts and weigh the evidence. This court's power, unlike that of the trial court on motion for a new trial, begins and ends with the ascertainment that there was substantial evidence supporting the verdict. We shall so find in this case, unless, upon examination, one or more of the several special observations and arguments made by the appellants to the effect that the general rule should not apply should seem valid and convincing.

[8] First of all, appellants set forth a detailed mathematical calculation as to the relative positions, speeds and courses of the two cars, from which they arrive at the conclusion that the defendant was clearly negligent and Mr. Davis guiltless. This constitutes a powerful jury argument, but it is not equally persuasive on appeal, for its primary basis is the assumption not only of the truthfulness of certain witnesses but of their accuracy, and these are matters which the jury has the clear right to decide. Furthermore, this argument completely eliminates the indirect evidence, both the presumption of due care and the inferences, which the jury had the right to take into consideration. In Kalfus v. Fraze, 136 Cal.App.2d 415, 288 P.2d 967, 973, it is said:

> "Where the existing circumstances militate against precise mathematical calculations, this court has stated the rule that on appeal it 'will not make dubious calculations based upon evidence of time and distance and speed (which evidence after all consists of mere opinions of witnesses) for the purpose of upsetting a verdict of the jury as to the facts.' Cooper v. Stevens, 17 Cal.App.2d 746, 748, 62 P.2d 763; Turner v. Clennell, 9 Cal.App.2d 736, 738, 50 P.2d 851; Powell v. Powell, 40 Cal.App. 155, 159, 180 P. 346."

Appellants cite Carr v. Holtslander, 112 Cal.App.2d 589, 246 P.2d 678, in which a judgment for a defendant in an intersection collision case was reversed on appeal. The court held that on the particular evidentiary showing in that case there was no substantial evidence supporting the jury's verdict. Every case is necessarily bottomed on its own facts. We find that the two cases are distinguishable factually.

[9, 10] Appellants next contend that the presumption of due care is not available to the defendant because he did not call to the stand Amil Fosberg, the guest who was with him at the time of the collision. The argument is founded on an ambiguity arising from a strictly literal reading of the following excerpt from the opinion in Downing v. Southern Pac. Co., 15 Cal.App.2d 246, 254, 59 P.2d 578, 583, in which the presumption of due care is referred to:

> "This presumption is one which may be invoked for the benefit of plaintiff when unable to produce any eyewitnesses to a collision, and is based upon the sound foundation of the natural law of self-preservation. Where it is possible to call eyewitnesses to testify positively to the facts and circumstances surrounding the accident, the presumption is not applicable."

A complete reading of the opinion and a consideration of the supporting authorities show that it was not intended to extend the rule relative to the elimination of the presumption as evidence, Gigliotti v. Nunes, supra, 45 Cal.2d 85, 286 P.2d 809, to cover a situation where someone not called as a witness by plaintiff *might* have given testimony irreconcilable with the presumption if he had been called. The failure on the part of the defendant to call his guest, Amil Fosberg, to the witness stand will be referred to again under our discussion of the alleged misconduct of defendant's counsel. It is sufficient to note at this point that a party to an action is not guilty of "wilful suppression" of evidence (giving rise to the presumption set forth in section 1963(5) of the Code of Civil Procedure "that evidence wilfully suppressed would be adverse if produced") by merely failing to call a potential witness to the stand. Counsel for a party to a civil action has not only the right but the duty to exercise discrimination in selecting the witnesses for whom his client vouches. Assuming, of course, his honesty and good faith, an attorney may not believe the account of such a potential witness, or may think that he is inaccurate or prejudiced or otherwise disqualified to testify. The record indicates that Fosberg was in Fresno and available for subpoena by either side. No adverse presumption against the defendant arose by reason of his failure to call Fosberg to the stand. There was no showing that defendant wilfully suppressed his evidence. Ericson v. Petersen, 116 Cal.App.2d 106, 112, 253 P.2d 99; Gist v. French, 136 Cal.App.2d 247, 288 P.2d 1003.

[11, 12] Appellants urge also that as the Scullys could not have been guilty of contributory negligence, and as counsel for respondent told the jury in his argument that if he were on the jury he would find both drivers negligent, the judgment must be overturned as to the Scullys. But, as counsel's statement was not made as an admission or stipulation, it is not absolutely binding on his client. Adelstein v. Greenburg, 77 Cal.App. 548, 552, 247 P. 520. We agree with appellant that the rule "de minimus non curat lex" does not apply to the injuries of Mr. and Mrs. Scully; and that if they were entitled to recover at all, they should have received compensatory damages and not merely nominal damages. 14 Cal.Jur.2d, Damages, Secs. 7 and 12. Our conclusion that the Scullys are not entitled to a reversal is based wholly on the general ground that the jury had before it substantial evidence from which it could legitimately conclude that the defendant was not guilty of negligence proximately causing the collision. As the verdict is supported by substantial evidence, we cannot disturb it.

[13–15] Repeated and serious misconduct on the part of respondent's counsel on multiple grounds is next urged by appellants. The first instance occurred in the examination of a traffic officer. In reply to questions of respondent's counsel, the officer testified that an elderly man named Fosberg was a passenger in Franson's car, and that he had taken a statement from Fosberg. The officer was then asked, "And what did he say?" An objection was made on the ground that this would be hearsay, and that there was no showing that Fosberg was not available as a witness. Respondent's counsel argued at some length that the statement was admissible, not to prove the truth of its content, but to show the reason for not calling Fosberg as a witness. The court stated that it was a hearsay statement which merely indicated that Fosberg did not know what had happened when he talked to the officer. At the request of appellant's counsel, the court then instructed the jury to disregard anything that had been said in this connection. The question asked by defendant's counsel called for hearsay; it was an improper inquiry; and the objection was properly sustained. A lawyer is not guilty of misconduct merely because he is wrong as to the law. To constitute misconduct in urging a proposition of law, counsel must do so in bad faith. Respondent's counsel consistently said he believed he had the right to establish in this manner an excuse for not calling Fosberg to the stand. The good faith of counsel in a matter of this kind occurring during the course of a trial is primarily for the trial court to determine on motion for a mistrial, or on motion for a new trial. Here, the court instructed the jury to disregard everything said in the legal argument on the admissibility of the evidence, and with the giving of such admonition, the misconduct or irregularity is deemed cured except in the most extreme cases. Ades v. Brush, 66 Cal.App.2d 436, 445, 152 P.2d 519; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 607, 111 P.2d 346; McCollough v. Langer, 23 Cal.App.2d 510, 521–522, 73 P.2d 649.

[16] Counsel's statement in his argument "We have found no other witnesses

except the adverse parties" was not objected to and must, therefore, be deemed waived. McCullough v. Langer, supra, 23 Cal.App.2d 510, 521–522, 73 P.2d 649; Schultz v. Sussman, 7 Cal.App.2d 100, 103, 45 P.2d 409. Likewise, the comment made in argument with reference to the amendment of the complaint during trial was not objected to by counsel for the plaintiffs and was waived.

The defendant was within the legitimate limits of cross-examination in referring to the earlier and then pending automobile accident case of Mr. Davis previously brought in Chicago, as some of the injuries claimed in both appeared potentially, at least, to be duplications.

[17] Lastly, as to misconduct, appellants complain of counsel's argument for sympathy for his client, which, in its entirety, is as follows:

> "* * * (t)here has been talk about sympathy. All of us agree that there should be no sympathy affecting your decision, and if counsel for the plaintiff and for the defendant can agree on any subject, then it ought to be easy for you to agree on it because it's hard for us to agree on anything. But, we agree on that. But let me say this. If there is sympathy in this case, and there is for Mrs. Davis who had a severe broken leg, and unless we are something else than human we feel sympathy, if there is sympathy let a little of that sympathy go to this old gentleman whom you saw in this courtroom. That isn't to affect your decision on either side, but don't let it be on one side and not on the other * * *."

This Janus-faced plea, looking in opposite directions at the same time, is an ancient oratorical device based, not on logic or good morals, but on the pragmatic virtue that it is often successful. We do not condone its use, but point out that appellants cannot complain of it now for they made no objection at the time and did not ask the court to instruct the jury to disregard it.

[18–20] As to the charge given to the jury, appellants make only one complaint, the refusal of a proposed instruction, reading as follows:

> "In this case the defendant has pleaded that plaintiffs were guilty of contributory negligence which contributed proximately to their injuries. Contributory negligence is an affirmative defense and the burden of proving such contributory negligence is upon the defendant in this action."

The instruction is a correct statement of the law. Respondent's comment that "the burden of proving contributory negligence is on the defendant *only* where contributory negligence does not appear from the plaintiffs' own evidence" is incorrect. The burden of proof as to contributory negligence is on the defendant throughout the case, even though all evidence produced by both sides must be considered by the jury in determining this issue. The instruction should have been given. The question remains, however, whether the jury was misled by its refusal, and we must seek an answer in the whole record. On the *voir dire* examination of the jurors, the court told them that in his pleading the defendant had denied negligence on his part and had set up affirmative defenses as to the plaintiffs, alleging as to each of them that they were guilty of negligence which contributed to the accident. In the course of the instructions themselves, the jury was charged as follows:

> "The defendant has denied any negligence on his part, and has alleged certain affirmative defenses. The burden of proving any such defenses by a preponderance of the evidence rests upon the defendant."

The words "affirmative defense" have a well-known meaning in accordance with the common usage of the English language. As is said in Nichols v. Nelson, 80 Cal. App. 590, 598, 252 P. 739, 743:

> "The jury are presumed to possess ordinary intelligence and to understand the meaning and use of words in their common and ordinary applica-

tion." See also Lawrence v. Pickwick States, N.D., 68 Cal.App. 494, 501, 229 P. 885.

We conclude that the error in refusing the instruction was not so prejudicial as to require a reversal.

[21] As there can be no appeal from an order denying a motion for a new trial, the attempted appeal must be dismissed. In re Estate of Dopkins, 34 Cal.2d 568, 569, 212 P.2d 886.

The judgment is affirmed and the appeal from the order denying the motion for a new trial is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION et al., Defendants and Appellants.

NORTHWEST CASUALTY COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION et al., Defendants and Appellants.

NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO., a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION et al., Defendants and Appellants.

Civ. 21030–21032.

District Court of Appeal, Second District,
Division 1, California.
April 30, 1956.

Insurance companies brought actions, which were consolidated, against the State Board of Equalization and others to recover taxes, which companies had paid under protest, on premiums received. The Superior Court of Los Angeles County, Allen T. Lynch, J., entered judgments adverse to the State Board of Equalization and others, and they appealed. The District Court of Appeal, Doran, J., held that where actions and conduct of Insurance Commission for several years constituted continuing representations that amounts charged and retained by bail bondsmen of insurance companies as compensation for services of bondsmen in securing release of prisoners on bail were not a part of gross premiums received by insurance companies for becoming sureties on bail bonds, the State of California, acting through the State Board of Equalization, was estopped to assert any liability on part of insurance companies for gross premiums taxes on account of any amount charged and retained by bondsmen as compensation for their services.

Judgment affirmed.

1. Taxation 🔑543(8)

In consolidated actions by taxpayers against the State Board of Equalization for recovery of taxes, which taxpayers had paid under protest, on premiums received in the insurance business, taxpayers were entitled to interest on amounts recovered. West's Ann.Const. art. 13, § 15; West's Ann. Rev. & Tax.Code, §§ 13101–13113.

2. Estoppel 🔑62(1)

Estoppel may not be invoked against a government entity where application of estoppel will tend to thwart public policy.

3. Estoppel 🔑62(1, 2)

The doctrine of estoppel applies against the state and public officials in proper cases.

4. Estoppel 🔑62(2)

Where actions and conduct of Insurance Commission for several years constituted continuing representations that amounts charged and retained by a bail bondsmen of insurance companies as compensation for services of bondsmen in securing release of prisoners on bail were not a part of gross premiums received by insurance companies for becoming sureties on bail bonds, the State of California, acting through State Board of Equalization, was estopped to assert any liability on part of insurance companies for gross premiums taxes on account of any amount charged and retained by bondsmen as compensation for their services. West's Ann.Rev. & Tax.Code, §§ 13101–13113.

◆

Edmund G. Brown, Atty. Gen., Harold B. Haas, Deputy Atty. Gen., for appellants.

Latham & Watkins, Dana Latham, Charles E. Horning, Jr., Los Angeles, for respondents.

DORAN, Justice.

The appeals are from judgments for recovery of taxes on premiums received in the year 1947, in favor of three plaintiff insurance companies, respectively, in the amounts of the taxes alleged to have been illegally assessed. The trial of the three cases was consolidated. The controversy relates to the premiums on bail bonds and the authority of the insurance commissioner to assess the taxes on the premiums in the circumstances.

As recited in appellants' brief, "During the year 1947, plaintiffs were engaged in the insurance business and at the close of the year, as required by law, submitted to the Insurance Commissioner of this State a report on gross premiums received from insurance transactions in the State in that year. Thereafter, in the usual course, the Board of Equalization assessed gross premium taxes against the plaintiffs on business done during the year 1947 and the tax was duly paid in 1948.

"Thereafter, in the summer of 1951, the Honorable John G. Clark, judge of the Superior Court, in deciding the case of Groves v. City of Los Angeles (above referred to) filed a memorandum opinion pointing out that fees and other considerations withheld by bail agents were premiums for insurance. This directed the Attorney General's attention to the fact that such premium had not theretofore been reported for assessment as taxable premium, he accordingly so advised the Insurance Commissioner and in consequence, under date of July 17, 1951, the Insurance Commissioner wrote each plaintiff informing him that an additional assessment (which is the subject of this litigation) was being made against plaintiff as part of the 1951 assessment. Plaintiffs have paid these additional assessments under protest, and the judgments herein appealed from awarded them the amounts of such assessments with interest from time of their payment thereof."

Appellant sets forth the issues as follows:

> "1. Can the State be estopped from collecting taxes assessed pursuant to a statute expressly permitting such assessment to correct a previous underassessment or credit a previous overassessment, for a limited period after normal assessment time?
>
> "2. If such an estoppel is permissible, is the evidence sufficient to establish the facts necessary to such an estoppel?
>
> "3. A subsidiary issue, which comes in only if the above issues are not decided in favor of appellants, is whether interest from time of payment of the tax to time of judgment is payable upon judgments for recovery of taxes under sections 13101–13113, Revenue and Taxation Code."

In this connection, it is argued by appellant that,

> "I. There being no conflict in the evidence, the Appellate Court is not bound by the Superior Court's construction of the evidence."
>
> "II. The theory of estoppel by erroneous administrative construction is not available to forbid retention of the principal amount of a tax directly imposed by statute upon the taxpayer without statutory provision for offset or reimbursement by other parties."
>
> "III. The nature of the statute, under which was made the assessment of the taxes here involved, is such as to negate any assertion of equities arising out of the prior assessment or reliance on prior administrative construction."

> "IV. The facts here in themselves preclude application of any estoppel theory."
>
> "V. Even if the judgments were to stand, they should be modified to exclude interest from date of payment under protest to date of judgment."

Respondent sets forth the issues as follows:

> "1. May the doctrine of equitable estoppel be applied in this jurisdiction against the State and its agencies?
>
> "2. Upon the facts, should the State here be held estopped to assert retroactively the additional tax liabilities here in question?
>
> "3. Does Article XIII, Section 15 of the Constitution of the State of California require that interest be allowed respondents upon the amounts recovered, from the date of payment to the date of judgment?"

Respondent argues that,

> "Under the law of this jurisdiction, the State may be subjected to an equitable estoppel in the same manner as an individual.";
>
> "The State of California should be held estopped to assert against respondents a liability for additional taxes for the year 1947.";
>
> "The right to recover interest upon a refund of gross premiums taxes is fixed by the Constitution of the State of California."

[1] As to whether respondents are entitled to interest on the amounts recovered, that question appears to be settled by Article XIII, § 15 of the State Constitution which provides as follows:

> "No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State, or any officer thereof, to prevent or enjoin the collection of *any tax levied under the provisions of this article; but after payment thereof action may be maintained to recover, with interest, in such manner as may be provided by law, any tax claimed to have been illegally collected.*" (Emphasis added.)

The only other issue relates to question of estoppel as above noted.

The complaint alleges that, "During the year 1947 plaintiff was engaged in the insurance business in the State of California. Taxes upon all gross premiums which plaintiff received or was entitled to receive in the course of said insurance business in the year 1947 were duly assessed and paid in full in 1948, pursuant to the provisions of Part 7 of Division 2 of the Revenue and Taxation Code of California.

"V

"Defendant Board, by Statement of Assessment transmitted to plaintiff on or about August 10, 1951, assessed additional gross premiums tax against plaintiff for the year 1947 in the amount of $693.61. The assessment of said additional tax was based upon the assertion by defendant Board that plaintiff, during the year 1947, had received and failed to report additional bail bond premiums in the amount of $29,515.12. Plaintiff neither received nor had any right to receive said amount or any part thereof, and neither directly nor indirectly authorized the charge or collection of said amount or any part thereof.

* * * * * *

"VIII

"On or about November 15, 1951, plaintiff paid to the State of California, among other amounts, the amount of $693.61, representing the aforesaid additional assessment of gross premiums tax on bail bonds. Said payment was accompanied by a protest in writing, a copy of which is attached hereto as Exhibit 'A', and by reference made a part hereof, in accordance with the provisions of Section 13104 of the Revenue and Taxation Code of California. A copy of said protest was filed with defendant Board. The amount paid under protest has not been refunded and is now due and owing to plaintiff." It is alleged that defendant board's action in assessing said additional gross premiums tax was illegal.

The findings by the trial court are comprehensive. Quoting therefrom, the court found that, "The actions and conduct of the Insurance Commissioner and of the State of California during 1941 and continuing throughout 1947 constituted continuing representations that the amounts charged and retained by plaintiffs' bail bondsmen as compensation for their services in securing the release of prisoners on bail were not a part of the gross premiums received by plaintiffs for becoming surety on bail bonds." The court found, as a conclusion of law, that,

> "(1) By reason of the facts found as aforesaid, in this cause, defendant Board, acting as the agent of the State of California, is bound by the representations of the Insurance Commissioner, acting as the agent of the State of California.
>
> "(2) By reason of the facts found as aforesaid, the State of California, acting through defendant Board, or otherwise, is now estopped to assert any liability on the part of plaintiffs or any of them for gross premiums taxes for the year 1947 on account of any amounts charged and retained by plaintiffs' bail bondsmen as compensation for their services in securing the release of prisoners on bail."

[2] In the case of Goodwill Industries, Inc., v. County of Los Angeles, 117 Cal.App.2d 19, 254 P.2d 877, 882, it was held that the doctrine of estoppel did not apply. The opinion noted however, that, "Estoppel, may, of course, be invoked against a government entity in 'exceptional cases' where 'justice and right require it.' Farrell v. County of Placer, 23 Cal.2d 624, 627-628, 145 P.2d 570, 153 A.L.R. 323. But it may not be invoked where its application would tend to thwart public policy. County of San Diego v. California Water & Tel. Co., 30 Cal.2d 817, 826, 186 P.2d 124, 175 A.L.R. 747."

[3] That the doctrine of estoppel applies against the state and public officials in proper cases, there is no question. Garrison v. State of California, 64 Cal.App.2d 820, 149 P.2d 711; La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47; Farrell v. County of Placer, 23 Cal.2d 624, 145 P.2d 570, 153 A.L.R. 323.

[4] The trial judge's conclusions are supported by the law and the evidence and the judgment is therefore affirmed.

WHITE, P. J., and FOURT, J., concur.

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141 Cal.App.2d 193

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Arthur Lawrence CUMMINGS, Defendant and Appellant.

Cr. 5533.

District Court of Appeal,
Second Appellate District,
Division 2, California.
April 30, 1956.

Hearing Denied May 29, 1956.

Defendant was convicted of attempt to commit an abortion. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1023(12)

Order which grants probation is deemed to be a "final judgment" for purposes of appeal. West's Ann.Pen.Code, § 1237.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Abortion 🔑1

Elements of an attempt to commit an abortion are a specific intent to commit the crime and a direct, unequivocal act done toward that end. West's Ann.Pen. Code, § 274.

3. Abortion 🔑1

Crime of abortion was committed where defendant, erroneously believing that woman was pregnant and intending to produce a miscarriage, did a direct, unequivocal act toward consummation of the miscarriage. West's Ann.Pen.Code, § 274.

4. Criminal Law 🔑44

Generally, where there is an apparent ability to commit a crime in way attempted, the attempt is indictable even though, unbeknown to person making the attempt the crime could not be committed because of non-existence of some extrinsic fact.

5. Criminal Law 🔑26

Preparation to commit a crime is not enough to result in commission of the crime, but some appreciable fragment of the crime must have been committed.

6. Criminal Law 🔑1144(13), 1159(2)

In passing on sufficiency of evidence to sustain conviction, it must be borne in mind that before reversal may be had on such ground, it must be made clearly to appear that, upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in the court below, and reviewing court would have to assume, in support of the judgment, existence of every fact which trial court could have reasonably deduced from the evidence and then determine whether the facts justified the inference of guilt.

7. Criminal Law 🔑1159(1)

If circumstances reasonably justified determination of trier of fact, opinion of reviewing court that those circumstances might also reasonably be reconciled with defendant's innocence will not warrant a reversal.

8. Abortion 🔑11

Evidence was sufficient to sustain conviction of an attempt to commit an abortion. West's Ann.Pen.Code, § 274.

9. Witnesses 🔑274(2)

In absence of showing of bad faith, it is within scope of legitimate cross-examination to ask a character witness whether he has heard person, whose reputation is under investigation, accused of conduct inconsistent with character attributed to such person by the witness, and such cross-examination is proper for purpose of testing weight which should be given to testimony of such witness on direct examination.

10. Criminal Law 🔑706

Where, in abortion prosecution, there was evidence that defendant had admitted performing abortions for about twelve years and performing about six abortions within six months prior to his arrest, prosecutor, in cross-examining defendant's character witnesses by asking them whether they had heard that defendant had been performing abortions during such period and whether they had ever heard that defendant had committed an abortion not necessary to preserve life on certain named persons did not constitute bad faith on part of prosecutor. West's Ann.Code Civ. Proc. § 1963, subd. 15.

11. Criminal Law 🔑1144(10)

Presumption is that prosecutor acted in good faith in cross-examination of defendant's character witnesses. West's Ann.Code Civ.Proc. § 1963, subd. 15.

12. Criminal Law 🔑1037(1)

Question of prosecutor's good faith in his cross-examination of defendant's character witnesses could not be raised for first time on appeal.

13. Criminal Law 🔑730(3)

Instruction to jury that questions and testimony in cross-examination of witness testifying to general reputation of defendant could be considered by jury only for purpose of testing weight and worth of testimony of such witness properly limited use by jury of matters gone into on cross-examination and eliminated any possible prejudice from that line of interrogation.

14. Criminal Law 🔑770(2), 814(1)

Defendant is entitled to instructions based on theory of his defense, but court may refuse proffered instructions on a theory that is not supported by substantial evidence.

15. Criminal Law 🔑37

Where doing of an act is a crime, regardless of consent of anyone, if the criminal intent originates in accused's mind, and the offense is completed, fact that an opportunity was furnished or that accused was aided in commission of the crime in order to secure evidence necessary to prosecute him therefor would not constitute a defense.

16. Criminal Law ⚷772(6)

In prosecution for attempt to commit an abortion, evidence was not sufficient to warrant giving of instruction on subject of entrapment.

17. Abortion ⚷13

Where significant factor in abortion prosecution was not circumstance that accused doctor had possession of the instruments but rather showing of his engagement in an actual and intended illicit use of them, failure to instruct jury that doctor had right to possess such instruments was not error. West's Ann.Pen.Code, § 274.

18. Criminal Law ⚷1144(18)

In denying motion for new trial, presumption was that trial judge, in denying motion for new trial, had properly performed his duty to re-evaluate the evidence. West's Ann.Code Civ.Proc. § 1963, subd. 15.

◆

A. Brigham Rose, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

FOX, Justice.

[1] A jury found defendant guilty of an attempt to commit an abortion. He appeals from the judgment[1] and order denying his motion for a new trial.

For some years prior to December, 1954, defendant was a duly licensed physician and surgeon and maintained offices in Burbank, California. On December 13, 1954, C. A. Mead, an investigator for the State Board of Medical Examiners, and a Miss Robinson, who worked with him, called on defendant at his office. Miss Robinson advised the doctor that she thought she was pregnant, although she knew she was not. Defendant inquired why she did not get married. Mead stated that he was already married. Defendant examined Miss Robinson and told her she was definitely pregnant. Miss Robinson acted perturbed and Mead remarked that they were really in trouble. Defendant then said, "Well, what you want is an abortion." They said they did and inquired about the cost. Defendant told them it would be $500. Miss Robinson stated that the friend who had referred her had paid $150. Mead said that he could not raise $500. Defendant thereupon asked him whether he could raise $300. Mead said he could but it would take a few days. Defendant inquired whether he could raise it by Friday. Mead stated that he thought he could. Defendant then told them to get the money and return about 8:00 o'clock Friday night, and when they saw the lights go out, to enter. On the way out, Mead paid a $3 fee for the examination, receiving a receipt therefor from the woman in the outer office.

Mead and Miss Robinson returned to defendant's office at the appointed time the following Friday night; they could not see any lights on; a nurse in the office told them defendant was not there, and asked them to wait. They waited outside until defendant arrived. He took them into the surgery room, where he asked who had the money. Mead gave him $300 in bills which defendant put in his pocket. Defendant told Miss Robinson to take off her lower clothing and gave her a sheet. She removed her clothes and got onto a table, where she put her feet in stirrups. At the front of the table was a shelf containing a basin, towel, bowls, gauze pads, rubber gloves, and instruments. Defendant dipped a gauze pad into a green solution and rubbed Miss Robinson's private parts with it. He then dipped another pad into a pink liquid, told Miss Robinson that it would sting, and wiped her vagina with it.

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[1] Defendant was granted probation but under section 1237 Penal Code, an order granting probation is deemed to be a final judgment for purposes of appeal.

He inserted a vaginal speculum into her vaginal tract. Mead asked defendant, "Are you going to use a tube on her, or what are you going to do." Defendant replied, "No, I'm going to scrape the uterus." Mead then inquired, "Will that cause her not to have a baby?" Defendant answered, "Well, that's the idea of the thing, yes."

Defendant picked up a curette and turned back toward Miss Robinson, remarking, "We'll get started now, and get this through." He started to bend forward, moving the curette toward Miss Robinson. When his hand was about to her knees, Mead arrested him. Either Miss Robinson or the nurse removed the speculum from Miss Robinson's person.

Miss Robinson retired to dress and to get Sergeant Vandegrift, who was outside of the office. Mead ordered defendant to take the money that he had given him out of his pocket and put it on the table. The doctor acknowledged he had accepted this money as payment for attempting to perform an abortion on Miss Robinson. Mead then went to the counter where the instruments were and picked up each one, asking the doctor, as he did so, whether that was an instrument he was going to use in an attempt to perform an abortion on Miss Robinson. Defendant answered these inquiries in the affirmative. Mead wrapped the instruments in a towel and took them with him. They were introduced in evidence at the trial.

Sergeant Vandegrift indicated an intention to arrest Miss Heslep, defendant's nurse. She, however, disclaimed any knowledge that the doctor was going to perform an abortion that night. Defendant corroborated her statement by saying, "She didn't know what I was going to do tonight. I hadn't told her, and she doesn't know anything about it."

Before leaving the office, defendant told the officers he had been performing abortions since 1942 and that he had performed half a dozen or more during the past six months.

At the Burbank police station, defendant stated it was his opinion that Miss Robinson was pregnant and that he intended to perform an abortion on her that evening. When asked whether he wanted to call his attorney he gave a negative answer, adding, "I don't need one. I'm guilty."

At the trial it was defendant's position that he thought Miss Robinson had an ectopic or tubular pregnancy and so advised her; he did not intend to perform an abortion on her that night; he was going to take a biopsy and have it analyzed by the laboratory; if it showed decidual cells it would mean she was definitely pregnant, and in that case, if it was an ectopic pregnancy, she was to be hospitalized.

[2-4] In seeking a reversal defendant contends:

First, that he may not be found guilty of an attempt to commit an abortion since the victim was not pregnant and an abortion was therefore impossible of accomplishment. He argues that such a conviction is contrary to law because it would make a criminal offense out of the *idea* of committing that which it is impossible to consummate. There is no merit in this point. Penal Code section 274 provides: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years." Prior to the amendment of this section in 1935, an essential element of the crime was that the woman on whom the abortion was performed was in fact pregnant. People v. DeVaughan, 105 Cal.App. 516, 518, 288 P. 113. Since the amendment, proof of pregnancy has not been required to establish guilt of abortion, and the performing of any of the enumerated acts, believing that she is pregnant and intending to produce a miscarriage, constitutes the offense although the woman is not in fact pregnant. People v. Raffington, 98 Cal.App.2d 455, 459-460, 220 P.2d 967; People v. Gallardo, 41 Cal.2d 57, 68, 257 P.2d 29; People v. Green, 111 Cal.App.2d 794, 799, 245 P.2d 526. The elements of an attempt to commit an abortion are (1) a specific intent to commit the crime, and (2) a direct, unequivocal act done toward that end. People v. Gallardo, supra; People v. Bowlby, 135 Cal.App.2d 519, 529, 287 P.2d 547. Thus, the crime of attempted abortion is committed if one, believing that a woman is pregnant and intending to produce a miscarriage, does a direct, unequivocal act toward the consummation of a miscarriage. People v. Berger, 131 Cal.App.2d 127, 129, 280 P.2d 136; People v. Raffington, supra; People v. Bowlby, supra. This is in harmony with the general rule that where there is an apparent ability to commit the crime in the way attempted, the attempt is indictable although, unbeknown to the person making the attempt, the crime cannot be committed because of the non-existence of some extrinsic fact. People v. Siu, 126 Cal.App.2d 41, 44, 271 P.2d 575; People v. Lanzit, 70 Cal.App. 498, 508, 233 P. 816; 22 C.J.S., Criminal Law, § 77, p. 142.

[5] Defendant relies on People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913. That case, however, does not support his thesis. It stands for the proposition that preparation to commit a crime is not enough, but that some appreciable fragment of the crime must have been committed.

Second, that the evidence is insufficient to sustain the conviction. Defendant argues that the evidence fails to show that he (1) intended to perform an abortion, or (2) did any direct, unequivocal act toward the commission of the offense.

[6–8] In passing on the sufficiency of the evidence to sustain a conviction it must be borne in mind that before a reversal may be had on that ground, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. [Citation.] We must assume in support of the judgment the existence of every fact which the trial court could have reasonably deduced from the evidence, and then determine whether the facts 'justify the inference of guilt.' [Citation.] If the circumstances reasonably justify the determination of the trier of fact, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant a reversal. [Citations.]" People v. Frankfort, 114 Cal.App.2d 680, 689, 251 P.2d 401, 407. Applying these principles to our factual situation, as herein recited, it is clear that the jury could reasonably infer that defendant believed Miss Robinson was pregnant, and that he intended to use the instruments and medicines at hand for the purpose of procuring a miscarriage. The jury could also reasonably conclude that defendant had completed his preparation and was in the process of performing direct, unequivocal acts which he thought would result in the miscarriage he intended to produce. Such implied factual findings on the part of the jury support the judgment of conviction. People v. Gallardo, supra, 41 Cal.2d at page 66, 257 P.2d 29; People v. Berger, supra; People v. Bowlby, supra. In People v. Raffington, supra, People v. Reed, 128 Cal.App.2d 499, 275 P.2d 633, and People v. Berger, supra, acts of less positive significance than those in the instant case were held to constitute an attempt rather than mere preparation.

Whether the story of the defendant, exculpating himself, was entitled to credence was for the determination of the triers of the facts. People v. Von Benson, 38 Cal.App.2d 431, 434, 101 P.2d 527. By their verdict the jury clearly indicated their disbelief of defendant's explanation of what took place on the evening of his arrest. By the same token it is obvious they believed the testimony of Mead, Miss Robinson and the police officers. Their testimony amply supports the verdict and judgment.

Third, that the district attorney was guilty of prejudicial misconduct in the cross-examination of defendant's character witnesses. Defendant bases this point on the fact that the prosecutor asked the four doctors who testified to the good professional reputation of defendant whether they had heard that he had been performing abortions since 1942, and whether they had ever heard that he had committed an abortion, not necessary to preserve life, on a woman named McGrath in September or October, 1954, or on one named LeGrand on January 3, 1954.

[9] The rule on this point is stated in People v. McKenna, 11 Cal.2d 327, 335–336, 79 P.2d 1065, 1069, as follows: "In the absence of a showing of bad faith it is always within the scope of legitimate cross-examination to ask a character witness whether he has heard the person whose reputation is under investigation accused of conduct inconsistent with the character attributed to him by the witness." To the same effect, see People v. Thompson, 69 Cal.App.2d 80, 93–94, 158 P.2d 213, where defendant was charged with having committed an abortion and his character witness was cross-examined relative to reports of defendant's general reputation with regard to the practice of procuring abortions. Such cross-examination is proper for the purpose of testing the weight that should be given to the testimony of the witness on direct examination. People v. Stevens, 5 Cal.2d 92, 99–100, 53 P.2d 133.

[10–12] There is no showing of bad faith on the part of the prosecutor in his cross-examination of defendant's character witnesses. There was evidence that defendant had admitted performing abortions since 1942 and to having performed a half dozen or more such operations within the six month's period prior to his arrest. Not without significance as bearing upon the prosecutor's good faith is Dr. Paul's answer to this question: "Did you ever hear that he [defendant] performed an abortion [in] September or October of 1954 on * * * McGrath that wasn't necessary to preserve her life?" Dr. Paul replied: "Well, I heard about the trial. I didn't hear that an abortion was done." Defendant's trial attorney[2] did not object to this line of interrogation on the ground that it was being pursued in bad faith and without factual basis. See People v. White, 43 Cal.2d 740, 744, 278 P.2d 9. The presumption is that the prosecutor acted in good faith. Code Civ.Proc., sec. 1963(15). The question of the prosecutor's good faith may not, therefore, be raised for the first time on appeal.

[13] Finally, the court instructed the jury as follows: "Questions and testimony in the cross-examination of a witness testifying to the general reputation of the defendant may be considered by the jury only for the purpose of testing the weight and worth of the testimony of such witness." This instruction properly limited the use by the jury of the matters gone into on cross-examination and eliminated any possible prejudice from that line of interrogation. See People v. Bentley, 131 Cal.App.2d 687, 691–692, 281 P.2d 1.

Fourth, that the trial court committed prejudicial error in refusing to instruct the jury on the subject of entrapment.

[14, 15] While it is well settled that a defendant is entitled to instructions based on the theory of his defense, the court may refuse proffered instructions on a theory that is not supported by substantial evidence. People v. Evans, 134 Cal.App.2d 733, 736–737, 286 P.2d 368. Was there substantial evidence of entrapment in this case? A few legal guideposts will assist in answering this question. In People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521, 525, the court had this to say on the subject of entrapment: "The many decisions in this state which define the defense of entrapment were reviewed in People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114, and the law stated as follows: 'Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. [Citations.] If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment.' 91 Cal.App.2d at page

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[2] Defendant has new counsel on appeal.

917, 205 P.2d 1115. More recently it was held: 'It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment.' [Citations.]" In People v. Bowlby, supra, 135 Cal.App.2d at pages 529–530, 287 P.2d 547, 554, the court pointed out: "It is essential to such a defense that the criminal intent originate with the one who is alleged to have entrapped defendant and that the crime be induced by him through persuasion or the like. His merely furnishing the occasion for one engaged in illegal activities to ply his trade does not amount to entrapment."

[16] Applying these principles to our factual situation, it is clear there is no substantial evidence of entrapment. Certainly there was no foundation for such a defense in the defendant's testimony for he denied that he had any intention of committing an abortion on Miss Robinson. His defense was that he intended only to do a biopsy for diagnostic purposes, and that his acts were directed to that end.

The testimony of Mead and Miss Robinson likewise fails to lay a foundation for the defense of entrapment. It does not appear that either of them ever asked defendant to perform an abortion on her. In fact, the evidence discloses that it was defendant who first suggested it. Mead and Miss Robinson simply furnished defendant "an opportunity" to commit the offense. There is no indication that they used any persuasion in order to get the defendant to undertake this illegal operation. The inference is clear that defendant was ready and willing to undertake the operation just as soon as Mead could raise the money for his fee.

Since there was no substantial evidence of entrapment it was not error to refuse to instruct the jury on that subject. People v. Braddock, supra; People v. Alamillo, 113 Cal.App.2d 617, 620–621, 248 P.2d 421; People v. Evans, supra; People v. Bowlby, supra.

Defendant relies on People v. Reed, 128 Cal.App.2d 499, 275 P.2d 633, and People v. West, 139 Cal.App.2d Supp. 923, 293 P.2d 166, in support of his contention that the court should have instructed the jury on the question of entrapment. Both of these cases are factually distinguishable. Neither is applicable here. In the Reed case, a police woman told defendant that she was pregnant and that she wanted him to perform an abortion. He agreed to do so and started the operation. It does not appear that he ever denied that he intended to perform it. Thus, the jury there might have drawn the inference that the doctor was induced to perform the operation by the persuasion of the investigator, whose idea it was. Hence defendant Reed was entitled to have the jury advised on the subject of entrapment. In the West case [139 Cal.App.2d Supp. 925, 293 P.2d 167], defendant's "testimony tended to show that the procuring scheme originated with the officer, that she resisted constant pressure from the officer for over a month to procure a prostitute for him, and that she yielded to the officer's insistence only in an effort to get rid of him." In such state of the record defendant was entitled to have the defense of entrapment considered by the jury under proper instructions.

Fifth, that the court prejudicially erred by failing to instruct the jury "concerning the right of a doctor of medicine to possess the instruments claimed to have been used in the attempted abortion."

[17] The instruments introduced in evidence in the instant case were those which Mead specifically asked defendant whether he was going to use to perform an abortion upon Miss Robinson, and he answered in the affirmative. There was testimony that defendant used or started to use some of these instruments. He had no right to use the instruments, which he identified, to commit an illegal abortion. No reliance is placed at any point on defendant's mere possession of them. The significant fact here is the *use* that defendant was making, and said he intended to make, of these instruments and not his mere possession. The situation here is distinguishable from

those cases where instruments capable of being used to perform an abortion are found in a doctor's office and are introduced in evidence to show that he had the means available to perform the abortion as corroborative evidence of the offense. In such circumstances and since the procurement of an abortion is permissible under certain conditions, Pen.Code, sec. 274, it has been held proper to instruct the jury that the defendant doctor was lawfully entitled to have such instruments in his possession. People v. Murphy, 60 Cal.App.2d 762, 771, 141 P.2d 755. But where, as here, the significant factor is not the circumstance that the doctor had possession of the instruments but rather the showing of his engagement in an actual and intended illicit use of them, it is not error to fail to instruct the jury that defendant had a right to possess such instruments.

Sixth, that the court erred in failing to give his proposed instructions as to the elements of an attempt to commit an abortion. Examination of the instructions discloses that the jury was fully and accurately advised as to the elements of the offense of which defendant was found guilty. The instructions that were given placed upon the jury the duty and necessity, before they could find the defendant guilty, of finding that he intended to perform an abortion on Miss Robinson and did a direct, unequivocal act toward that end. They completely covered the contents of the instructions proposed on behalf of defendant. Therefore the court was not required to give the latter. People v. Roche, 68 Cal.App.2d 665, 668, 157 P.2d 440.

[18] *Seventh,* that the court abused its discretion in denying the motion for a new trial. Defendant points out that it is the duty of the trial court, on a motion for a new trial, to re-evaluate the evidence. People v. Robarge, 41 Cal.2d 628, 262 P.2d 14. He makes no showing, however, that the trial judge did not properly perform this duty. The presumption is that he did. Code Civ.Proc., sec. 1963(15). We find nothing in the record to indicate that the defendant did not have a fair trial.

The judgment and order are affirmed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

46 Cal.2d 423

CONTINENTAL CASUALTY COMPANY, a corporation, Plaintiff and Appellant,

v.

PHOENIX CONSTRUCTION COMPANY, a corporation; Oilfields Trucking Company, a corporation; Transport Indemnity Company, a corporation; Harvey Leming and James E. Mason, Defendants and Respondents,

Underwriters at Lloyd's, London, an unincorporated association, et al., Interveners and Respondents.

L. A. 23225.

Supreme Court of California.
In Bank.
May 4, 1956.

Rehearing Denied May 29, 1956.

Action for declaratory judgment to determine liability between vehicle liability insurers of joint venturers for satisfaction of judgment entered against them and an employee of one of them, based on negligence of such employee. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment adverse to plaintiff, and it appealed. The Supreme Court, Schauer, J., held that in view of fact that motor carrier was subject to provisions of highway carriers act requiring it to carry liability insurance and to provisions of financial responsibility law, which while not requiring insurance specify limits of insurance which constitute financial responsibility, liability policy which was issued to carrier and which stated that it complied with financial responsibility laws of state, properly construed, afforded maximum coverage with respect to both laws but that policy issued to other joint venturer excluded by its terms coverage to employee of carrier.

Reversed and remanded with directions.

Carter, J., dissented.

Opinion 284 P.2d 554, vacated.

1. Indemnity 🔑13(1)

Where a judgment has been rendered against employer for damages occasioned by negligent unauthorized act of employee, employer may recoup his loss in action against negligent employee, as, between them, obligation of employee is primary and obligation of employer is secondary.

2. Insurance 🔑606(5)

Under equitable principles of subrogation, where insurer of employer has been compelled to pay judgment against employer predicated upon employee's negligence, insurer may recover from negligent employee or employee's insurer.

3. Insurance 🔑146(1)

Where policies of insurance were introduced into evidence by stipulation, not subject to conflicting inferences, and no parol evidence was offered in aid of construction, construction of policies was matter of law.

4. Insurance 🔑150

Where there is conflict in meaning between endorsement and body of policy, endorsement controls. West's Ann.Civ.Code, § 1651.

5. Insurance 🔑435.2

Where automobile liability policy issued to road construction company contained typewritten endorsement extending coverage to its joint venturer with respect to joint venture except as to automobiles maintained or used by joint venturer, such endorsements controlled over other insuring agreements in policy and policy provided no coverage for joint venturer with respect to vehicle accident caused by negligence of its employee while driving its truck. West's Ann.Civ.Code, § 1651.

6. Insurance 🔑146(2)

An insurer has right to limit coverage of policy issued by it, and when it has done so, plain language of limitation must be respected. West's Ann.Civ.Code, § 1651.

7. Automobiles 🔑132

Provisions of financial responsibility act are intended for benefit of drivers and owners of motor vehicles and to give monetary protection to persons who while lawfully using highways suffer grave injury through negligence of others, and are remedial and in public interest, and are to be liberally construed to such ends. Vehicle Code, §§ 419–423.1.

8. Statutes ⚿264

The construction of remedial statutes requires great liberality, and wherever meaning is doubtful, it must be so construed to extend remedy.

9. Automobiles ⚿55

Under provisions of financial responsibility law respecting unpaid judgments, where judgment is obtained against employer and employee, based on employee's act in driving employer's vehicle, employer will suffer suspension of registration of vehicle while judgment is unpaid. Vehicle Code, § 410(c).

10. Insurance ⚿146(3)

Policy will be given such construction as will fairly achieve its object of securing indemnity to insured for those losses to which insurance relates, if it is semantically possible.

11. Insurance ⚿146(3)

Doubt will be resolved against insurer where language of policy is ambiguous, whether doubt relates to extent or fact of coverage, whether to peril insured against, to amount of liability, or to persons protected, and language will be understood in its most inclusive sense for benefit of insured.

12. Insurance ⚿435.25

In view of fact that motor carrier was subject to provisions of highway carriers act requiring it to carry liability insurance and to provisions of financial responsibility law which, while not requiring insurance, specify limits of insurance which show financial responsibility, liability policy which was issued to carrier and which stated that it complied with financial responsibility laws of any state in which policy would be applicable, properly construed, afforded maximum coverage with respect to both laws. St.1935, p. 880, §§ 5, 6; Vehicle Code, §§ 410–423.1, 415, 421, 422.5, 422.6.

13. Insurance ⚿435.25

In view of fact that motor carrier was subject to provisions of highway carrier act requiring it to carry liability insurance and to provisions of financial responsibility law which, while not requiring it to carry insurance, provided that policy sufficient for financial responsibility would insure anyone using or responsible for use of vehicles, liability policy, issued to it, which stated that it complied with financial responsibility laws of state and which included as insured any managing employee, provided coverage for managing employee directly as an insured as well as to carrier as named insured. St.1935, p. 880, §§ 5, 6; Vehicle Code, §§ 410–423.1, 415, 421, 422.5, 422.6.

14. Insurance ⚿435.25

For purposes of provisions of vehicle liability policy issued to highway carrier, including as insured a "managing employee" driver employed by named insured was a "managing employee". St.1935, p. 880, §§ 5, 6; Vehicle Code, §§ 410–423.1, 415, 421, 422.5, 422.6.

See publication Words and Phrases, for other judicial constructions and definitions of "Managing Employee".

15. Appeal and Error ⚿1176(4)

Where Supreme Court reversed judgment because of errors of law only, it would direct trial court to amend conclusions of law and to enter judgment declaring rights of parties in accordance with views expressed by Supreme Court. West's Ann.Rules on Appeal, rule 23(b); West's Ann.Code Civ.Proc. § 53.

16. Appeal and Error ⚿1173(2)

Fact that party did not appeal did not preclude reversal of judgment as to it where phase of judgment relating to it was so interwoven with rest of judgment that complete reversal was necessary in interests of justice.

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Jennings & Belcher, Sigurd E. Murphy and Louis E. Kearney, Los Angeles, for appellant.

Robert W. Stevenson, John F. O'Hara, Martin, Hahn & Camusi, William P. Camusi, Los Angeles, and Oscar F. Catalano, Bakersfield, for respondents and interveners.

Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, as amici curiae on behalf of respondents.

SCHAUER, Justice.

In this suit for declaratory relief determination is sought, as among the contesting insurance companies, of the order of incidence and of the limits of their respective contractual obligations to defendants Phoenix Construction Company, Oilfields Trucking Company (hereinafter called, respectively, Phoenix and Oilfields), and James E. Mason, all as affected by certain judgments previously recovered by defendant Leming in an action for personal injuries. Leming was injured in a highway truck collision on July 10, 1951, caused by the negligent driving by Oilfields' employe, Mason, of a truck owned by Oilfields. In April, 1955, this court affirmed a judgment (in Kern County superior court action No. 56455) in Leming's favor against Oilfields and Phoenix in the principal sum of $213,460.02 (Leming v. Oilfields Trucking Co., 44 Cal.2d 343, 282 P.2d 23); a judgment entered against Mason in the same action, in the principal sum of $212,585.69, had previously become final.

Phoenix and Oilfields as joint venturers contracted with the State of California to do certain highway construction work known as the Haypress Canyon Job. The business of Phoenix was highway and similar construction; that of Oilfields was the truck hauling of oil surfacing materials and heavy construction equipment. The two companies had entered into the highway contract pursuant to a written agreement between themselves that they should engage in certain unspecified joint ventures. The present suit was commenced by Continental Casualty Company (hereinafter called Continental), which had issued an insurance policy to Phoenix, to have declared the liabilities arising under various outstanding policies. Named as defendants were (1) Phoenix, (2) Oilfields, (3) Transport Indemnity Company (hereinafter called Transport), the insurer of Oilfields, (4) Leming, (5) Mason, who defaulted, and (6) various other persons as to whom the action was dismissed before trial. Complaints in intervention were filed on behalf of "Underwriters at Lloyd's, London, an unincorporated association" (hereinafter called Lloyd's London), and on behalf of "Certain Underwriters at Lloyd's London" (hereinafter called Pacific Lloyd's). Lloyd's London had issued a certificate of excess insurance over the basic policy issued by Transport[1] to Oilfields, and Pacific Lloyd's had issued certificates of excess insurance over the basic policy issued by Continental to Phoenix.

After extensive oral argument the trial court concluded (1) that Oilfields, Phoenix and Mason are covered under the Continental and Pacific Lloyd's policies; (2) Oilfields, but not Phoenix or Mason, is covered under the Transport and Lloyd's London policies; (3) that the liability should be prorated among the insurers according to a formula set out in the judgment.

Continental, the appellant herein, contends that its basic policy provided no coverage for the liability here involved, either to Phoenix, to Oilfields or to Mason, both by reason of certain endorsements and exclusions attached to that policy and upon the theory that the liability which had attached to Phoenix was based solely on imputed negligence as a joint venturer, and not as an employer of Mason.[2] The trial court in the present suit found, among other things, that Mason was a general employe of Oilfields and a special employe of Phoenix, and that at the time and place of the accident he was "acting in the scope and course of his employment as such employee and agent"; Continental questions the sufficiency of the evidence to support the finding insofar as it refers to Phoenix. Transport (with Lloyd's London), although admitting coverage of Oilfields for any liability chargeable to it which arises from the accident, denies that any coverage was extended by Transport to Phoenix or to Mason. Transport, Oilfields, Phoenix and Leming all contend that the Continental policy (and Pacific Lloyd's excess certificates) extended coverage to Phoenix, Oilfields and Mason.

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[1] Transport had also issued a policy (No. 46–002) of excess insurance over that provided by the Lloyd's London excess certificate.

[2] The liability of Pacific Lloyd's as excess insurer is, of course, dependent on Continental's liability under the basic policy issued to Phoenix.

For reasons which are hereinafter developed we have reached the following conclusions:

1. Insofar as the issues now before us are concerned, Mason, as the negligent driver, bears the primary liability to Leming.

2. The Transport policy, together with its related excess insurance, provides $1,000,000 coverage to Mason as well as to Oilfields, an amount more than sufficient to pay the Leming award.

3. The Continental policy, together with its related excess certificates, covers neither Mason nor Oilfields.

4. Hence, there is no need to decide either (a) whether the evidence supports the trial court's determination that Mason was acting as an employe of Phoenix at the time of the accident, or (b) whether either the Continental or the Transport policy (and excess insurance) covers Phoenix.

5. Result: Transport and Lloyd's London must pay the entire award to Leming.

[1] Where a judgment has been rendered against an employer for damages occasioned by the unauthorized negligent act of his employe, the employer may recoup his loss in an action against the negligent employe (Popejoy v. Hannon (1951), 37 Cal.2d 159, 173 [19], 231 P.2d 484; Bradley v. Rosenthal (1908), 154 Cal. 420, 423, 97 P. 875; Johnston v. City of San Fernando (1939), 35 Cal.App.2d 244, 246, 95 P.2d 147; Myers v. Tranquility Irr. Dist. (1938), 26 Cal.App.2d 385, 389, 79 P.2d 419; Ledgerwood v. Ledgerwood (1931), 114 Cal.App. 538, 542–543, 300 P. 144; Rest., Restitution, 418–419, § 96; 35 Am. Jur. 530–531, § 101; 56 C.J.S., Master and Servant, § 79, p. 502; see also Aynes v. Winans (1948), 33 Cal.2d 206, 208–209, 200 P.2d 533); that is, as between employer and employe in such a situation, the obligation of the employe is primary and that of the employer secondary. Respondents cite Consolidated Shippers v. Pacific Employers Ins. Co. (1941), 45 Cal.App.2d 288, 293, 114 P.2d 34; Air Transport Mfg. Co. v. Employers' Liability, etc., Corp., (1949), 91 Cal.App.2d 129, 132, 204 P.2d 647; Employers Liability Assur. Corp. of London, England v. Pacific, etc., Ins. Co. (1951), 102 Cal.App.2d 188, 192, 227 P.2d 53; and Traders & General Ins. Co. v. Pacific Emp. Ins. Co. (1955), 130 Cal.App.2d 158, 165–166, 278 P.2d 493, as supporting a contrary view; such cases are broadly distinguishable on their facts but it would unduly extend this opinion and serve no useful purpose to individually discuss and differentiate them as any implications therein contrary to the long established rule above stated must be deemed disapproved.

[2] Under equitable principles of subrogation the insurer of the employer who has been compelled to pay the judgment against the employer may recover against the negligent employe or the employe's insurer (Canadian Indemnity Co. v. United States Fidelity & Guaranty Co. (9 Cir., 1954), 213 F.2d 658, 659; see also Maryland Cas. Co. v. Employers Mut. Liability Ins. Co. (2 Cir., 1953), 208 F.2d 731; United Pacific Ins. Co. v. Ohio Casualty Ins. Co. (9 Cir., 1949), 172 F.2d 836, 840 (note 5), 846–848.) Here, it is established that the negligent act upon which the Leming judgment is based was the unauthorized act of Mason who, it will be remembered, is not only a judgment debtor to Leming but is also a defaulted defendant in this proceeding. It follows that if Mason was covered with sufficient insurance to pay the total Leming judgment, then the insurance coverage of Oilfields and Phoenix becomes immaterial insofar as concerns the issues now involved. Consideration will therefore first be given to whether and to what extent Mason is covered by the two lines of policies, Continental and Transport.

[3] Copies of the insurance policies and excess certificates which were in effect

at the time of the Leming accident were introduced into evidence by stipulations, not subject to conflicting inferences, and no parol evidence was offered in aid of construction. Therefore, construction of the policies is a matter of law. (Western Coal & Mining Co. v. Jones (1946), 27 Cal.2d 819, 826–827, 167 P.2d 719, 164 A.L.R. 685; see also Arenson v. National Automobile & Cas. Ins. Co. (1955), 45 Cal.2d 81, 286 P.2d 816.)

The Continental policy, which is entitled "Comprehensive General—Automobile[3] Liability Policy," commences with "Item 1. Name of insured Phoenix Construction Co., Inc.", and in paragraph I of the printed "insuring agreements" identifies the primary protection as Coverages A, B, and C.[4] Coverage A, thus included in the printed policy form, extends coverage to Phoenix for bodily injury liability. An endorsement, numbered R6309202 and hereinafter referred to as No. 202, reads as follows: "It is agreed Oil Fields Trucking Company is added as an additional insured in connection with construction operations conducted as a joint venture with the Phoenix Constr*cu*tion Company, Inc.

"It is further agreed that this policy excludes coverage for all operations of Oil Fields Trucking Company other than construction operations conducted as a joint venture with Phoenix Constr*cu*tion Company, Inc."

A second endorsement, numbered R6309208 and hereinafter referred to as No. 208, reads: "It is agreed that *this policy does not apply to automobiles* owned, maintained or used by the Oil Fields Trucking Company, even though, they might be used in a joint venture operation with other named insureds." (Italics added.)

[4] Although if there is any ambiguity in an insurance policy it must be resolved against the insurer (Arenson v. National Automobile & Cas. Ins. Co. (1955), supra, 45 Cal.2d 81, 286 P.2d 816; Coit v. Jefferson Standard Life Ins. Co. (1946), 28 Cal.2d 1, 3, 168 P.2d 163, 168 A.L.R. 673; Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941), 18 Cal.2d 731, 747, 117 P.2d 661), nevertheless if there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls. (Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941), supra, 18 Cal. 2d at page 738, 117 P.2d at page 664; Tarleton v. De Veuve (9 Cir., 1940), 113 F.2d 290, 297, 132 A.L.R. 343). Likewise, under the provisions of section 1651 of the Civil Code,[5] the written or specially prepared portions of a contract control over those which are printed or taken from a form. The provisions of the two endorsements, as quoted above, are typewritten, while, as already mentioned, the insuring agreements are part of the printed policy form.

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[3] The policy defines "automobile" as "a land motor vehicle."

[4] Such coverages read as follows: "Coverage A—Bodily Injury Liability

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person.

"Coverage B—Property Damage Liability—Automobile

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

"Coverage C—Property Damage Liability—Except Automobile

"To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

[5] Section 1651: "Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded."

[5, 6] Thus, the clear import of the two endorsements is that (No. 202) Oilfields is added as a second named insured, but only as to construction operations conducted as a joint venture with Phoenix, and (No. 208) that the policy does not apply to (i. e., provides no coverage for) liability arising out of the operation of automobiles owned, maintained or used by Oilfields, even though "used in a joint venture operation with other named insureds." It follows that the Continental policy (and excess certificates ancillary thereto) provided no coverage to Mason for the accident to Leming, which resulted from Mason's negligent operation of a truck owned by Oilfields. The suggestion of various of the respondents on appeal that certain of the other printed policy provisions[6] may be construed to include Mason as an insured must likewise give way to the provisions of the endorsement excluding liability arising from the operation of vehicles owned by Oilfields, from coverage of the policy. An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected. (See Coit v. Jefferson Standard Life Ins. Co. (1946), supra, 28 Cal.2d 1, 11, 168 P.2d 163, 168 A.L.R. 673; Long v. West Coast Life Insurance Co. (1940), 16 Cal.2d 19, 23–24, 104 P.2d 646; Sampson v. Century Indemnity Co. (1937), 8 Cal.2d 476, 478–480, 66 P.2d 434, 109 A.L.R. 1162; Security Trust & Savings Bank of San Diego v. New York Indem. Co. (1934), 220 Cal. 372, 376–377, 31 P.2d 365; John G. Speirs & Co. v. Underwriters at Lloyd's London (1948), 84 Cal.App.2d 603, 605, 191 P.2d 124; Guidici v. Pacific Automobile Ins. Co. (1947), 79 Cal.App.2d 128, 134, 179 P.2d 337; Boole v. Union Marine Ins. Co., Ltd. (1921), 52 Cal.App. 207, 209, 198 P. 416; American Mut. Liability Ins. Co. of Boston v. Meyer (3 Cir., 1940), 115 F.2d 807.)

The next question is whether Mason had insurance coverage under the Transport line of policies. It is undisputed that at the time of the Leming accident Mason was an employe of Oilfields, that the Leming judgment was based upon an implied jury finding that in driving Oilfields' truck Mason was acting within the scope of his employment at the time of the accident, and that the trial court in the present litigation likewise found that he was acting within such scope. It is also undisputed that at the time of the accident Mason was exercising sole control and direction of the truck.

It now becomes essential to consider certain provisions of the basic Transport policy. Under Coverage Clause (1) Transport agrees "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay for damages, arising out of the occupation of the named insured, as a result of bodily injury * * * or death to persons or for damage to property of others * * *" Various endorsements attached to the policy state that it "is an Automobile Bodily Injury Liability and Property Damage Liability policy" and declare that the "Occupation of the named insured is Motor Carrier for Hire." Another endorsement provides that the "Name of the Insured * * * is amended to read: Oilfields Trucking Company and P. A. Phoenix and H. E. Phoenix, as co-partners only, jointly and not severally, doing business as Phoenix Brothers Garage and Storage Company [and] It is further agreed that the named insured is: corporation—Co-partnership." Under the heading "conditions" the policy provides: "(3) definitions (a) Named Insured. The term 'named insured' shall mean the insured named in the declarations. (b) Insured. The unqualified word 'insured' includes the named insured and also includes as respects Coverage Clause 1: (1) any partner, executive officer, *managing employee,* director or stockholder thereof while acting within the scope of his duties as such or in so far as he is or may be liable by reason of his occupying such a position. (c) Automobiles. The word 'automobile' shall mean a land motor vehicle, trailer or semi-trailer and its equipment * * * (6) Financial Responsibility Laws. Such insurance as is afforded by this policy shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable *with respect to any such liability* arising out of the existence, ownership, maintenance or use of any automobile during the policy period, to the extent of the coverage and limits of liability required by such law." (Italics added.)

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[6] Such provisions, found in paragraph III of the printed insuring agreements, read as follows so far as here material: "The unqualified word 'insured' includes the named insured and also includes * * * (2) under coverages A and B, any person while using * * * a hired automobile * * *, provided the actual use of the automobile is by the named insured or with his permission * * * [except that the] insurance with respect to any person * * * other than the named insured does not apply: * * * (d) with respect to any hired automobile, to the owner thereof or any employee of such owner. * * *"

It may be noted that even if respondents were successful in their contention that "hired automobile" includes the Oilfields' truck here involved, nevertheless it appears that exception (d) would deny coverage to Mason, the admitted employe of Oilfields.

It is further to be noted (and the significance will later appear more clearly) that the basic policy prominently displays advice seemingly applicable to the person directly in charge of, operating, or "managing" the motor vehicle. Under the heading "What to Do in Case of Accident" it admonishes: "Stop, render aid. Place flags, flares, or post someone to warn other traffic—avoid other accidents. Get names and addresses of witnesses. If no eye witnesses, obtain names and addresses of first persons to arrive. Get license numbers of vehicles if persons refuse names. Report accidents involving injury (no matter how slight) immediately by telephone to our nearest claim office. Order photographs in all serious accidents; the Exchange will assume the cost. Be courteous—Good Conduct Helps. Draw rough diagram of scene of accident showing position of vehicles or skidmarks; step off distances. This will assist in giving an accurate report. Protect your equipment or cargo from further damage or theft." Under the heading "What Not to Do in Case of Accident" it cautions: "Do not admit responsibility; let the Exchange determine if you are legally responsible. Do not agree to pay anything, except for immediate First Aid treatment. In accidents involving death, do not talk nor give statements until you are represented by an attorney—you have this right under the law. Don't argue responsibility for the accident. Don't make any verbal statements at the scene of accident regarding the accident. Statements you make may be used as evidence against you. Do not Sign Anything, except for your insurance investigator. Be sure to identify the insurance investigator as representing *your* company, not someone else." (Italics added.)

At the times concerned Oilfields, by reason of its occupation, was subject to the Highway Carriers Act (Stats.1935, ch. 223) and was required (§ 5) "to procure, and continue in effect during the life of the permit [issued by the Public Utilities Commission and without which Oilfields' operations would be unlawful], adequate protection * * * against liability imposed by law * * * for the payment of damages for personal bodily injuries * * *" Section 6 of the Highway Carriers Act further enacts that "The protection required under section 5 shall be evidenced by the deposit with the Railroad [now Public Utilities] Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance * * * or of a bond of a surety company * * * or of a personal bond * * *"

[7, 8] At the times concerned Oilfields was also subject to California's general automobile financial responsibility law. That law is found in sections 410 through 423.1 of the Vehicle Code. (See Escobedo v. State of California (1950), 35 Cal.2d 870, 878, 222 P.2d 1.) Sections 410–418.5, which comprise chapter 2, cover the matter of establishing responsibility after an accident and an unpaid judgment, while sections 419–423.1, which comprise chapter 3, provide for such a showing after the accident and before any judgment, all directly in-

tended *for the benefit of drivers and owners of motor vehicles* as a means of forestalling suspension of the license of the driver and of the registration of the vehicle or vehicles, and, more fundamentally, designed to give monetary protection to that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of those highways by others. Such a law is remedial in nature and in the public interest is to be liberally construed to the end of fostering its objectives. (See Wheeler v. O'Connell (1937), 297 Mass. 549, 9 N.E.2d 544, 111 A.L.R. 1038, 1041.) As said by Mr. Justice Heydenfeldt for this court long ago, and still the law, "The rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy." (White v. Steam-Tug Mary Ann (1856), 6 Cal. 462, 470; see also Cullerton v. Mead (1863), 22 Cal. 96, 98; Cormerais v. Genella (1863), 22 Cal. 116, 125; Davis v. Hearst (1911), 160 Cal. 143, 188, 116 P. 530.)

[9] Under the unpaid judgment provisions of chapter 2, the owner of a motor vehicle which has been operated with his consent (here, Oilfields, whose truck was operated by Mason) suffers suspension of the registration of the vehicle (Veh.Code, § 410, subd. (c); Sheehan v. Division of Motor Vehicles (1934), 140 Cal.App. 200, 205, 35 P.2d 359) unless he files "an affidavit stating that at the time of the accident * * * he was insured, that the insurer is liable to pay such judgment, and the reason, if known, why such insurance company has not paid such judgment. He shall also file the original policy of insurance or a certified copy thereof, if available," and if his showing is satisfactory his registration certificate will not be suspended. (Veh.Code, § 411.5.) Under section 411 the procedure is made applicable to successive accidents and judgments.

Section 415 is entitled "Requisites of Motor Vehicle Liability Policy," and provides: "(a) A 'motor vehicle liability policy,' as used *in this code* means a policy of liability insurance * * * to or for the benefit of the person named therein as assured, which policy shall meet the following requirements:

"(1) Such policy shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby intended to be granted.

"(2) Such policy shall insure the person named therein *and any other person* [here, Mason] *using or responsible for the use of said motor vehicle or motor vehicles with the express or implied permission of said assured.*

"(3) Such policy *shall insure every said person* on account of the * * * operation of every motor vehicle therein covered * * * against loss from the liability imposed by law arising from such * * * operation to the extent * * * with respect to each such motor vehicle, of five thousand dollars ($5,000) for bodily injury to or death of each person as a result of any one accident and, subject to said limit as to one person, the amount of ten thousand dollars ($10,000) for bodily injury to or death of all persons as a result of any one accident * * *

"(c) Any such policy may grant any lawful coverage in excess of or in addition to the coverage herein specified or contain any agreements, provisions or stipulations not in conflict with the provisions of this code and not otherwise contrary to law. * * *" (Italics added.)

Thus, although the financial responsibility statute does not in so many words make mandatory the procuring of a liability insurance policy prior to the first accident and judgment, the Highway Carriers Act does. Furthermore, an employer who is a highway carrier, as a practical matter in the ordinary course of business, in order to protect against the possibility of suspension in case of a judgment against himself and his employe, must have in force a policy complying with the requisites of section 415. (See Code Civ.Proc., § 1963(4), (20).) Here, of course, it is not disputed that the Transport liability insurance policy was executed; the only dispute with which we are seriously concerned is whether and to what extent the policy covered Mason in his operation of Oilfields' truck at the time of the Leming accident.

It is the position of Transport (among other contentions) that California's financial responsibility laws do not require that Mason's liability be covered, that section 415 of the Vehicle Code has no application to the present case, and that in order to avoid the forfeiture or suspension provisions of the law by evidence of insurance it is not necessary for the owner of a motor vehicle to show that the personal liability of his employe is insured. We have given careful consideration to all of Transport's arguments.[7] It is, however, our conclusion reached in the light of all pertinent provisions of the law and the terms of the policy, that Transport's coverage fairly includes Mason's operation of Oilfields' truck and that its liability is direct to Mason as an insured as well as to Oilfields as a named insured.

[10-12] It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. (Arenson v. National Automobile & Cas. Ins. Co. (1955), supra, 45 Cal.2d 81, 286 P.2d 816; Coit v. Jefferson Standard Life Ins. Co. (1946), supra, 28 Cal.2d 1, 3, 168 P.2d 163, 168 A.L.R. 673; 5 Am.Jur. 790, § 507.) If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. (Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941), 18 Cal.2d 748, 751, 117 P.2d 669.) If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against. (Fageol Truck & Coach Co. v. Pacific Indemnity Co. (1941), 18 Cal.2d 731, 746–747 [16, 17], 117 P.2d 661; Ocean Accident & Guarantee Corp., Ltd., of London, England v. Industrial Acc. Comm.

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[7] We note in this connection that under the provisions of chapter 3 (Veh.Code, §§ 419–423.1), as they existed on the date of the accident here involved (July 10, 1951), it is made the duty of the driver, and in case the driver was permissively operating "a motor vehicle owned, operated or leased by" his employer then it is the duty of the employer rather than of the driver (§ 419), to report to the department of motor vehicles any accident which resulted in personal injury or death; except that the employer need not make such a report if the vehicle involved in the accident "is owned or operated by any person or corporation who has filed with the department a certificate of an insurance carrier or bonding company that there is in effect a policy or bond meeting the requirements of Section 422.6 and when such insurance policy or bond was in full force and effect in respect to such vehicle at the time of the accident." Unless a driver can meet the pre-accident security provisions laid down in chapter 3, he is required to deposit security or suffer suspension of driving privileges in this state, except that if he was permissively driving his employer's motor vehicle then the suspension provisions do not apply to the driver but instead do apply to the employer; unless the employer can meet the pre-accident security provisions (i.e., insurance policy, or bond) in such case, he is required to deposit security or suffer the suspension of "registration of all vehicles not covered by insurance * * * owned, operated or leased by him * * *" (§§ 420, 421.)

Section 422.5 declares that exemption from the requirements of posting security following an accident may be established by satisfactory proof to the department (a) that the owner had "in effect with respect to the driver or the motor vehicle involved in the accident * * * an automobile liability policy or bond * * * [which] shall meet the requirements of Section 422.6"; (b) that the driver, if not the owner, had in effect a policy or bond covering his own driving; "(c) That such liability as may arise from the driver's operation of the motor vehicle involved in the accident is, in the judgment of the department covered by some form of liability insurance or bond which complies with the requirements set forth under Section 422.6."

Section 422.6 sets forth certain qualifications of the insurance company and requires policy limits of not less than $5,000 for injury or death of one person in any one accident, $10,000 for two or more persons in the same accident, and $1,000 property damage.

(1924), 194 Cal. 127, 132, 228 P. 1; Miller v. United Ins. Co. (1952), 113 Cal.App.2d 493, 248 P.2d 113; Pendell v. Westland Life Ins. Co. (1950), 95 Cal.App.2d 766, 770, 214 P.2d 392; see also Christoffer v. Hartford Acc., etc., Co. (1954), 123 Cal. App.2d Supp. 979, 267 P.2d 887), the amount of liability (Hobson v. Mutual Benefit H. & A. Ass'n (1950), 99 Cal.App.2d 330, 333, et seq., 221 P.2d 761; see also Narver v. California State Life Ins. Co. (1930), 211 Cal. 176, 180, et seq., 294 P. 393, 71 A.L.R. 1374) or the person or persons protected (Olson v. Standard Marine Ins. Co. (1952), 109 Cal.App.2d 130, 135 [1, 5], 240 P.2d 379; see also Island v. Fireman's Fund Indemnity Co. (1947), 30 Cal.2d 541, 543, 548, 184 P.2d 153, 173 A.L.R. 896; Sly v. American Indemnity Co. (1932), 127 Cal.App. 202, 15 P.2d 522), the language will be understood in its most inclusive sense, for the benefit of the insured. Here we have the seemingly explicit provision of section 415 of the Vehicle Code that "A 'motor vehicle liability policy,' as used in this code means a policy * * *, which policy shall meet the following requirements: * * * (2) Such policy shall insure the person named therein and any other person using or responsible for the use of said motor vehicle * * * with the * * * permission of said assured," and coupled with that are the provisions of the Highway Carriers Act and the language of the policy, some of it as already emphasized being apparently directed primarily to the driver of the vehicle, admonishing him as to his duties upon the happening of an accident, and in another place declaring that the coverage provided "shall comply with the provisions of the motor vehicle financial responsibility law * * * which shall be applicable with respect to *any such liability* arising out of the existence * * * or use of any automobile * * * to the extent of the coverage and limits of liability required by such law." (Italics added.) That language cannot properly be construed to mean minimum coverage or minimum limits; rather, it must be interpreted as providing full or maximum coverage in both aspects insofar as encompassed by the law and not exceeding the clear limitations of the contract.

[13, 14] We have hereinabove noted the contract provision expressly stating that "The unqualified word 'insured' includes the named insured and also as respects Coverage Clause 1 [the coverage clause here involved] * * * any partner, executive officer, managing employee, director or stockholder thereof while acting within the scope of his duties as such * * *" Obviously the term "managing employee" is used for generic inclusion. 55 C.J.S., page 2, tells us that "managing" means "To have under control and direction; to control and direct; * * * to guide." Webster's New International Dictionary gives the same meanings. We need not go farther. It is undisputed that Mason at the time of the Leming accident was Oilfields' employe and that he had Oilfields' truck under his control and direction; he was guiding it and he was acting within the scope of his duties. In respect to the several tons of equipment entrusted to him he was Oilfields' sole managing employe. The very identities and relationships and the diversified characters of the several other classes listed in the inclusory clause all lend support to the view that the words "managing employee" as used therein include an employe entrusted with the duties and responsibilities and performing the functions of Mason under the circumstances shown. The most that could be said in favor of construing the generic term as not including one in the position of Mason is that the term is uncertain in scope and signification. This argument, however, for reasons given in the authorities already cited, must be resolved against the insurer and in favor of coverage. We must therefore conclude, as already indicated, that the Transport policy insured Mason in his operation, direction and control of the Oilfields truck here involved.

With respect to the extent or limits of coverage of Mason, it has already been noted that condition (6) of the basic Transport policy states, "to the extent of the * * * limits of liability required by such law" and that such language must be given its full and inclusive, as opposed to a restrictive, meaning. The primary Transport policy, No. 46–001, is limited to $5,000 for injury or death of one person and $10,000 for two or more persons injured or killed in any one accident. Lloyd's London excess certificate 46–C3–32 provides insurance in the amount of $40,000 excess over $10,000 "against the hazards and perils of Comprehensive Bodily Injury, Property Damage and Cargo Liability Coverage as insured under policies issued by the Transport Indemnity Company * * * to Oilfields Trucking Company, et al and other persons * * * named as insureds under said policies, all hereinafter called the Assured." The certificate further declares that "It is the intention of the parties that under this Policy the Assured is to be indemnified up to $40,000.00 as aforesaid, against all liability in excess of the liability of the Primary Insurer under its policies.

"It is agreed that this Policy is subject to the same Warranties, Terms and Conditions (except as regards * * * the amount and limit of Liability * * *) as are contained in, or as may be added to said Policy of the Primary Insurer."

Inasmuch as Mason was covered by the primary Transport policy (No. 46–001, with limits of $5,000 and $10,000), the Lloyd's London certificate (46–C3–32) thus increases his coverage by the amount of $40,000.

Transport policy 46–002 furnishes additional excess coverage "over $50,000.00" in an amount of $950,000. The "special excess endorsement" provides, "Notwithstanding anything in the policy to the contrary, it is further agreed that this policy is subject to the same warranties, terms and conditions (except as regards * * * the amount and limit of liability * * *) as are contained in, or as may be added to the primary policy issued by * * * Transport * * *" Thus, Mason's coverage was increased by this policy to an aggregate total of one million dollars, obviously sufficient to meet the Leming judgment of less than a quarter of a million.

Inasmuch as the Transport line of policies did, and the Continental line did not, afford personal coverage to Mason, the driver upon whom ultimate responsibility for the Leming judgment otherwise devolves, it follows that no further controversy remains to be decided as between the other parties to this litigation. It may further be noted that placing the responsibility for the insurance coverage squarely upon the carriers for Mason and for his employer, the owner of the truck he was driving, not only accords with the purposes and intents of the policy provisions and of the financial responsibility law, but appears also to accomplish justice as among all the parties involved in this declaratory suit.

One final matter remains for mention. Plaintiff-appellant, Continental, has filed in this court an application for leave to produce additional evidence (see subd. (b), Rule 23, Rules on Appeal) which it avers will show that full payment of the Leming judgment has been made by or on behalf of Phoenix, Oilfields, and Transport; that full satisfaction of such judgment has been entered of record; and that by reason of such facts and upon various asserted legal principles any theory for contribution by Continental has become unenforceable. In view of our conclusions as stated hereinabove, no useful purpose would be served in receiving such evidence, and the application to produce the same will be denied.

[15, 16] Because there will be no factual issues to be determined after a reversal of the judgment, since the errors of the trial court were of law only, it is appropriate to reverse with directions. (Code Civ.Proc., § 53; In re Estate of Davis (1936), 8 Cal.2d 11, 12, 63 P.2d 827; Wixom v. Davis (1926), 198 Cal. 641, 645, 246 P. 1041; Stauter v. Carithers (1921), 185 Cal. 160, 164, 196 P. 37.)[8]

Plaintiff's application to produce additional evidence is denied; the judgment is reversed with directions to the trial court to amend its conclusions of law and enter judgment declaring the relative and respective rights and obligations of the parties to this action in accordance with the views expressed in this opinion.

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[8] The fact that the Pacific Lloyd's group (providers of the excess certificates over the basic Continental policy issued to Phoenix) did not appeal does not preclude reversal as to them, for the phase of the judgment relating to their alleged liability

GIBSON, C. J., and TRAYNOR, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

I agree that the Transport insurance covered Mason and Oilfields but do not agree that the Continental insurance did not cover Oilfields and Mason. The majority opinion holds that Mason and Oilfields are not covered by Continental because of an endorsement on the Continental policy which it says excludes the operation of automobiles.

Oilfields and Phoenix were engaged in a joint venture. Continental issued a policy to Phoenix as the named insured. The policy was mainly concerned with coverage of liability arising out of the operation of automobiles. *At the time the policy was issued* the endorsements here involved were attached. Both endorsements 202 and 208 were added at the same time, one following the other in attachment to the policy and *both were typewritten.* They read (202): "It is agreed Oil Fields Trucking Company is added as an additional insured in connection with construction operations conducted as a joint venture with the Phoenix Construction Company, Inc.

"It is further agreed that this policy excludes coverage for all operations of Oil Fields Trucking Company other than construction operations conducted as a joint venture with Phoenix Construction Company." And 208 read: "It is agreed that this policy does not apply to automobiles owned, maintained or used by the Oil Fields Trucking Company, even though, they might be used in a joint venture operation with other named insureds." These endorsements must be read together for they deal with the same subject. Inasmuch as they are *both* typewritten they are on an equal footing and one does not control over the other. Hence the rule, that the typewritten controls over the printed part, relied upon by the majority, is not applicable.

Endorsement 202 expressly makes Oilfields a named insured along with Phoenix insofar as the two are engaged in a joint venture. Hence Oilfields is as fully covered as Phoenix, that is, to the same extent as if it had been named along with Phoenix in the policy, the main purpose of which, was to cover automobile operations. Then comes endorsement 208. It is possible to interpret that endorement to exclude operation of trucks owned by Oilfields and used in the joint venture as is done by the majority. However, it may be interpreted to be in direct conflict with 202 on the basis that 202 extends coverage to Oilfields as an insured and then 208 purports to take that coverage away. So viewed, the rule of construction against the insurer would require that 208 be ignored.

There is another wholly reasonable construction which limits 208 to joint ventures between Oilfields and Phoenix and others who might be insureds. It will be recalled that in making Oilfields an insured, 202 expressly mentions and makes it such an insured in joint venture construction operations between Oilfields and Phoenix by that name. Endorsement 208 then says that, as to automobile operations by Oilfields, the policy does not extend *even though* they might be used in a joint venture with *other* insureds. It is reasonable to interpret "even though" as "if," May v. Missouri Pac. R. Co., 143 Ark. 75, 219 S.W. 756, 757; Webster's New Inter. Dict. (2d Ed.), pp. 885, 77, and "other" insured as "'"different from that which has been specified,"'" Robinson v. First Nat. Life Ins. Co., La.App., 10 So.2d 249, 251; In re Nelson's Estate, 152 Misc. 245, 273 N.Y.S. 268; Webster's New Inter. Dict. (2d Ed.), p. 1729. Endorsement 208 then reads that the policy does not cover automobiles owned by Oilfields if they are used in joint venture operations with different insureds. We

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is so inextricably interwoven with the rest of the judgment that a complete reversal is necessary in the interest of justice.

(See Blache v. Blache (1951), 37 Cal.2d 531, 538 [233 P.2d 547].)

already have a joint venture expressly named in 202. A different one then would be a venture between Oilfields and some insured other than Phoenix. Hence where, as here, the liability arose out of the Phoenix-Oilfields joint venture and none other, 208 is not applicable.

Oilfields being a named insured, then Mason, its employee, the driver of the truck is clearly covered because the policy states that the insured includes "any person while using an owned automobile" if the use is by the insured "or with his permission." An "owned automobile" is one owned by the insured. Here the truck was owned by Oilfields, the insured, and was not hired from anyone.

The rule stated in Pendell v. Westland Life Ins. Co., 95 Cal.App.2d 766, 770, 214 P.2d 392, 395, is particularly appropriate: "Exceptions in a contract of insurance which purport to limit the risk assumed by the insurer in the general provisions thereof are to be construed *most strongly against the insurer* and in favor of the insured *and if susceptible of two meanings, the one most favorable to the insured is to be adopted.* Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424, 213 P. 42, 26 A.L.R. 123; Bayley v. Employers', etc., Corp., 125 Cal. 345, 352, 58 P. 7. The insurer is bound to use such language as to make the exceptions and provisions of the contract clear to the ordinary mind; and in case it fails to do so, any uncertainty or reasonable doubt is to be resolved against it. Pacific Heating & Ventilating Co. v. Williamsburg, etc., Co., 158 Cal. 367, 370, 111 P. 4." (Emphasis added.)

In accordance with that rule, endorsement 208, being susceptible of the construction that it does not take away the coverage given by 202, must be so construed.

I therefore agree with the holding of the trial court that since Mason and Oilfields are covered by Continental as well as Transport, the former as well as the latter is liable for the payment of the judgment recovered by Leming against Mason, Oilfields and Phoenix within the limits of their respective policies.

I would therefore affirm the judgment.

Rehearing denied; SHENK and CARTER, JJ., dissenting.

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46 Cal.2d 460

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leslie Robert NUNN, Defendant and Appellant.

Cr. 5748.

Supreme Court of California.
In Bank.
May 8, 1956.

Rehearing Denied June 6, 1956.

Defendant was convicted of prescribing narcotics for a person not under his treatment for a pathology and of prescribing a narcotic for a person who represented himself to be an addict in violation of the statutes. From a judgment and order in the Superior Court, Los Angeles County, Mildred L. Lillie, J., the defendant appealed. The Supreme Court, McComb, J., held that the evidence sustained the conviction that the statutes were not unconstitutional and that rulings on evidence and instructions were without error.

Judgment and order affirmed.

Carter, J., dissented.

Opinion, 284 P.2d 47, vacated.

1. Poisons 🔑**9**

In prosecution of a physician for prescribing narcotics for a person not under his treatment for a pathology and for a person who represented himself to be an addict, evidence sustained conviction. West's Ann.Health & Safety Code, §§ 11163, 11164.

2. Criminal Law 🔑**683(1)**

In narcotics violation, admitting testimony of an inspector of his opinion that most of the narcotics addicts are caused by criminal association and not by the medical profession was not improper on the ground that it was rebuttal of a collateral matter brought out on cross-examination by the prosecution and was immaterial to the issues at trial where the inspector qualified as an expert. West's Ann.Health & Safety Code, §§ 11163, 11164.

3. Constitutional Law 🔑**258**

To comply with the constitutional requirements of due process of law the crime for which defendant is being prosecuted must be clearly defined but it is only necessary that the words used in the statute be well enough known to enable those persons within its purview to understand and correctly apply them.

4. Criminal Law ⇨13

The statute penalizing "except in the regular practice of his profession" the administration or furnishing of a narcotic to any person who is not under the treatment of a physician for a condition other than a narcotic addiction is not invalid because the quoted phrase is too uncertain to give notice of what constitutes the act sought to be prohibited. West's Ann.Health & Safety Code, §§ 11163, 11164, 11330; West's Ann.Bus. & Prof.Code, §§ 2137, 2360–2411.

5. Statutes ⇨47

The statute authorizing a physician to prescribe narcotics under certain circumstances only when in "good faith" he believes that the disease or infirmity requires such treatment is not invalid for indefiniteness because of the quoted phrase which means honest, lawful intent and is the opposite of fraud and bad faith and is ordinarily used to describe a state of mind denoting honesty of purpose, freedom from intent to defraud and generally meaning faithful to one's duties or obligations. West's Ann.Health & Safety Code, § 11330.

See publication Words and Phrases, for other judicial constructions and definitions of "Good Faith".

6. Poisons ⇨9

In prosecution of a physician for narcotics violation, contention that the statutes were unconstitutionally applied and that the inspectors rather than the defendant were allowed to determine whether the defendant acted "in the regular practice of his profession" and in "good faith" was without merit where the determination of whether defendant so acted was left to the jury. West's Ann.Health & Safety Code, §§ 11163, 11164, 11330.

7. Poisons ⇨2

A statute providing that no person shall prescribe or administer or dispense a narcotic to an addict or any person representing himself as such is not unconstitutional on the ground that the Legislature cannot deprive a doctor of the right to prescribe for any patient including one who may be an addict and that the statute leaves the subject of who constitutes an addict to speculation and conjecture. West's Ann. Health & Safety Code, § 11164

8. Criminal Law ⇨569

In prosecution of a physician for narcotics violation, evidence did not establish that defendant was unlawfully entrapped. West's Ann.Health & Safety Code, §§ 11163, 11164.

9. Constitutional Law ⇨266
Criminal Law ⇨394

In prosecution of a physician for a narcotics violation, a narcotics inspector's act in giving a false name and address and in telling physician the inspector was using "H" when buying narcotics from the physician were not illegal in view that inspector was immune from prosecution and a conviction resulting from use of the evidence secured by such acts was not against public policy and a denial of due process of law. West's Ann.Health & Safety Code, §§ 11163, 11164.

10. Criminal Law ⇨507(4)

In prosecution of a physician for narcotics violation, where the inspector was immune from prosecution for the acts which he performed in securing evidence against the defendant, the inspector was not an "accomplice" to issuance of the prescriptions in violation of the statute so as to require that his testimony be corroborated. West's Ann.Health & Safety Code, §§ 11163, 11164, 11170, 11170.5; West's Ann.Pen.Code, § 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

11. Criminal Law ⇨37

Entrapment as a matter of law is not established where there is any substantial evidence from which it may be inferred that the criminal intent to commit a particular offense originated in the mind of the accused.

12. Criminal Law ⚷814(3), 829(1)

Refusal of requested instructions of the defendant was not error where they were either covered by the instructions given or inapplicable to the facts.

◆

Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before a jury defendant, an osteopathic physician, was convicted on four counts of prescribing narcotics for a person not under his treatment for a pathology, in violation of section 11163 of the Health and Safety Code.[1]

He was also convicted of one count of prescribing a narcotic for a person "who represented himself to be an addict," in violation of section 11164 of the same code.[2]

He appeals from the judgment and order denying his motion for a new trial.

About 3 p. m. on February 3, 1954, pursuant to instructions from his superior officer, who directed him to use the name "Joe Dillon," State Narcotics Inspector Clarence A. Shaw went to the office of defendant, who was an osteopathic physician and surgeon licensed to practice in the State of California. Inspector Shaw entered the waiting room. Shortly thereafter defendant came from his private office, whereupon Inspector Shaw said "I am Dillon," and defendant asked, "Are you the one Walter sent?" The inspector said he was.

The inspector and defendant went into the doctor's private office where defendant asked the inspector his first name, to which he replied that it was "Joe." Defendant asked him his address and was told that it was "2903 Rodeo Road, Los Angeles." The doctor entered this information on his patient's history card, together with the inspector's age, sex and race. Defendant then handed the card, which had no writing on it other than that heretofore mentioned, to the inspector, requesting him to sign it on the line where he had placed an "x." Defendant asked the inspector what he was using, to which he replied, "I am using H," which in the vernacular means heroin. Defendant said "I cannot write a prescription for heroin, but I can write for some legitimate drug like morphine or dilaudid." The inspector said that would be all right.

Defendant then wrote and signed a narcotics prescription calling for 60 tablets of 1/16 grain dilaudid to be taken one or two every four hours as needed. Defendant handed the prescription to the inspector and charged him $20.

On the patient's history card which was received in evidence there had been filled in "1. Migraine Headache" and "2. Narcotic Addiction" below the space provided for "Diagnosis."

On February 11, 1954, at about 2 p. m., Inspector Shaw went to defendant's home at 99 Las Flores Canyon Road, Malibu. Defendant was fixing the mail box on his property by the main road. Inspector Shaw said to defendant "Hello," and defendant asked him if he had a pen. The inspector replied that he did not, and defendant said, "My prescription books are in the car, but I will have to get my pen."

They both went in separate cars to the house, which was a short distance from the mail box. At the house defendant wrote and signed a prescription in a prescription book. Defendant asked for the inspector's address again, and the inspector said it was 2903 Rodeo Road. Defendant asked him if 80 tablets would hold him for a week, to which the inspector replied that it would.

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[1] Section 11163 of the Health and Safety Code reads: "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction, except as provied in this division."

[2] Section 11164 of the Health and Safety Code reads: "No person shall prescribe for or administer, or dispense a narcotic to an addict, or to any person representing himself as such, except as permitted by this division."

The inspector told defendant that he liked that very much, and asked him if he could come there again the next week. Defendant replied that it would be all right.

Defendant gave the prescription, which called for 80 1/16th grain tablets of dilaudid, to the inspector, who paid $50 for it.

On February 18, 1954, at about noon, Mr. Shaw drove to defendant's home in Malibu. Defendant answered the inspector's knock at the door and they both walked out to the car, where defendant asked Mr. Shaw if 85 tablets would hold him. The inspector said that it would and that he would be out of town the next week so he wanted to go to defendant's office on the 24th of February. Defendant said that would be all right.

Defendant then wrote and signed a prescription for 85 tablets of 1/16th grain dilaudid and gave it to the inspector, who paid him $40 for it.

On February 24, 1954, Mr. Shaw went to defendant's office in West Los Angeles about noon. There the doctor started to write a prescription and asked him if his address was 2903 Rodeo Road. The inspector said that it was, and the defendant said that as soon as they got the physical examination out of the way he could write a prescription for more than 100 tablets. This was the only time in the various interviews that there was any mention of the inspector's physical condition.

He was then given the prescription, which called for 85 1/16th grain dilaudid tablets, and he paid defendant $40 for it.

Defendant never made any physical examination of Inspector Shaw nor did the inspector ever tell defendant that he had any physical ailment other than that he was using heroin. He never at any time told defendant that he suffered from migraine headaches or any physical ailment, nor was he during this period confined in any medical institution of the state, county or city, and he was not under treatment in any institution for any ailment or for narcotic addiction. He in fact did not use narcotics.

Defendant relies for reversal of the judgment upon these grounds:

[1] *First: That the evidence was insufficient to support the verdicts.*

This contention is devoid of merit. From the facts set forth above, the jury was fully justified in believing that defendant had on four different occasions violated section 11163 of the Health and Safety Code by prescribing a narcotic to or for a person not under treatment for a pathology or condition other than narcotic addiction. (Cf. People v. Whitlow, 113 Cal.App.2d 804, 807 [6], 249 P.2d 35; Davis v. State Board of Medical Examiners, 108 Cal.App.2d 346, 352, 239 P.2d 78.) Also that defendant had violated the provisions of section 11164 of the Health and Safety Code in that he had prescribed a narcotic for a person representing himself as a narcotic user. (Cf. Davis v. State Board of Medical Examiners, 108 Cal.App.2d 346, 350 et seq., 239 P.2d 78.)

Defendant asked Inspector Shaw "What are you using?" and the inspector said "I am using H," which in the vernacular means heroin. Defendant clearly understood that it meant heroin, which is a contraband drug, because he answered "I cannot write a prescription for heroin but I can write for some legitimate drug like morphine or dilaudid." He then wrote a prescription for dilaudid and gave it to the inspector. The conclusion is inescapable that Inspector Shaw represented himself to be an addict, that defendant believed he was an addict and prescribed a narcotic for him in a manner not permitted by law.

[2] *Second: That the court committed prejudicial error in the admission of evidence.*

Defendant contends that Inspector Blanchard was improperly permitted to give his opinion that most narcotic addicts are caused by criminal association and not by the medical profession, because it was rebuttal of a collateral matter brought out on cross-examination by the proscecution and was immaterial to the issues of the trial.

This contention is untenable. Defendant on direct examination testified that he believed on February 3, 11, 18 and 24, 1954, that "Dillon" was suffering from a migraine headache for which he had previously taken heroin and might be an addict, and that he prescribed the narcotic in the belief that he was properly treating Dillon for a pathology by relieving his pain.

The People were justified in believing it would be contended, defendant was acting reasonably and in the ordinary practice of his profession in prescribing the narcotic in the amounts that he did, since he had no reason to know or believe that such pathology did not exist but had reason to believe that it did.

It was therefore appropriate to ask defendant concerning the reasonableness of his conduct and to bring out in connection with such reasonableness that defendant believed it was quite possible that a person using narcotics for the relief of a pain would become addicted to the narcotic. Also that he believed the majority of narcotic addicts were produced that way. The deduction could then be made by the jury that most narcotic addicts suffered from pain for which they had first taken the narcotics to which they became addicted, and that it was more likely a person who was addicted would suffer from a painful pathology. This would support defendant's position that he believed that "Dillon" was suffering from a painful pathology.

This deduction could reasonably be controverted by showing that it was not true that most addicts are created by the medical profession through the use of narcotics to relieve pain.

To forestall such a deduction and not to impeach defendant, the People properly presented the opinion of Inspector Blanchard on the subject.

The evidence disclosed that Inspector Blanchard had a knowledge of the causes of narcotic addiction, gained through experience in interviewing addicts and study, not possessed by the average man. He thus qualified as an expert and as such his opinion was properly received. (People v. Ernst, 121 Cal.App.2d 287, at page 292, 263 P.2d 114; People v. Horowitz, 70 Cal.App.2d 675, 689 [13], 161 P.2d 833.)

[3, 4] *Third: That section 11163 of the Health and Safety Code is unconstitutional because the term "except in the regular practice of his profession" is too vague, indefinite and uncertain to give notice of what constitutes the act sought to be prohibited.*

This proposition is devoid of merit. To comply with the constitutional requirement of due process of law, the crime for which defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its purview to understand and correctly apply them. (Lorenson v. Superior Court, 35 Cal.2d 49, 60 [7], 216 P.2d 859.)

Section 2137 of the Business and Professions Code provides: "The physician's and surgeon's certificate authorizes the holder to use drugs or what are known as medical preparations in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, or other physical or mental conditions."

Sections 11161 to 11571 of the Health and Safety Code give physicians and surgeons certain rights with regard to narcotics and prohibit certain acts with regard to them.

Business and Professions Code sections 2360 through 2411 provide for revocation of the certificate of a physician and surgeon for "unprofessional conduct" and specify numerous acts which constitute unprofessional conduct. The "regular practice of his profession" covers the activity allowed by Business and Professions Code section 2137 and those parts of the Health and Safety Code which give the physician and surgeon certain rights with regard to narcotics, as long as that activity is untainted by any of the acts which specifically constitute unprofessional conduct or acts which are prohibited by the Health and Safety Code. Thus, the "regular practice of his profession" is a term clearly to be understood from the statutes, and it is well enough known to enable a person practicing as a physician and surgeon to understand

and apply it. Therefore, section 11163 of the Health and Safety Code is constitutional.

[5] Defendant further contends that section 11330 of the Health and Safety Code is unconstitutional because the term "good faith" is too vague, indefinite and uncertain to form the basis of a criminal prosecution. This section reads:

> "A physician may prescribe for, furnish to, or administer narcotics to his patient when the patient is suffering from a disease, ailment, injury, or infirmities attendant upon old age, other than narcotic addiction.
>
> "The physician shall prescribe, furnish, or administer narcotics only when in good faith he believes the disease, ailment, injury, or infirmity, requires such treatment.
>
> "The physician shall prescribe, furnish, or administer narcotics only in such quantity and for such length of time as are reasonably necessary."

A similar contention was made before the Supreme Court of Illinois in People v. Guagliata, 362 Ill. 427, 200 N.E. 169, 103 A.L.R. 1035. In disposing of the contention and holding that the words "good faith" have a common and generally accepted meaning, the court, 200 N.E. at page 171 said: "The words complained against have been defined in many cases in many jurisdictions. In Crouch v. First Nat. Bank, 156 Ill. 342, 40 N.E. 974, 979, we said that 'good faith' means 'honest, lawful intent,' and in McConnel v. Street, 17 Ill. 253, we said that 'good faith' is 'the opposite of fraud and bad faith.' Numerous cases in other jurisdictions give substantially similar definitions. A liberal construction should be given constitutional provisions in order to sustain legislative enactments, and all doubts and uncertainties arising from the Constitution, as well as the statute, should be resolved in favor of the validity of the statute. (Citing cases.) The words 'good faith,' as used in paragraph 3, have a definite and well-understood meaning, are free from ambiguity, and their use in the act does not violate the due process clause of the State or Federal Constitution. (Citing cases.)"

The phrase "good faith" in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. (See 18 Words and Phrases, Good Faith, p. 475 et seq.; 35 C.J.S. (1943), Faith, p. 488; 1 Bouvier's Law Dict. (Rawle's Third rev. 1914), p. 1359.)

We therefore hold that the words "good faith" as used in Health and Safety Code section 11330 have a definite and well-understood meaning, are free from ambiguity, and their use in the statutes does not violate the due process clause of the federal Constitution.

[6] Defendant further contends that the statutes of the Health and Safety Code are unconstitutionally applied in that the inspectors from the State Bureau of Narcotics Enforcement, rather than defendant, were allowed to determine whether or not defendant acted "in the regular practice of his profession" and in "good faith." This is not the case. The narcotic inspectors testified to certain facts; defendant testified to others. The determination of whether defendant acted "in the regular practice of his profession" and in "good faith" was left to the jury, which believed the facts were as testified to by the inspector, and that such facts did show that defendant had not acted "in the regular practice of his profession" and in "good faith."

[7] *Fourth: That Health and Safety Code section 11164 is unconstitutional because (1) the Legislature cannot deprive a doctor of the right to prescribe for any patient, including one who may be an addict, and (2) the section leaves the subject of who constitutes an addict to speculation and conjecture.*

This proposition is untenable. (1) The Legislature has the power to regulate the practice of a profession which affects the public health and safety. (Cf. Hewitt v.

Board of Medical Examiners, 148 Cal. 590, at page 592, 84 P. 39, 3 L.R.A.,N.S., 896; People v. Ratledge, 172 Cal. 401, at page 405, 156 P. 455.) (2) Addict is defined in section 11009 of the Health and Safety Code as follows: "'Addict,' as used in this division, means a person who unlawfully uses, or is addicted to the unlawful use of, narcotics." Therefore, the question of who constitutes an addict is not left to speculation and conjecture, but is clearly and definitely defined by law.

[8] *Fifth: That defendant was unlawfully entrapped.*

This contention is likewise without merit. The trial judge fully and completely instructed the jury upon the law relative to entrapment.

[9] Defendant claims that the narcotics inspector's acts in giving a false name and address and telling him he was using "H" were illegal and that a conviction resulting from the use of evidence secured by such acts is against public policy, void, and a denial of the due process of law.

Health and Safety Code sections 11170 and 11170.5 forbid any person to "obtain or attempt to obtain narcotics * * * (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact", or to give a false name or address in connection with the prescribing of a narcotic.

Health and Safety Code section 11710 provides: "All duly authorized peace officers, while investigating violations of this division in performance of their official duties, and any person working under their immediate direction, supervision or instruction, are immune from prosecution under this division."

Health and Safety Code sections 11170, 11170.5 and 11710 are all in division 10 of such code, as are sections 11163 and 11164, a violation of which sections defendant was found guilty.

Duly authorized peace officers, while investigating violations of Health and Safety Code sections 11163 and 11164 are immune from prosecution for violating such sections. Since Shaw was (a) a narcotics inspector for the State of California, and (b) was acting pursuant to the orders of his chief, Walter Creighton, who told him to go to defendant's office and use the name "Joe Dillon" to see if defendant would write a prescription for narcotics for him, the inspector was clearly engaged in enforcing the laws regulating the prescribing of narcotics by investigating to see whether or not defendant had an existing intention of ignoring the laws forbidding his prescribing narcotics except under certain specified circumstances, and was performing his official duties.

[10] He was immune from prosecution while investigating violations of the provisions of sections 11170 and 11170.5 of the Health and Safety Code. Thus, contrary to defendant's contention, he was not violating any law and his acts were not illegal when he gave a false name and address in attempting to buy narcotics from defendant. (See United States v. Swift, D.C., 186 F. 1002, at page 1017.) Because the inspector was immune from prosecution for the acts which he performed, there is no merit in defendant's contention that he was an accomplice to the issuance of the prescriptions in violation of Health and Safety Code sections 11163 and 11164, as an accomplice must be liable for prosecution for the identical offense charged against the defendant. (Pen.Code, § 1111.) Here the inspector was immune from such prosecution.

Defendant urges certain language used in People v. Cahan, 44 Cal.2d 434, at page 472, 282 P.2d 905, in support of his contention that the People should not be permitted to use the evidence obtained by the narcotics inspector because he procured it by false representations. The language used in the Cahan case had reference to the facts in such case and has no application to such facts as the record discloses in the instant proceeding.

[11] This court has held that where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he commits a crime, raises no inference of unlawful entrapment. (People v. Braddock, 41 Cal.2d 794, at page 802 [10],

264 P.2d 521.) Also that entrapment as a matter of law is not established where there is any substantial evidence from which it may be inferred that criminal intent to commit a particular offense originated in the mind of the accused. (People v. Terry, 44 Cal.2d 371, at page 372 [2], 282 P.2d 19.)

In the instant case it is clear the jury was justified in finding from the evidence that the criminal intent originated in the mind of defendant and therefore the mere fact that he was solicited by a decoy to commit the crime raises no inference of an unlawful entrapment.

[12] *Sixth: That the trial court erred in refusing to give certain instructions requested by defendant.*

This contention is devoid of merit. An examination of the record shows that the trial judge fully, fairly and clearly advised the jury on each and every material issue and that the instructions requested by defendant and refused were either covered by instructions read by the judge to the jury or were not applicable to the facts in the instant case.

The judgment and order denying a new trial are each affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I cannot agree that any law of the State of California permits an officer to go about using a fictitious name and make false statements to induce a doctor to prescribe a narcotic or medicine that requires a prescription for a patient, and to misrepresent that he is such patient. Such conduct, whether by an officer, or anyone else, violates sections 11170, 11170.5 and 11171 of the Health and Safety Code.

Section 11170 of the Health and Safety Code provides as follows: "(1) No person shall obtain or attempt to obtain narcotics, or procure or attempt to procure the administration of or prescription for narcotics, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the concealment of a material fact. * * * (3) No person shall, for the purpose of obtaining narcotics, falsely assume the title of, or represent himself to be [here follows a list of authorized persons] *or other authorized person.* * * *" (Emphasis added.)

Section 11170.5 of the Health and Safety Code says: "No person shall, in connection with the prescribing, furnishing, administering, or dispensing of a narcotic, give a false name or false address."

Section 11171 reads: "*No person* shall obtain or possess a prescription that does not comply with this division." (Emphasis added.)

It is plain from the foregoing that the officer violated every one of these mandates of the Legislature. He obtained each of the prescriptions involved in this case (a) by fraud, deceit, misrepresentation, and subterfuge; and (b) he concealed a material fact, namely his true identity.

He represented himself to be an authorized person, which he was not.

He obtained and possessed prescriptions that did not comply with the provisions of the Health and Safety Code. Thereafter he falsely had them filled in violation of section 11170 of the Health and Safety Code.

The Legislature clearly intended these sections to apply to *all persons.*

False and fictitious use of one's name and misrepresentation of one's character are fraud and deceit, which the statute expressly forbids. Fraud vitiates everything. It nullifies judgments obtained thereby.

If these statutes that expressly forbid *any person* to use these means, are changed by judicial construction, to authorize an officer to obtain a prescription (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by concealment of a material fact, or by giving a false name or address, or obtain or possess a narcotic that does not comply with these provisions of the Health and Safety Code, then such sections, if thus construed and applied, violate due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. That constitutional guarantee provides for American standards for the administration of justice and conduct consistent with the fundamental principles of liberty and justice must lie at the base of all our civil and political institutions. Hebert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct. 103, 71 L.Ed. 270; Twining v. State of New Jersey, 211 U.S. 78, 100, 29 S.Ct. 14, 53 L.Ed. 97; Palko v. State of Connecticut, 302 U.S. 319, 323, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288; State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422; Adamson v. People of State of California, 332 U.S. 46, 53, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223.

The obtaining of a prescription from a duly licensed doctor by means of fraud, deceit and misrepresentation—in violation of the express commands of the Legislature—is reprehensible, unlawful, and contrary to the conscience of mankind. This court is not authorized to legislate that it is lawful or to condone it judicially. If it does, then the statutes, as thus construed, violate the Fourteenth Amendment to the Constitution of the United States.

If the knowing presentation of perjured testimony in a criminal prosecution amounts to the denial of due process of law, Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, it should follow as a matter of course that evidence obtained by means of fraud, deceit and misrepresentation should have the same effect.

The purity of the courts belongs to the courts. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413; People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 and cases cited therein.

When the officer in this case falsified his name and character he acted in an individual capacity, for the state did not authorize him to act falsely and fraudulently and to violate the express provisions of the Health and Safety Code. But if we approve such conduct then we become a party to it. This the court cannot do, lest the citizen shall say, "If the officer can falsify, why can't we?" Courts of justice must set an example of truth and justice and equal application of the law's mandates to officers and citizens alike, lest the bad example of one shall lead to misconduct of the other. Civilized standards of due process guaranteed by the federal Constitution forbid this.

I do not think this court or any court should ratify, adopt and approve such lawless disregard of honesty, decency and the express and plain provisions of the Health and Safety Code as written and adopted by our lawmakers.

For the foregoing reasons and those stated in my dissenting opinion in People v. Braddock, 41 Cal.2d 794, 803, 264 P.2d 521, I would reverse the judgment and grant defendant a new trial.

Rehearing denied; CARTER, J., dissenting.

46 Cal.2d 481

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ray PROCTOR, Defendant and Appellant.

Cr. 5846.

Supreme Court of California.
In Bank.
May 11, 1956.

Prosecution for soliciting another to commit and join in commission of the crime of burglary. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction for violation of statute denouncing the offense of injuring the property of another, an allegedly lesser but included offense, and defendant appealed. The Supreme Court, Schauer, J., held that a defendant who if guilty of any offense was guilty of solicitation to commit burglary, could not be punished under statute declaring it a misdemeanor for any person to commit any act injuring the property of another for which no other punishment was expressly described by the penal code, since solicitation to commit crime of burglary was specifically denounced by the code.

Purported appeal from order denying motion in the arrest of judgment dismissed. judgment, order denying a new trial, and order denying motion to vacate the judgment reversed.

Opinion, Cal.App., 291 P.2d 35, vacated.

1. Malicious Mischief ⚿**1**

A defendant who if guilty of any offense, was guilty of solicitation to commit burglary, could not be punished under statute declaring it a misdemeanor for any person to commit any act injuring the property of another for which no other punishment was expressly described by the penal code, since solicitation to commit crime of burglary is specifically denounced by the code. West's Ann.Pen.Code, §§ 650½, 653f.

2. Criminal Law ⚿**1023(8)**

An order denying a defendant's motion in arrest of judgment is not an order made after judgment and therefore is not appealable.

◆

D. Wendell Reid, Van Nuys, and Paul P. Selvin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged with violation of section 653f of the Penal Code in that he did "solicit * * * Gerald G. Cohen, to commit and join in the commission of the crime of Burglary." Defendant was tried by the court without a jury. The court determined that defendant was guilty of violation of section 650½ of the Penal Code (which denounces the offenses of injuring the person or property of another, disturbing or endangering the public peace or health, etc.), "a lesser offense than that charged in the information but necessarily included therein," and defendant was sentenced to the county jail. He appeals from the judgment and various orders hereinafter described. We have concluded that, assuming but not deciding tenability of the trial court's determination that violation of section 650½ is an offense included within section 653f, the solicitation shown here cannot be punished under section 650½ because that section provides that the acts which can be punished thereunder are those "for which no other punishment is expressly prescribed by this code."

By stipulation the case was submitted upon a transcript of the evidence at the preliminary hearing. According to such transcript, Gerald G. Cohen testified that he was introduced to defendant by one Morales at defendant's residence adjoining defendant's real estate office; Cohen was a police officer, but his identity was not disclosed to defendant; defendant produced the keys to two houses, gave Cohen the addresses, and solicited Cohen to commit burglaries of the houses. It is apparent then that if any offense at all was shown, it was the offense of solicitation.

The trial court expressed the view that the People had not met the requirement of section 653f of the Penal Code that "Such offense [solicitation] must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances." However, as stated, the court determined that the evidence showed the "lesser included" offense of violation of section 650½ of the Penal Code.

Section 650½ of the Penal Code provides, "A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, or who willfully and wrongfully * * * uses another's name for accomplishing lewd or licentious purposes * * * or who with intent of accomplishing any lewd or licentious purpose * * * personifies any person other than himself, * * * *for which no other punishment is expressly prescribed by this code*, is guilty of a misdemeanor." (Italics added.)

[1] Defendant argues that it is apparent that the elements of the charged offense of soliciting another to commit burglary do not include essential elements of the offenses described in section 650½. For example, it is suggested, solicitation need not

be and here was not committed in circumstances such that it injured the person or property of another, or *seriously* endangered the *public* peace, or *openly* outraged *public* decency. And there was here no suggestion that in the solicitation defendant was wrongfully using the name of or impersonating another. However, on the face of the record and the clear language of the pertinent code sections there is no occasion for reaching defendant's argument. Assuming for the purposes of this opinion, but not deciding, that the offense denounced by section 650½ might in some conceivable circumstances be considered as included within the offense of solicitation, it is obvious from the italicized language of section 650½ quoted supra that here defendant cannot be convicted of that offense. The testimony of officer Cohen shows that if defendant committed any offense he committed the offense of solicitation to commit burglary. Whether or not this offense of solicitation was proved by evidence which met the requirements of section 653f of the Penal Code, and whether or not it included the elements of a disturbance of the public peace, the offense of solicitation was expressly denounced by section 653f. And section 650½ specifically provides that acts punishable thereunder are only those "for which no other punishment is expressly prescribed by this code."

[2] In addition to appeals from the judgment and order denying a new trial, defendant noticed appeals from an order denying his motion to set aside the judgment and an order denying his motion in arrest of judgment. The order denying the motion in arrest of judgment is not appealable because it is not made after judgment (People v. McGee (1947), 31 Cal.2d 229, 232, 187 P.2d 706).

For the reasons above stated, the purported appeal from the order denying the motion in arrest of judgment is dismissed; the judgment, the order denying a new trial, and the order denying the motion to vacate the judgment are reversed.

SHENK, CARTER, TRAYNOR and SPENCE, JJ., and DOOLING, Justice pro tem., concur.

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141 Cal.App.2d 462

Grace Grant CLARK, Plaintiff and Appellant,

v.

Otto VIEROTH, Defendant and Respondent.

No. 16555.

District Court of Appeal, First District, Division 1, California.

May 14, 1956.

Pedestrian brought action against motorist for injuries suffered when pedestrian was struck, while crossing a street, by motorist's automobile. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment on verdict in favor of motorist and pedestrian appealed and also attempted to appeal from the order denying pedestrian's motion for a new trial. The District Court of Appeal, Bray, J., held that where pedestrian had been crossing a well travelled street, outside the area of a marked crosswalk, late at night and without having seen automobile, whether actions of the pedestrian were a proximate cause of the accident was question for the jury.

Judgment affirmed and purported appeal from the order denying a new trial dismissed.

1. Automobiles ⚿245(90)

In action by pedestrian for personal injuries received when struck by automobile, while crossing a well travelled street, outside a marked crosswalk, at night and without having seen automobile, whether actions of pedestrian were a proximate cause of the accident was a question for jury.

2. Automobiles ⚿243(17)

In action by pedestrian for personal injuries received when struck by automobile, evidence that pedestrian had been away from city for approximately two years and that when she formerly lived in city there had been a crosswalk at place of accident was inadmissible.

3. Automobiles ⚿217(3)

That pedestrian, struck by automobile, had been out of city for two years and did not know of crosswalk changes was not an excuse for violation of ordinance requiring use of crosswalk.

4. Trial ⚷260(3)

In action by pedestrian for injuries sustained when struck by automobile while crossing street, where the trial court gave jury full and complete instructions on burden of proof for a civil action, there was no error in refusing to discuss burden of proof in criminal cases.

5. Automobiles ⚷246(38)

In action by pedestrian for personal injuries received when struck by automobile, instructions which would bar recovery by pedestrian only if pedestrian's continuing negligence was a proximate cause of the accident, did not exclude the possibility of the operation of the last clear chance doctrine.

6. Trial ⚷121(1)

In pedestrian's personal injury action against motorist, counsel's statement in his summation to the jury, to the effect that injured pedestrian's charge of motorist's negligence was easily made and difficult to disprove, contained no intimation that pedestrian had a burden of proof similar to that of a prosecution in a criminal case, and did not give action a criminal case aspect.

7. Trial ⚷121(1)

In personal injury action by pedestrian struck by automobile of defendant motorist, a statement of motorist's counsel that motorist was not at fault as he had not been cited for any violation by the officer who witnessed the accident, was not an intimation to the jury that pedestrian's burden was that of a prosecutor in a criminal case.

8. Appeal and Error ⚷207

Where during trial, opposing counsel make improper statements, it is necessary to assign the alleged misconduct as error and to request the trial court to instruct the jury to disregard the improper statements.

9. Appeal and Error ⚷110

Order denying a new trial is not appealable.

Paul Friedman, San Francisco, for appellant.

Healy & Martin, San Francisco, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment on a jury verdict in favor of defendant in an action for personal injuries sustained when plaintiff was struck by defendant's car.[1]

Questions Presented.

1. Alleged error in excluding evidence to show plaintiff's lack of familiarity with changes at the street intersection.
2. Refusal to instruct on difference between burden of proof in civil and criminal cases.
3. Alleged error in last clear chance instructions.
4. Alleged misconduct of defendant's counsel.

Facts.

[1] Plaintiff, a woman 64 years old, dressed in a powder blue coat and using a cane, was crossing Van Ness Avenue between Market and Fell Streets, San Francisco, about 12:30 a. m. She testified that she never saw the car which struck her and that she was crossing in the marked crosswalk at Market and Van Ness Avenue. However, a police officer who saw the accident testified that she was crossing Van Ness approximately 40 feet north of that crosswalk. In the center of the street there is a concrete island extending from Market to Fell. When plaintiff had approached within 3 to 6 feet of that island, she was struck by a car driven by defendant, a man 75 years of age, suffering from an optical disability in one eye. He did not see her until she stepped in front of him, although his car lights were on and the area was well lit. He claimed that she suddenly came out in front of a moving car proceeding alongside him on his right. The officer testified there were no other vehicles near defendant's. After the accident defendant told him that he thought plaintiff had stepped off the island to his

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[1] Plaintiff also attempts to appeal from the order denying a new trial. As no appeal lies from such order, that purported appeal must be dismissed.

left. (She actually came from his right.) Plaintiff contends that the sole proximate cause of the accident was defendant's failure to see plaintiff or to stop after seeing her. However, it is obvious that plaintiff's conduct in crossing a well traveled street outside a marked crosswalk at that hour at night without observing defendant's oncoming car could have been found by the jury (and it evidently was so found) to be at least a proximate cause of the accident.[2]

1. Exclusion of Testimony.

[2, 3] On direct examination by plaintiff, the police officer testified that the concrete island in the center of Van Ness Avenue had been constructed in 1952.[3] The court sustained defendant's objection to plaintiff's question, evidently intended to show that prior to 1952 there had been a marked crosswalk at about the place where plaintiff was crossing this night. Later, in chambers, plaintiff offered to prove[4] that prior to the accident she had been away from San Francisco for approximately two years, and that when she formerly was in San Francisco there was a marked crosswalk at the place of the accident. The court ruled this evidence inadmissible. Plaintiff contends that this evidence could have been considered by the jury as an excuse for plaintiff's violation of the city ordinance which prohibited pedestrians crossing the street at any place except in a marked crosswalk, where such crosswalk exists, a violation of which ordinance the court instructed the jury would raise a rebuttable presumption of negligence per se.[5] No one has the right to assume that the layout of crosswalks in a street will always be the same, any more than to assume that a street open to two-way traffic today will not become a one-way traffic street tomorrow. Therefore, no one has the right to assume without looking that the crosswalk situation at a particular place is the same today as it was previously, particularly as it was more than a year past. Failing to observe the change because of an absence from the city over a period of time could not possibly be an excuse for violating the ordinance requiring the use of the crosswalk. Moreover, here, the plaintiff was not excusing her conduct on the ground that she was crossing where she formerly knew a crosswalk to be. She insisted that she was actually using the Market Street crosswalk which is about 40 feet from the one that previously existed. The court properly rejected the evidence.

2. Refused Instructions.

[4] Plaintiff contends generally that the court erred in refusing to give instructions offered by her. Except as hereafter mentioned she points to no particular instruction. We have examined all her proposed instructions (although we are not required to do so where no specification is made). We find no offered instruction which should have been given but was refused, which was not covered by the instructions given. The only refused instructions specifically referred to by plaintiff are those on the difference in burden of proof in civil and criminal cases. Plaintiff has cited no authority requiring the court to so instruct. The instructions on burden of proof in this, a civil case, were full and complete. We see no error in refusing to discuss burden of proof in criminal cases.

3. Last Clear Chance Instructions.

[5] The court gave two instructions on last clear chance, BAJI Nos. 205 and 205-A. Plaintiff concedes that these are "technically correct" but seems to think that 205-A states that if a plaintiff continues to be negligent up to the moment of

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[2] It may be significant in this respect that only 11 minutes elapsed from the time the jury left the courtroom until it returned with a defendant's verdict.

[3] This accident occurred July 24, 1953.

[4] The offer of proof is equivocal. We are construing it most favorably to plaintiff.

[5] In her opening brief plaintiff (omitting a portion of it) criticized that instruction. At argument, however, plaintiff conceded the correctness of the instruction and withdrew her objection to it. The instruction is similar to that approved in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279 and Combs v. Los Angeles Railway Corp., 29 Cal.2d 606, 177 P.2d 293.

the impact he cannot recover from the driver of a car who failed to exercise the last clear chance even though the plaintiff's contributory negligence was not a proximate cause of the accident. The instruction does not so state. It bars recovery by the plaintiff only if her continuing negligence is a proximate cause of the accident, and is in line with the statement in Girdner v. Union Oil Co., 216 Cal. 197, 203–204, 13 P.2d 915, 918: "The real question to be determined in considering cases of the character of the one here involved is whether or not the so-called continuing negligence is the proximate or remote cause of the injury, which question is determined by the application of the principles of the doctrine of the last clear chance itself. Stated in another way, contributory negligence of the party injured is not the proximate cause of the injury, as the negligence of the defendant being later it constitutes the sole proximate cause." The instruction in no way is contrary to the holding in Overacker v. Key System, 99 Cal.App.2d 281, 284, 221 P.2d 754, 755: "* * * in every case of negligent unawareness plaintiff's negligence continues to the very time of the injury, but if the elements of the last clear chance doctrine are present that rule none the less applies."

4. Conduct of Defendant's Counsel.

[6–8] Plaintiff makes the broad statement that in defendant's "summation * * it was made to appear that plaintiff had a burden of proof similar to that of a prosecutor in a criminal case * * *." We have read the entire summation and we find no justification for this statement. There are only two remarks specifically pointed out by plaintiff to support this contention: the first, a statement by defendant in his closing argument referring to plaintiff's charge that defendant was negligent, to the effect that such a charge is easily made and difficult to disprove. Plaintiff argues that this remark is always made to a jury in a sex case and hence making it here gave this case a criminal case aspect. We fail to see any such connotation. Secondly, defendant's counsel stated in argument that defendant was not at fault as he was not cited for any violation by the officer who witnessed the accident. No objection to this remark nor the one above mentioned was made by plaintiff nor was the court's attention called to them. See Estate of Hart, 107 Cal.App.2d 60, 70, 236 P.2d 884, and People v. Harmon, 89 Cal.App.2d 55, 61, 200 P.2d 32, for necessity of assigning alleged misconduct as error and of requesting the trial court to instruct the jury to disregard it. Moreover, we fail to see in the defendant's remarks any intimation to the jury that plaintiff's burden was that of a prosecutor in a criminal case.

[9] The purported appeal from the denial of the motion for new trial is dismissed. The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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141 Cal.App.2d 353

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George BEAUREGARD and Jerry Lucile Hutson, Defendants,

George Beauregard, Defendant and Appellant.

Cr. 5487.

District Court of Appeal, Second District, Division 3, Califoruia.

May 8, 1956.

Prosecution for burglary. The Superior Court, Los Angeles County, John G. Barnes, J. pro tem., entered judgment of conviction and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained conviction.

Judgment affirmed.

1. Criminal Law ⚷409

In prosecution for burglary, where defendant was in possession of tires that were taken from burglarized tire shop, and made contradictory statements regarding them, and knew the location of the tire shop, it was not inherently improbable or unbelievable that defendant made certain admissions regarding taking of the tires which a police officer testified he made.

2. Criminal Law ⚷317

A defendant's failure to testify in a prosecution for burglary could have been considered by the trial judge as tending to indicate the truth of the evidence presented against him.

3. Burglary ⚷41(1)

Evidence sustained conviction for burglary.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

In Count I of an information, defendant Beauregard and one Hutson were charged with burglary of a shop owned by Mr. Westfall; and in Count II they were charged with burglary of a shop owned by Mr. Jenkins. It was also alleged therein that each defendant had been previously convicted of a felony. Trial by jury was waived. Beauregard was found guilty on Count II, and not guilty on Count I. Hutson was found guilty on both counts. The allegations as to a prior conviction of each defendant were found to be true. Beauregard appeals from the judgment as to Count II.

Appellant contends that the evidence was insufficient to support the judgment.

During the night of January 30, 1955, the building in which Mr. Westfall conducted his business as a general contractor was burglarized, and various articles, including two sanders, a drill, outboard motor, checkwriter, and checks, were stolen therefrom. The next morning Mr. Westfall observed a hole in the back wall.

Also, during the night of January 30, 1955, the building in which Mr. Jenkins conducted his business as a tire dealer was burglarized, and 18 to 22 new tires, a Masonic ring, blank checks, and $150 in bills and silver were stolen therefrom. The next morning Mr. Jenkins observed that there was a hole in the wall.

The two buildings, referred to, were adjoining buildings, and the wall in which there was a hole was the adjoining wall or wall between the two places of business.

About 1 a. m. on January 31, 1955, two police officers "stopped" an automobile which "coasted through the [boulevard] stop sign" at a public highway intersection. Three persons were in the front seat of the automobile—Hutson was driving, and Beauregard was in the middle, and "a juvenile" was on the right side. Officer Lewis, upon noticing a group of tires in the back seat of the automobile, asked Hutson what kind of tires they were. That officer testified that Beauregard answered the question, stating "I have B. F. Goodrich tires there." The tires were Kelly-Springfield tires. The officers also found a double grinder in the area where the tires were; and in the trunk of the automobile there were other articles, including two sanders, drills, and an outboard motor.

Officer Lewis testified further that, in answer to questions, Beauregard said that he bought the tires from Jack Bale Tire Service, that he had not paid any money to Bale but there was an understanding that he would pay later by working for Bale; in a subsequent conversation at the police station, Beauregard also said that he got the tires from Bale; later, in that conversation, Beauregard said that he bought the tires from Bale's wife; in another conversation at the station he said he had "entered the business establishment at 4400 Firestone [Jenkin's place]" and had taken a number of tires—approximately 12, placed them on the roof of the building, then lowered them tc the ground, placed them in the car and drove away.

Officer Taylor testified that he had a conversation with Beauregard on January 31 about 10 a. m.; Beauregard said that, in the late afternoon (of January 30), he had walked to Hutson's residence, picked up the Hutson car, had gone home with it, had done the family shopping, had driven around, and stopped at the tire shop (involved in Count II); he scaled a wall, got onto the roof, went down a ladder and into the tire shop; he put some tires on the roof, then threw them to the ground and loaded them into the car; then he took some tools and an outboard motor from another part of the same building; as he was going down the street he saw that some of the tires were showing, so he went home and left 10 tires in a garage; then, about 11 p. m., he went to Hutson's house where he stayed about an hour; then they (Hutson, Beauregard and the juvenile) went to Bell, had some coffee, and were traveling toward Beauregard's house when they were arrested. The officer also testified that he was taken to the scene of the burglary, and that Beauregard directed him. He also testified that on January 31, about 3 p. m., he had a conversation with both defendants and the juvenile; that, in the presence of both defendants, the juvenile said that he and Hutson had entered the building (involved in Count I) through a rear door and had knocked a hole in the wall; Hutson climbed through the hole, opened the door of the tire shop and let him (juvenile) in; Hutson made no reply to that statement; Beauregard said, in effect: "Why are you trying to take the blame for me? I did all this."

Officer Barnes testified that, when they had Beauregard at the shop, Beauregard showed the rear door to them and said that it was unlocked when he got there and he did not know how the marks got on the door; Beauregard also said that he did not know how the hole got in the wall, and he went into the tire shop through the door; the juvenile, in the presence of both defendants, said that he and Hutson put the marks on the door before they cut the hole in the wall; Hutson made no reply thereto; Beauregard asked (the juvenile) "why he was trying to take the blame for him, he did it."

Beauregard did not testify. His father testified that he picked up his son, about 8 p. m., on January 30, 1955; he also picked up his other son, and that the three of them went riding, went to his (father's) house and eventually went to appellant's house; he (father) stayed there until approximately 11:15 p. m.; and he did not see appellant driving a car on January 30.

Defendant Hutson testified that on said January 30, about 11 p. m., while he was at a restaurant, a man (stranger) asked him if he wanted to buy some tires; Hutson and the man went in Hutson's car to a place on Firestone Boulevard in South Gate where the tires were on a vacant lot; Hutson bought 17 new tires from the man for $50; he also bought a Masonic ring from the man for $1 the man asked him to keep some equipment for him; then Hutson took the man back to the restaurant; Beauregard was not with Hutson during that part of the evening, and was not with Hutson until approximately 12:45 a. m.; Hutson took the tires to Beauregard's house that night; in taking the tires there he made different trips, and he left the first load in Beauregard's garage.

[1-3] Appellant's argument, with reference to insufficiency of the evidence, is to the effect that the statements of appellant, allegedly made to the officers, bear "the stamp of inherent improbability" or may be said to be "unbelievable per-se"; and that appellant was assuming the "blame for burglaries" which he did not commit. When the automobile, in which there were stolen tires, was stopped, appellant said he had "B. F. Goodrich tires there." The tires were Kelly-Springfield tires. Appellant said that he bought the tires from Jack Bales. Later, he said he bought them from Mrs. Bales. Some of the stolen tires were in appellant's garage. He directed the police to the burglarized tire shop. It thus appears that appellant was in possession of tires that were taken from the burglarized tire shop, that he made contradictory statements regarding them, and he knew the location of the tire shop. Of course, it is not inherently improbable, or unbelievable, that appellant would made the admissions which

the officer said that he made. Appellant's failure to testify could have been considered by the trial judge "as tending to indicate the truth of" the evidence presented against him. See People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17. The evidence was amply sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

141 Cal.App.2d 357

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Al E. FENTON et al., Defendants.

Al E. Fenton, Bert B. Lewis and James F. Watts, Defendants and Appellants.

Cr. 5514.

District Court of Appeal, Second District, Division 3, California.

May 8, 1956.

Hearing Denied June 6, 1956.

Prosecution for criminal conspiracy to commit grand theft and for grand theft. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgments of conviction, denied probation as to one defendant, and denied new trial as to other defendants, and all defendants appealed. The District Court of Appeal, Shinn, P. J., held that refusal to grant application for probation made by one defendant who stipulated, in open court in criminal proceeding, that he had received stolen gasoline knowing that it was stolen property and had received it for his own gain and to deprive owner thereof, was an exercise of sound judicial discretion and that showing was not sufficient to establish that other defendants had consented to stipulation of facts as result of mistake or misunderstanding.

Judgments and orders affirmed.

1. Criminal Law 🔑958(1)

Defendant, who had produced no affidavits in support of his motion for new trial and had not shown that they might be produced if further time were allowed, was in no position to urge newly discovered evidence as ground of his motion for new trial. West's Ann.Pen.Code, § 1181, subd. 8.

2. Criminal Law 🔑982

Court, which expressed criticism of probation reports in regard to improper statements and arguments contained in the reports, would not be held to have been improperly influenced by such statements and arguments. West's Ann.Pen.Code, § 1203.

3. Criminal Law 🔑982

Refusal to grant application for probation made by defendant who stipulated, in open court in criminal proceeding, that he had received stolen gasoline knowing that it was stolen property and had received it for his own gain and to deprive owner thereof, was an exercise of sound judicial discretion. West's Ann.Pen.Code, § 1203.

4. Criminal Law 🔑913(1)

Defendant's being led into stipulation from which he should justly have been released is not ground for new trial. West's Ann.Pen.Code, § 1181.

5. Stipulations 🔑21

In criminal prosecution, showing was not sufficient to establish that defendants had consented to stipulation of facts as result of mistake or misunderstanding.

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Zimmerman, Kelly, Thody and Harold J. Ackerman, Los Angeles, for Appellant Al E. Fenton.

Stanley C. Poster, Hollywood, for Appellant Bert B. Lewis.

Matthews & Hill, Los Angeles, for Appellant James F. Watts.

Edmund G. Brown, Atty. Gen., James C. Maupin, Deputy Atty. Gen., for Respondent.

SHINN, Presiding Justice.

Al E. Fenton, Bert B. Lewis, James F. Watts and Frank A. Engle were accused by indictment of criminal conspiracy to commit grand theft; in a second count of the indictment they were charged with grand theft in that they stole from Standard Oil Company of California gasoline of the value of $1,600. The indictment alleged that Lewis had previously suffered a conviction of burglary, which he admitted.

Pursuant to stipulation an information was filed charging Fenton with the offense of receiving stolen property, namely, gasoline stolen from Standard. Fenton pleaded not guilty; trial by jury was duly waived; the cause was submitted upon an agreed statement of facts. In open court defendant, represented by competent counsel, and the district attorney, stipulated that one Edward William Huff, a truck driver, stole from Standard Oil Company a tank truck load of gasoline which he unloaded into gas tanks of Fenton, who received the same knowing that it was stolen property and that he received the same for his own gain and to deprive the owner thereof. The stipulation was oral and was assented to by defendant as well as by his counsel. There being no other evidence, the cause was submitted, defendant was adjudged guilty and the indictment above mentioned was, as to Fenton, dismissed on motion of the district attorney. Defendant made an application for probation, which was denied, and he was sentenced to state prison. He made a motion for new trial which was denied, and he appeals from that order and also from the judgment.

The grounds of appeal are that the trial court committed error in the following particulars: 1. In denying the motion for new trial; 2. In denying the application for probation.

The precise point relevant to the grounds upon which the motion for new trial was urged is that there was newly discovered evidence which, if given proper effect, required the court in its discretion to grant a new trial. Prefacing a more particularized statement, mention should be made of certain facts which the court had for consideration. Standard Oil Company, suspecting that thefts of gasoline were being committed at its plant at El Segundo in Los Angeles County, instituted an investigation consisting of surveillance of the loading of tank trucks at the plant and the disposition that was being made of the loads. It was in the course of this investigation that Huff, driving a tank truck for Allyn Tank Lines, was detected loading his truck with gasoline with the assistance of defendant Watts, an employe of Standard, and delivering the same to the tanks of Fenton at his service station. In his first report, the deputy probation officer stated: "From the District Attorney's file and from other sources the probation officer discovers that after the operation was revealed to the authorities by Mr. Huff, the Los Angeles County Sheriff was brought into the picture, established a stakeout or surveillance at the El Segundo plant in May 1954 and continued this in operation up until July, that is, particularly July 4, 1954, at which time a tank and trailer, illegally loaded, were followed by the authorities until the gasoline was dumped in one of this defendant's service stations." In a supplemental report the probation officer stated that he was in error in that he had ascertained later that the stakeout or surveillance was not established by the sheriff; that the sheriff did not have knowledge of the identity of the persons in the operation until the events of July 4, 1954, which was the date alleged in the indictment and the information as the date when Fenton received the gasoline. Defendant calls attention to the fact that the testimony of Huff before the grand jury did not disclose that Standard knew that he, Huff, had been stealing gasoline and that Standard initiated or participated in the investigation that led to the discovery of the theft of the gasoline that Fenton received.

Defendant argues that if Standard had knowledge that Huff was stealing gasoline and joined in surveillance of the plant it thereby consented to thefts by Huff and that this "would establish a complete defense in law to the crime charged against the defendant herein." He theorizes that if Huff took the gasoline through prearrangement with the company the taking would not have amounted to theft and he would not be guilty of having received stolen property. He then argues that if he had known of the knowledge and participation of the company in the investigation he would not have stipulated that the gasoline he received had been stolen, and that for this reason it was the duty of the court to grant his motion for new trial.

It is unnecessary to pursue the vague line of argument advanced by appellant. No affidavit was filed by Fenton, his attorney or any one else in support of the motion for new trial. Section 1181(8) of the Penal Code provides that when a motion for a new trial is made upon the ground of newly discovered evidence the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given. Defendant was allowed 21 days in which to produce affidavits.

[1] The court was asked to assume material facts as to the existence of which there was no showing of any sort. The claim that defendant first learned of the previous knowledge of Standard from the supplemental probation report is merely an unsupported assertion. A Mr. Strong, special agent of Standard in police work, had testified to that fact before the grand jury. It did not appear of record that the fact of previous knowledge of Standard was unknown to defendant; the record indicated the contrary. The claim of appellant that the gasoline was taken with the consent of the company assumes that some one in the company having authority had arranged with Huff that he should take it and thus actively participated in a manner that would rob the act of the essential element of taking the property against the will of the owner. People v. Werner, 16 Cal.2d 216, 105 P.2d 927. For if the company merely remained passive as an observer of what might go on, the claim that consent was given would not be well-founded. People v. Hanselman, 76 Cal. 460, 18 P. 425. There was no showing whatever that upon a retrial evidence could be produced that the company had arranged with Huff for the taking of the tankful of gasoline. Having produced no affidavits, and without any showing that they might be produced if further time were allowed, defendant was in no position to urge newly discovered evidence as a ground of his motion for new trial. We are of the opinion that the court would not have been justified in granting a new trial.

The next claims of error relate to the court's denial of appellant's application for probation. It is argued that the court erred "in denying, in effect, that the defendant came within the purview of Section 1203 of the Penal Code." Cited in support of this ambiguous statement is People v. Jones, 87 Cal.App. 482, 262 P. 361. In that case defendant being eligible for probation was denied the right to file an application for the reason that the trial court ruled that probation was available only to defendants who pleaded guilty, and refused to permit an application to be filed. The order was reversed with directions to permit an application to be filed and to act upon it. We have no such situation here. The probation officer filed a full report; a strong showing for probation was made on behalf of defendant and the matter received the court's careful consideration.

It is contended that the report of the probation department was filled with hearsay assertions and was replete with argument detrimental to the appellant, all of which unduly influenced the court to withhold probation.

It is the duty of the probation officer upon a reference to "make an investigation of the circumstances surrounding the crime and of the prior record and history of the defendant" and report to the court the facts found with his recommendation. Pen.Code, § 1203.

The probation officer here went far afield. The report stated: "The probation officer understands that the California State Board of Equalization has arrived at a figure of 2,420,000 gallons taken illegally from Standard Oil and received by Fenton and Lewis. The state authorities have declined to tell the probation officer the method by which they have arrived at the above figure for this would give unnecessary advantage to the defense. * * * Standard Oil states further that while it is true that the whole oil industry is watching the present case with interest, the victim does not want to appear aggressive. * * * Since this matter has received such general publicity and will probably receive more, the attitude of the general public and more particularly of the oil industry should be considered. Along this line, it seems the facts of the offense are so grave and the quantity of gasoline taken is so large that a probation program is not in order. It is not alone the question of preventing the defendant from doing the same kind of thing in the future for this would probably be impossible anyway; but the offense that has been committed is, in the opinion of the probation officer, too big to be fitted into the probation bracket." In a supplemental report the officer stated that he had received a letter from appellant's wife which closed with the statement: "I beseech you Mr. Coyner, and beg of you to go over your report again and eliminate all the plain gossip that the State Bd of Equalization, Standard and Mr. Huff have given you." The supplemental report stated that although defendant had refused at first to furnish a financial statement he had now done so and that his attitued at this point should probably be considered satisfactory. It stated that the officer had based his recommendation for denial of probation upon the testimony of Huff before the grand jury, much of which was summarized in the original probation report. In the supplemental report he also stated his belief in the accuracy of the testimony of Huff. No change was made in the original report except in the particular we first mentioned. It would appear that the recommendation against probation was influenced by extravagant and unsupported statements with respect to thefts in enormous amounts, and by what the deputy thought the reaction of the public and the oil industry would be if probation should be granted. And there was an apparent effort to influence the decision of the court by argument, which is not to be approved.

In other respects the reports were fair. They spoke highly of appellant's past record and stated "The probation officer has received and attached hereto character letters of unusually fine qualities from the following persons," listing authors of some 30 letters, and the report closed with the statement that the officer did not believe that appellant, if granted probation, would commit any further offense.

[2] But we must reject the contention the court was influenced by the improper statements and arguments in the reports. While the matter was being discussed the court expressed criticism of the report in these particulars and we think it is reasonable to suppose that the recommendation against probation was weakened, in the mind of the court, by some of the faulty reasoning upon which it was based.

[3] In support of the contention that defendant was deprived of some right in the probation hearing it is argued that the court should have determined the matter solely upon the basis of the stipulated facts, without regard to the surrounding circumstances, and especially those disclosed by the testimony of Huff and others before the grand jury; and that because that testimony was considered and was detrimental to defendant he was deprived of a fair and impartial hearing of his application. The contention is not sustainable. The motions of Fenton, Lewis and Watts for new trials and the hearings on their applications for probation were considered on the same day. The cases of Lewis, Watts and Engle had been submitted upon a stipulation of facts, certain exhibits and the testimony of one Morrison which related a confession by Watts which implicated Lewis, but not Fenton. Lewis and Watts had been found guilty only of grand theft and Engle had been found not guilty. The court had read the testimony of Huff and Morrison before the grand jury and so stated. The testimony of Huff tended to implicate Fenton, Lewis and Watts in a conspiracy and accused Fenton of having received four or five loads of stolen gasoline from Huff. This testimony was properly considered. The powers of the court in the consideration of the matter of probation are exceedingly broad with respect to the scope of the court's inquiry as to the circumstances of the offense and the record of the applicant for leniency. It was understood that the court would familiarize itself with the evidence before the grand jury. It had been so stipulated in the cases of Lewis and Watts and no objection was raised by Fenton to the consideration of that evidence upon his application. It is probably true, as defendant contends, that the court

believed that Lewis and Watts and, to a lesser extent, Fenton himself, had been engaged in systematic thefts of gasoline from Standard. But a proper and sufficient inquiry into the circumstances of the offense could not be foreclosed by stipulations of fact, amounting to confessions, which resulted in convictions of offenses other than conspiracy. No doubt it was the hope of defendants and their attorneys that the court would ignore all facts tending to prove that the offenses admitted by the defendants were not isolated transactions but were a part of a series of such transactions. But it was a vain hope that in considering the applications the court would ignore the fact, certain to be developed in the course of a proper investigation, that defendants had probably been guilty of similar acts. By their admissions which led to their convictions and by their applications for probation the several defendants created the conditions of which they now complain. Moreover, they assume they would have been granted probation if there had been no evidence of their guilt of offenses other than the ones they admitted. The record contains no statement of the court tending to support that assumption. The application of Fenton was vigorously pressed, was given lengthy consideration by the court and the conclusion reached by the court was, in our opinion, the exercise of sound judicial discretion.

The Appeals of Lewis and Watts

The ground of appeal being the same the two appeals will be considered together.

After the trial had begun it was adjourned and a conference was had with the judge in chambers. Present were the trial judge, the attorneys for Lewis, Watts and Engle and representatives of the district attorney. The conference was not reported. The purpose of defense counsel was to arrange for submission of the case, as to the charge of grand theft alone, upon the evidence before the grand jury, without defense evidence, and to obtain a dismissal of the conspiracy charge. Mr. Poster, attorney for Lewis, made a persistent effort to obtain a commitment from the judge as to whether probation would be granted and what the punishment would be. After that conference the jury was discharged, a stipulation of facts was entered into which could only result in conviction of Lewis and Watts, the case was submitted, Lewis and Watts were found guilty, the conspiracy count was dismissed and Engle was acquitted. Applications for probation were made and probation reports submitted. On the day preceding sentence another conference was had in chambers which was reported. This consisted of a discussion between Mr. Poster and the judge as to what had been said at the first conference. Mr. Poster repeatedly asserted that at the first conference he gained the impression from the judge's remarks that the court would be lenient in its sentence, he reported that fact to his client, who was induced thereby to submit the case under the grand theft charge upon stipulated facts.

It would serve no useful purpose to relate the discussion between Mr. Poster and the judge concerning what was said at the former conference. Although Mr. Poster disclaimed an intention to plead for leniency it was his evident purpose to influence the court to grant Lewis' application for probation because of his interpretation of the judge's statements at the unreported conference. The judge consistently denied having intimated what the sentence might be and insisted that he had said nothing whatever to encourage a belief that leniency would be shown. Neither counsel for Lewis nor Watts made any request to be released from their stipulation.

Upon this record Lewis and Watts claim the benefit of the rule which they state as follows: "Where a defendant in a criminal action has pleaded guilty (or has allowed himself to be found guilty) in reliance upon false factual representations that the trial judge, or some responsible state officer, has promised a lesser sentence than might otherwise be imposed, such plea (or judgment) will be set aside, even though such representations were made by the defendant's own attorney, if the same are apparently substantially corroborated by acts or statements of a responsible state officer." (Citing cases.)

[4] The grounds upon which a new trial may be granted are stated in section 1181, Penal Code. They do not include the ground that in the course of the trial the defendant was led into a stipulation from which he should justly have been released.

[5] If it be assumed that on an appeal from a judgment the court will consider the point that through some fault of the trial court he entered into a stipulation detrimental to his interests, even though at the trial he did not seek release from the stipulation, the merits of the point cannot be fully considered on the present record. It is obvious that that record, as to foundational facts, is a mere vacuum, and that it does not sustain the contention of the defendants. It does relate a colloquy between Lewis' attorney and the court as to what had taken place at the unreported conference in chambers but the material facts, such as the recollection of the participants as to what was said, the interpretation counsel placed upon the statements of the court, what was reported to Lewis by his attorney, and as to what induced Lewis to consent to the stipulation—these are entirely without verification and the subsequent unsworn statements of the attorney relative thereto are deserving of no consideration. We hold that in the record that is before us there is nothing of substance or verity which tends to support the contention that defendants Lewis or Watts consented to the stipulation under mistake or misunderstanding.

It is suggested in one of the briefs that perhaps "this court could use this case as the basis for laying down a rationale of procedure to be followed by courts" in such matters. We believe we should avoid any misunderstanding of our opinion by making clear our belief that a conference of all counsel and the court, duly reported, respecting the court's attitude toward accepting a plea of guilty, or its equivalent, is of every day occurrence and often a necessary step in the disposition of criminal cases. But when inexperienced attorneys overstep the bounds of professional ethics and accepted court procedure by endeavoring to make a "deal" with the court as to punishment, we can only refer to the remarks of the patient but harrassed judge when he found himself confronted with that situation and expressed himself as follows: "This type of business only leads me to a conclusion that I formed one time, and deviated from, that a judge should never have any conferences with attorneys at all, because this is just what you are faced with when you do, see. Somebody is always willing at some time along the line to put another interpretation on the conference." We may add that there were experienced and competent attorneys in the case who realize the futility as well as the impropriety of endeavoring to obtain leniency for a client by prearrangement with the court. The above remark was not addressed to them.

The judgments as to the three appellants and the orders denying their motions for a new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

141 Cal.App.2d 479

Joseph W. DRISKILL, Plaintiff, Cross-Defendant and Appellant,

v.

Ted R. THOMPSON and Stanley Kruse, Defendants, Cross-Complainants and Respondents.

Civ. 16648.

District Court of Appeal, First District, Division 1, California.

May 14, 1956.

Hearing Denied July 11, 1956.

Action for accounting after dissolution of a partnership wherein the defendants cross complained. From a judgment in the Superior Court, City and County of San Francisco, Thomas M. Foley, J., the plaintiff appeals. The District Court of Appeal, Peters, P. J., held that error of the trial court in awarding a personal judgment for the value of partnership property converted without a full accounting was not prejudicial to the plaintiff, that the evidence supported a finding of conversion, that the partnership at will had good will which was an asset required to be accounted for by plaintiff and that error in computing the value of good will was not prejudicial to the plaintiff.

Judgment affirmed.

1. Appeal and Error ⚷428(2)

Where judgment was not entered until December 1, 1954, and a premature notice of appeal had been filed on October 29, which was after rendition of the judgment but before its entry, such premature notice was effective to perfect the appeal. West's Ann.Rules on Appeal, rule 12(a).

2. Partnership ⚷344

Generally, until the affairs of a partnership are wound up, the claim of a partner is equitable and can only be enforced in an accounting action, and no personal judgment can be entered therein until all the partnership assets have been converted into money, the debts paid and a final balance ascertained, but the rule is not inflexible.

3. Partnership ⚷344

While in general, a judgment may not be entered against a partner in a suit for an accounting until all of the assets have been marshaled and made to bear the burden of copartnership liabilities, where there are no liabilities to settle, except as between the partners themselves, such course is not necessary.

4. Partnership ⚷342

In action for accounting after dissolution of a partnership, trial court failed to find on a material issue, the value of tangible assets, cash and capital contributions of the partners.

5. Partnership ⚷344

In action for accounting after dissolution of the partnership, although the court had power to award a personal judgment for the value of partnership property converted, it was error to do so without a full accounting of the property of the partnership.

6. Appeal and Error ⚷1170(12)

In action for an accounting after dissolution of a partnership, error in awarding a personal judgment for the value of partnership property converted without a full accounting of the property of the partnership was not prejudicial to the plaintiff partner, since it actually inured to the benefit of plaintiff. West's Ann.Const. art. 6, § 4½.

7. Partnership ⚷336(3)

In action for an accounting after dissolution of partnership, evidence supported finding that plaintiff converted partnership property and thereby breached the partnership agreement and caused its dissolution.

8. Partnership ⚷342

In action for accounting after dissolution of a partnership at will, where cross complaint was not based on a claim of breach of partnership agreement but asserted rights under the statute respecting rights of retiring partners upon dissolution against the partner continuing the business, finding as to breach of the partnership was immaterial, since the judgment for defendants could be sustained without it. West's Ann.Corp.Code, §§ 15029, 15030, 15041(6), 15042.

9. Partnership ⚷310

In action for an accounting after dissolution of a partnership at will conducting dances in rented halls, continuance of the business created good will which was an asset of the partnership for which plaintiff was required to account.

10. Appeal and Error ⚷1170(10)

In action for accounting after dissolution of a partnership, erroneous calculation of the value of good will which was less than defendants were entitled to was not ground for complaint by the plaintiffs. West's Ann.Const. art. 6, § 4½.

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Simeon E. Sheffey, J. Clark Benson, San Francisco, for appellant.

Marshall E. Leahy, John F. O'Dea, San Francisco, for respondents.

PETERS, Presiding Justice.

The plaintiff, Joseph W. Driskill, and defendants Ted R. Thompson and Stanley Kruse, on March 11, 1950, entered into an oral partnership agreement to conduct dances in a rented hall in San Francisco. Each partner contributed $500 to the project. It was agreed that the plaintiff should check the cash, act as a special police officer, supervise personnel, and also should perform some janitorial services. Defendant Kruse, it was agreed, should tend bar and perform some janitorial services. Defendant Thompson played in the band. Plaintiff and Kruse, by agreement, got paid a small salary for their work, Thompson getting paid an equal amount through the band.

By the middle of 1951 disagreements developed and there was some talk of, but no demand for, a dissolution. At a meeting of the partners in November, 1951, it was agreed that the partnership should seek a lease of the dance hall, and plaintiff agreed to handle these negotiations. This he did by securing, on December 20, 1951, a lease on the hall from the landlord in his own name. In addition, in November, 1951, he withheld $400 from the cash receipts of the partnership, claiming that he did so because of the imminency of dissolution. On December 28, 1951, plaintiff served on the other two partners a notice of dissolution effective January 1, 1952. Plaintiff took possession of the physical assets of the partnership consisting of ice boxes purchased for $175, spotlights purchased for $68, an electric fan worth $500, and some miscellaneous items valued at twenty to thirty dollars. The other two partners kept the bank account which plaintiff was informed had in it 400 plus dollars. As of January 1, 1952, an accountant computed that plaintiff's partnership interest was worth $288.24, while defendants' interest was computed at $688.24 each. The difference of $400 between these interests was because of the $400 withdrawn by plaintiff. An expert fixed the value of the good will and leasehold interest at $11,520.

On January 4, 1952, plaintiff filed this action for an accounting after dissolution and defendants cross-complained for the same relief. The trial court found that the good will of the partnership was valued at $11,520; that on December 24, 1951, plaintiff converted the going concern and good will to his own use and benefit, thereby breaching the partnership agreement and causing a dissolution; that by reason thereof each defendant was damaged in the sum of $3,666.67.[1] Judgment was entered accordingly. Plaintiff appeals.

[1] Although the judgment was not entered until December 1, 1954, a premature notice of appeal had been filed on October 29, 1954, which was after rendition of the judgment but before its entry. Such premature notice was effective to perfect the appeal. Rule 12(a), Rules on Appeal; In re Estate of Lopus, 12 Cal.2d 651, 86 P.2d 818; Phillips v. Phillips, 41 Cal.2d 869, 264 P.2d 926; see also Larrus v. First National Bank, 122 Cal.App.2d 884, 266 P.2d 143.

[2, 3] Appellant's first major point is that prejudicial error was committed by the trial court in failing to take a complete accounting. In this connection appellant urges that the judgment is not based on the issues made by the pleadings, that the findings are not supported by the pleadings or the evidence, and that an accounting is a condition precedent to an award of damages in favor of one partner against another. There is some merit in appellant's position. The pleadings clearly set forth opposing causes of action for an accounting. The case was tried on this theory. But the trial court made no findings as to the assets in the hands of the partners, nor as to the capital balance of each partner. The only basic finding of the trial court is that the partnership was a going concern with a good will valued at $11,520, and that such good will was converted by appellant, causing damage to defendants. There is no finding at all as to the value of the personal property in the hands of appellant although he testified that he took over these physical

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[1] This was a miscalculation, as will later appear.

assets which he valued at $763. Admittedly, respondents retained the bank account which totaled $908.94. No findings were made as to these matters. Thus, the trial court did fail to make a complete accounting. It is a general rule that until the affairs of a partnership are wound up, the claim of a partner is equitable and can only be enforced in an accounting action, and that no personal judgment can be entered in such an action until all partnership assets have been converted into money, the debts paid and a final balance ascertained. Hooper v. Barranti, 81 Cal.App.2d 570, 184 P.2d 688; Clark v. Hewitt, 136 Cal. 77, 68 P. 303; Olmo v. Olmo, 56 Cal.App.2d 590, 133 P.2d 866; Nakamura v. Kondo, 65 Cal. App. 211, 223 P. 425. The rule is, however, not inflexible. One important exception was stated as follows in Wilson v. Brown, 96 Cal.App. 140, 143, 273 P. 847, 848: "But while 'in general a judgment may not be entered against a partner in a suit for an accounting until all of the assets have been marshaled and made to bear the burden of the copartnership liabilities, in cases where there are no liabilities to settle except as between the partners themselves, such course is not necessary.' Shuken v. Cohen, 179 Cal. 279, 176 P. 447. *Where, as in this case, some of the partners have excluded another and have appropriated the partnership property to their own use,* the latter may treat the matter as a conversion and, without any accounting or disposition of the former partnership assets, sue the offending partners and recover against them a personal judgment in the amount of his damage." (Italics added.)

[4, 5] Now how do these rules apply to the present case? Our case is clearly one for an accounting. The judgment is based on a conversion. It would appear that the findings and judgment are not within the issues framed by the pleadings. Treated as an accounting action, as already pointed out, there was a failure to find on a material issue, the value of the tangible assets, cash and capital contributions of the partners. Thus, it would seem clear that, although the court had the power under the rule announced in Wilson v. Brown, supra, to award a personal judgment for the value of partnership property converted, it was error to do so without a full accounting of the property of the partnership.

[6] But was this error prejudicial within the meaning of Article VI, Section 4½, of the Constitution? That depends on the facts. Here appellant admits that he took possession of physical assets valued at $763. At this time his capital interest was but $288.24. The capital interests of respondents together amount to $1,376.48, while the only asset they possessed was $908.94 in the bank account. Thus, before considering the converted good will, appellant had assets in his possession in excess of his capital contribution. Thus, the failure of the trial court to take an accounting of the physical assets and bank account actually inured to the benefit of appellant. In truth, the only ones injured by the failure to take the accounting were respondents, and they have not appealed. The error being favorable to appellant he is in no legal position to complain. Walker v. Etcheverry, 42 Cal.App.2d 472, 109 P.2d 385.

[7] Appellant challenges the sufficiency of the evidence to support the finding that he converted partnership property and thereby breached the agreement and caused a dissolution. The evidence clearly supports the finding of conversion. On December 20, 1951, prior to dissolution, plaintiff obtained a lease on the premises used by the partnership in his own name, eight days later served a notice of dissolution, and thereafter ran the dance hall as his own individual enterprise. Obviously, this evidence supports the finding of conversion.

[8] Appellant next complains that there was no breach of the partnership agreement because, admittedly, this was a partnership at will, terminable at any time. Section 15029 of the Corporations Code provides: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

Section 15030 provides: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

The rights of retiring partners upon dissolution against the partner continuing the business are provided by section 15042 of the Corporations Code, which reads: "When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 15041(1, 2, 3, 5, 6)[2], or Section 15038(2b) without any settlement of accounts as between him * * * and the person * * * continuing the business, unless otherwise agreed, he * * * may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest * * *."

The cross-complaint of respondents was not based on a claim of a breach of the partnership agreement but asserted rights under this section. Thus, the finding as to the breach was immaterial because the judgment can be sustained without it.

[9] Appellant next argues that a partnership dissolvable at will can have no good will, because, so it is urged, such can exist only in a going business. Appellant confuses the partnership with the business of operating a dance hall. The operation of the dance hall was a business whether operated as a partnership, by individuals, or by a corporation. The continuance of that business created a good will regardless of who continued to operate it. A business, together with its good will, may continue regardless of the form of organization used to conduct it. Appellant continued to operate that business and to capitalize on the good will of that business as a going concern. This was an asset of the partnership which he was using for his own benefit.

[10] There was an error made in computing the value of the good will. A qualified C.P.A. and attorney testified that the good will should be computed at twice the partnership's excess earnings as shown by its books, and that so computed the good will was valued at $11,520. The trial court so found. That finding is supported. Dividing that value by three gives $3,840 as the value of each partner's interest in that good will. The court, however, fixed each respondent's damages at $3,666.67 each. Just how this figure was determined does not appear. But, erroneous as it may be, it was less than respondents were entitled to, and appellant is in no legal position to complain.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

141 Cal.App.2d 376

Van M. GRIFFITH, Plaintiff and Appellant,

v.

DEPARTMENT OF PUBLIC WORKS of the State of California; Frank B. Durkee; Chester H. Warlow; James A. Guthrie; Charles T. Leigh; F. Walter Sandelin; Robert E. McClure, and H. S. Chase, as Members of and constituting the California Highway Commission of the State of California; Frank B. Durkee, Director of Public Works of the State of California; The City of Los Angeles, a Municipal Corporation; Everett G. Burkhalter; Earl D. Baker; Robert M. Wilkinson; Harold A. Henry; Rosalind Weyman; L. E. Timberlake; Don A. Allen; Gordon R. Hahn; Edward R. Roybal; Charles Navarro; Harold Harby; Harriett Davenport; Ernest E. Debs; John C. Holland; John S. Gibson, Jr., are Members of and constitute the Council of the City of Los Angeles, Defendants and Respondents.

Civ. 21629.

District Court of Appeal, Second District, Division 1, California.

May 9, 1956.

Rehearing Denied May 29, 1956.

Hearing Denied July 5, 1956.

Complaint, by person, who was resident, citizen and taxpayer of city, and owner of contingent remainder interest in

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2. (6) provides for the case herein—"When a partner is expelled and the remaining partners continue the business * * * without liquidation * * *."

property deeded to city "exclusively as public park and pleasure ground", under deed containing reverter if property ceased to be so used, alleging that state and local officials were acting in combination to divert part of park to use as high-speed freeway, in violation of deed and city charter. Defendants, state and local officials, demurred. The Superior Court of Los Angeles County, Arnold Praeger, J., sustained demurrers without leave to amend, and plaintiff appealed. The District Court of Appeal, Doran, J., held that complaint was sufficient upon demurrer.

Judgment reversed, with instructions.

1. Municipal Corporations 🔑1017
States 🔑193

Proposed and concerted action by state and city officials, in violation of law and of private rights, is a proper subject for judicial scrutiny.

2. Appeal and Error 🔑863

Upon review of order sustaining demurrer to complaint, without leave to amend, only concern would be whether complaint, as it stands, under any reasonable theory, can be deemed to state a cause of action; reviewing court would not be concerned with ultimate outcome of controversy, or whether plaintiff will be able to prove allegations.

3. Municipal Corporations 🔑987

Collusion and ultra vires acts of public officials are proper grounds for action by taxpayer.

4. Pleading 🔑218(1)

Where, upon consideration of complaint on its face, standing alone, without regard to various extraneous matters which seemed to have crept into case, it appeared that plaintiff had stated cause of action which should only be determined after plenary trial of issues, it would not suffice to decide issues, summarily, upon hearing of demurrer.

5. Pleading 🔑216(1)

Where survey of trial court's memorandum seemed to indicate that ruling sustaining demurrers and dismissing action was predicated not upon language used in complaint, but upon consideration of various matters of fact and law which would be proper issues upon trial of merits, trial court erred.

6. Pleading 🔑189

Function of a demurrer is concerned solely with allegations found in complaint, not at all with final outcome.

7. Municipal Corporations 🔑221

Terms of grant, under deed of land to city for park purpose, containing reverter clause upon cessation of such use, should be strictly construed.

8. Covenants 🔑49

Where a grant deed is for a specified, limited and definite purpose, subject of grant cannot be used for another and different purpose.

9. Pleading 🔑216(1)

Whether plaintiff would be able to establish allegations of complaint to satisfaction of trial court or jury, or what final outcome would be, were matters of no importance, in determining sufficiency of complaint upon demurrer.

10. Municipal Corporations 🔑1000(5)

Complaint, by person, who was resident, citizen and taxpayer of city, and owner of contingent remainder interest in property deeded to city "exclusively as public park and pleasure ground", under deed containing reverter if property ceased to be so used, alleging that state and local officials were acting in combination to divert part of park to use as high-speed freeway, in violation of deed and city charter, was sufficient upon demurrer. West's Ann.Civ.Code, § 826; West's Ann. Code Civ.Proc. § 1240; West's Ann.Streets & High.Code, § 103.5.

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Loren A. Butts, Los Angeles, for appellant.

Roger Arneberg, City Atty., Bourke Jones, Asst. City Atty., Claude E. Hilker, Deputy City Atty., Los Angeles, for respondents City of Los Angeles and others.

Edmund G. Brown, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., Robert E. Reed, Sacramento, George C. Hadley, Ford Hendricks, Los Angeles, for other respondents.

DORAN, Justice.

The plaintiff herein is not only a "resident, citizen and taxpayer of the City of Los Angeles", but, as alleged in the complaint, "is the son of Griffith Jenkins Griffith and Mary Christina Griffith, both now deceased, and is the owner of a contingent remainder interest in and to" the Griffith Park real estate herein involved, which was given to the City by plaintiff's parents for park purposes.

The present action was instituted for the purpose of enjoining the respondents, designated state and city officials, "from diverting a portion of the property donated for public park purposes * * * from a park use to that of a public freeway", and for declaratory relief. It appears that Griffith Park contains some 3,000 acres of land and that the proposed freeway will divert approximately 206 acres from park purposes.

Among other things, the complaint alleges "That the defendants all working in conjunction with each other intend to and will unless restrained" effect the diversion in question, "in violation of the trust upon which said property is held by the City of Los Angeles", and in violation of the City Charter.

The complaint alleges that on December 16, 1896, plaintiff's parents by letter offered said park property to the City of Los Angeles which offer was on the same day duly accepted by the City for park purposes. Thereafter, the donors executed a deed to the City containing a provision that the property was "To be used as a Public Park for purposes of recreation, health and pleasure, for the use and benefits of the inhabitants of said City of Los Angeles, forever", to be used and maintained "exclusively as a public park and pleasure ground".

It is stipulated in the conveyance that "whenever said tract of land hereby conveyed, or any part thereof shall cease to be used as a park", or if the name of Griffith Park be changed, "then the lands hereby conveyed shall immediately * * * revert to said parties of the first part or their heirs. An exception is made to the effect "that the use of any part of said premises * * * for railroad or other transportation purposes for carrying the inhabitants of said City into and through said park, shall not be considered a violation of any of the conditions upon which this donation and grant are made". It will be noted that the donors were not content with merely designating the granted property as a park, but definitely provided for a reversion in the event of any diversion or deviation.

[1] Contrary to the respondents' statements, the State of California is not made a defendant. Plaintiff has charged that certain named persons, acting as state and city officials, "all working in conjunction with each other", are about to divert a portion of the granted lands from park purposes. In this situation injunctive relief and declaratory relief are both sought. That proposed and concerted action by state and city officials, in violation of law and of private rights, is a proper subject for judicial scrutiny can hardly be doubted.

The complaint further alleges that the City Board of Recreation and Park Commissioners have not authorized the opening, establishment and maintenance of the proposed freeway, as required by Section 170 of the City Charter, but that said Board has entered objections and protests in respect thereto. It is also alleged that the use of said lands for freeway purposes "will constitute an illegal waste of and injury to the property of the City of Los Angeles".

The second cause of action, for declaratory relief, repleads the first cause of action, and alleges a controversy concerning the defendants' right to construct the freeway over the lands conveyed to the city by the Griffiths, in violation of the terms of the grant, and without the consent of the

Board of Recreation and Park Commissioners.

[2] As hereinbefore stated, the trial court sustained demurrers to the complaint without leave to amend. The present review, therefore, is not concerned with the ultimate outcome of the controversy or whether the plaintiff will be able to prove the allegations made. The only present concern is whether the complaint as it stands, under any reasonable theory, can be deemed to state a cause of action.

In a memorandum sustaining the demurrers and dismissing the action, the trial court states that "The only ground for a cause of action against the City and its officials is the allegation: 'That the defendants all working in conjunction with each other intend to * * * divert a portion of the park to a "public highway".' The basis for this allegation is the agreement entered into between the City and the State as alleged in Paragraph XI. A taxpayer can bring suit only in cases involving fraud, collusion, *ultra vires,* or a failure on the part of a governmental body to perform a duty specifically enjoined. Pratt v. Security Trust and Savings Bank, 15 C[al.]A[pp.]2d 630 [59 P.2d 862]. It does not appear to the Court that the plaintiff has brought himself within this rule."

As noted in appellant's brief, however, the plaintiff, Van M. Griffith, is not in this case suing as a mere citizen and taxpayer, but, as the son of the grantors, "is the owner of a contingent remainder interest" in the property. If there has been a violation of the grant to the City, the Griffith Park property will revert to the Griffith heirs. And, as provided in Civil Code, § 826, "A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance".

[3, 4] Plaintiff's complaint, in legal effect, alleges both "collusion", and "ultra vires" on the part of the defendants, which, as noted by the trial court, are proper grounds for an action by a taxpayer. Assuming, as must be done, that the plaintiff is able to substantiate the truth of these allegations, it would appear that, occupying the dual status of taxpayer and one having a contingent remainder or reversionary interest in the property involved, plaintiff is a proper person to bring the present action. And, considering the complaint on its face, standing alone, without regard to various extraneous matters which seem to have crept into the case, it appears that plaintiff has stated a cause of action which should only be determined after a plenary trial of the issues. In such a situation, it will not suffice to decide the issues, summarily, upon a hearing of the respondents' demurrers.

[5, 6] A survey of the trial court's Memorandum seems to indicate that the ruling sustaining the demurrers and dismissing the action is predicated not alone upon the language used in the complaint, but upon a consideration of various matters of fact and law which would be proper issues upon a trial of the merits. This is not the function of a demurrer which is concerned solely with the allegations found in the complaint and not at all with the final outcome.

The trial court construes the Griffith deed proviso that the property may be used "for railroad or other transportation purposes for carrying *the inhabitants of said City* into and through said park", as creating a privilege open to the general public. It is difficult to believe that the Griffith donors ever intended that this provision should be interpreted as furnishing authority for construction of a public, high-speed freeway which will remove some 206 acres of land from the original park purpose. And if such a definite provision requires judicial interpretation, then the plaintiff should be accorded full opportunity to present the Griffith side of the controversy.

[7, 8] As said in appellant's brief, the terms of such a grant should be strictly construed, and in the language of Roberts v. City of Palos Verdes Estates, 93 Cal.App. 2d 545, 547, 209 P.2d 7, 8, "It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose". And in Olmstead v. City of San Diego, 124 Cal.App. 14, 12 P.2d 22, it was held that the City Council should

be enjoined from constructing a road through lands dedicated as a park where the proposed road would seriously interfere with the use of such lands as a park.

Much has been said in the respondents' briefs concerning the right of the State to condemn the land in question for freeway purposes. In the trial court's Memorandum it is stated that the private property which may be so taken under Code of Civil Procedure, § 1240, includes: "Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has already been appropriated". Whether the proposed freeway is a "more necessary public use than" that of the park use for which the Griffith grant was intended, raises but another material question which should not be summarily disposed of.

The trial court's memorandum in like manner calls attention to the fact that "In 1937 the Legislature added Section 103.5 to the Streets and Highways Code which provides: 'The real property which the department may acquire by eminent domain, or otherwise, includes any property dedicated to park purposes, however it may have been dedicated, when the Commission has determined by such resolution that such property is necessary for state highway purposes.' This section does not appear to have been passed upon by an appellate court in this state". The question of constitutionality is not directly presented on this appeal, but should the broad terms of this statute be held unconstitutional as conferring unlimited power on the Commission, or for any other reason, then it may be questioned whether the position taken by respondents in the present controversy, is warranted in law. The present controversy, incidentally, is not a condemnation proceeding.

The above matters are here mentioned for the purpose of pointing out the many and varied matters which seem to have been given consideration in ruling on the demurrers, such matters often depending in whole or in part upon factual issues or mixed questions of law and fact. Neither trial nor appellate courts should be detracted from the main issue, or rather, the only issue involved in a demurrer hearing, namely, whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action.

[9] As stated in Lloyd v. R. K. O. Pictures, Inc., 136 Cal.App.2d 638, 289 P.2d 295, and elsewhere, the allegations of the complaint must be regarded as true, and a reviewing court "is confined to the allegations of the complaint", as is a trial court, in determining the matter. Other matters, outside the complaint, although doubtless proper subjects for consideration at the trial, should not be considered. Whether plaintiff is able to establish the allegations made, to the satisfaction of a trial court or jury, or what the final outcome may be, are matters of no importance so far as the present inquiry is concerned.

[10] If the plaintiff can establish the truth of the allegations made, which amount to charges of collusion and conspiracy on the part of city and state officers to divert dedicated park property to freeway use, in violation of the original grant and of the City Charter, and the other allegations, a case has been made out which would seem to justify the relief prayed for. Moreover, the plaintiff will then be entitled, under the complaint, to a declaratory judgment definitely confirming, refuting, limiting or interpreting, as the evidence requires, the nature and extent of rights and obligations arising out of the original grant, and the defendants' alleged right to divert the use of the Griffith Park property.

The judgment is reversed, with instructions to overrule the demurrers to the complaint, to allow respondents a reasonable time within which to file their answers, if so advised, and to proceed to a trial on the merits.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; GIBSON, C. J., and SPENCE, J., dissenting.

141 Cal.App.2d 332

The PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Plaintiff and Respondent,

v.

C. L. FINK, also known as Charles L. Fink, individually and doing business under the fictitious firm names and styles of California Refrigerator Repair Shop, Inc., and Fink's Electrical Appliances; California Refrigerator Repair Shop, Inc., a California corporation, John Doe, Jane Doe, Richard Roe, Roe Corporation and Doe Partnership, Defendants.

C. L. Fink, also known as Charles L. Fink, and California Refrigerator Repair Shop, Inc., a corporation, Appellants.

Civ. 21462.

District Court of Appeal, Second District, Division 1, California.

May 7, 1956.

Proceeding on motion to vacate judgment on ground that same was taken through mistake, inadvertence, surprise or excusable neglect and without authority of defendant. The Superior Court, Los Angeles County, Bayard Rhone, J., entered an order denying the motion and defendant appealed. The District Court of Appeal, White, P. J., held that where the parties were identically aligned and were represented, respectively, by same counsel in action and in proceeding instituted by defendant before Public Utilities Commission and counterclaim in action raised issue which was subject matter of utility proceeding and where affidavits of defendant and defendant's counsel conflicted as to authority of counsel to stipulate for entry of judgment against defendant if defendant failed to obtain relief prayed for in utility proceeding, trial court did not abuse its discretion in denying motion to vacate judgment entered under stipulation.

Affirmed.

1. Attorney and Client 🔑72

Authority of attorney, like that of any agent, may be established by attorney and his testimony in that regard is admissible to prove agency and nature and scope of authority. West's Ann.Bus. & Prof.Code, § 6068(e); West's Ann.Code Civ.Proc. § 1881, subd. 2.

2. Witnesses 🔑199(3)

Where defendant denied that former attorney was given authority to enter into stipulation whereby default judgment was taken against defendant, defendant's employment of attorney was not a privileged communication within statute forbidding examination of attorney in regard to communications and advice given in course of professional employment. West's Ann. Code Civ.Proc. § 1881, subd. 2.

3. Witnesses 🔑204(2)

Where defendant, in support of motion to vacate judgment taken under stipulation of former attorney, averred that judgment was taken and entered without defendant's authority, it was proper for court to permit reading of affidavit made by former attorney and such reading did not violate statutes relating to confidential relationship of attorney and client and privileged communication. West's Ann.Bus. & Prof.Code, § 6068(e); West's Ann.Code Civ.Proc. § 1881, subd. 2.

4. Judgment 🔑392

Where affidavit of defendant's former attorney set forth that matter was "fully and fairly" discussed with defendant and that stipulation was entered into with defendant's "full knowledge and consent", quoted words when read in conjunction with entire paragraph were statements of ultimate facts admissible in proceeding on defendant's motion to set aside judgment entered against defendant under stipulation.

5. Appeal and Error 🔑931(1), 948

On appeal every presumption must be indulged in favor of trial court's ruling and burden is on appellants to establish that trial court abused discretion

6. Attorney and Client 🔑70

There is a rebuttable presumption that an attorney has authority from his client to enter into a stipulation which may amount to a surrender of client's rights, unless adverse party as well as court is aware that attorney is acting in direct opposition to his client's instructions.

7. Appeal and Error ⚷935(1)

On appeal from order denying defendant's motion to vacate judgment, all conflicts in evidence must be resolved in favor of respondent and all legitimate and reasonable inferences indulged in to uphold order of court.

8. Attorney and Client ⚷86

Where two actions, each pending, involve same disputed issue raised between same adverse parties represented, respectively, by same attorneys in each proceeding, attorneys of record have apparent or implied authority to enter into stipulation that disposition of issue in one proceeding shall be determinative in the other.

9. Judgment ⚷390

In proceeding on motion to vacate judgment taken pursuant to stipulation, where parties were identically aligned and were represented, respectively, by same counsel in action and in proceeding instituted by defendant before Public Utilities Commission and counterclaim in action raised issue which was subject matter of utility proceeding and where affidavits of defendant and defendant's counsel conflicted as to authority of counsel to stipulate for entry of judgments against defendant if defendant failed to obtain relief prayed for in utility proceeding, abuse of discretion in denying motion was not shown.

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Charles A. Thomasset, Los Angeles, for appellants.

Lawler, Felix & Hall, L. B. Conant, Robert Henigson, Jules J. Sherman, Los Angeles, for respondent.

WHITE, Presiding Justice.

This is an appeal from an order denying defendants' motion to vacate a prior judgment entered against them.

This action was instituted on March 10, 1954 when plaintiff filed its complaint which stated several causes of action, all now merged in a final judgment rendered by the Superior Court of Los Angeles County. On June 10, 1954, defendants filed their answer to the complaint as then amended, denying generally and specifically each of the several causes of action set forth in said amended complaint and, in addition, a counterclaim, recoupment and setoff was alleged, premised upon plaintiff's refusal to publish certain of defendants' requested advertising in the forthcoming issues of plaintiff's classified directories and damages were prayed in the sum of $100,000.

On June 18, 1954, plaintiff and defendants, through their attorneys of record, entered into and filed a stipulation for continuance and entry of judgment. By the terms of the said stipulation, all of the parties agreed that, should defendants fail to obtain "the relief prayed for" in the administrative proceeding then pending before the Public Utilities Commission of the State of California, being Case No. 5545, then judgment on the said amended complaint should be entered against defendants in the amount of $6,586.25 plus interest and judgment on the said counterclaim should be entered in favor of plaintiff.

The decision of the Public Utilities Commission of the State of California, rendered January 19, 1955, dismissed defendants' complaint, thus denying them "the relief prayed for" therein. Agreeably with said stipulation, judgment was entered in this action February 11, 1955. Notice of entry of judgment was served on defendants February 17, 1955.

On March 14, 1955, a writ of execution was issued by the court, and on March 18, 1955, the Los Angeles County Marshal, pursuant to said writ levied execution on the real property of defendant Charles L. Fink. A notice of sale of real estate under execution was given by said Marshal on March 21, 1955, and said notice was duly published on said date.

The aforesaid sale was noticed to take place on April 20, 1955, at the Inglewood office of the Los Angeles County Marshal.

On April 19, 1955 defendants, through Attorney Charles A. Thomasset, filed a motion to vacate the said judgment on the ground that the same was taken through mistake, inadvertence, surprise or excusable neglect, and on the further ground that said judgment was taken without authority of defendants.

On April 20, 1955, defendants filed a substitution of attorneys, whereby Charles A. Thomasset was substituted as attorney of record in place and instead of Bertram H. Ross.

Thereafter, defendants served and filed an affidavit of defendant Charles L. Fink in which it was averred that the aforesaid judgment was taken and entered without his authority.

Plaintiff thereafter served and filed the affidavit of Bertram H. Ross (defendants' former attorney who signed the foregoing stipulation) wherein the attorney averred that said stipulation was entered into with knowledge, approval and consent of defendants.

At the time of the hearing, defendants moved to strike the affidavit of Bertram H. Ross on the grounds of privileged communication and moved to strike designated portions thereof on the ground that the same constituted conclusions of law. Each of said motions was denied. Defendants' motion to vacate said judgment was then argued, submitted and denied.

[1, 2] As a first ground for reversal of the order, appellants contend that the court erred in denying the motion to strike the affidavit of Attorney Bertram H. Ross on the ground that it violated the confidential relationship of attorney and client, and contained statements that were privileged and concerning which the former attorney for defendants could not testify, Bus. and Prof.Code, § 6068(e); Code Civ.Proc. § 1881, subd. 2.

Appellant urges that the challenged affidavit contained confidential and privileged advice such as: "There is no question in my mind but that the Telephone Company can collect from you * * *"; and "To my mind, this is a most advantageous settlement and I am recommending that you give it your consideration and advise me at once whether or not you want to accept it." That it also contains a statement which, by implication, is based upon conferences between attorney and client, to-wit: "That in connection with the execution of said stipulation by your affiant, as attorney for the defendants in the above entitled action, said matter was fully and fairly discussed with Mr. C. L. Fink, the president of the corporate defendant and one of the individual defendants and that said stipulation was entered into with the knowledge, approval and consent of the said C. L. Fink." We are not in accord with appellants' contentions in this regard. The authority of the attorney, like that of any agent, may be established by the attorney and his testimony in that regard is admissible to prove the agency and, in the instant case, the nature and scope of his authority to sign the stipulation in question, Fleschler v. Strauss, 15 Cal.App.2d 735, 737, 60 P.2d 193. Here, the question addressed to the court was whether the stipulation was authorized. If it was, the judgment was properly entered. It was not error to allow defendants' former attorney to set forth in his affidavit the authority he had to enter into the stipulation. Defendants denied that any such authority was given. As to his authority and the purposes for which he was employed, the attorney was the principal witness. Within the meaning of the statute the employment was not a privileged communication, Security Loan & Trust Co. v. Estudillo, 134 Cal. 166, 170, 66 P. 257; Rose v. Crawford, 37 Cal.App. 664, 667–668, 174 P. 69.

[3] In the case now engaging our attention the professional conduct of appellants' former attorney was attacked by them. It would be a sad commentary upon our boasted concept of fairness and the right to defend one's reputation and integrity, were it possible for the accuser to silence the accused by invoking the doctrine of privileged communication. The court committed no error in permitting the affidavit to be read.

[4] It is next contended by appellants that the court erred in denying their motions to strike certain portions of the affidavit of attorney Ross. The challenged

statements contained in the affidavit are as follows:

1. "That some time after issue was joined by the filing of an answer in the above entitled action, a stipulation was entered into wherein and whereby it was stipulated that in the event that the defendants did not make good their claim before the Public Utilities Commission of the State of California that plaintiff may have judgment as prayed for in its amended complaint."

2. "That in connection with the execution of said stipulation by your affiant, as attorney for the defendants in the above entitled action, said matter was fully and fairly discussed with Mr. C. L. Fink, the president of the corporate defendant and one of the individual defendants and that said stipulation was entered into with the knowledge, approval and consent of the said C. L. Fink."

It is urged that the foregoing averments constituted conclusions of law rather than statements of ultimate facts.

The first above-mentioned quotation from the affidavit paraphrases the affidavit which we have herein held was properly read at the hearing on the motion to set aside the judgment.

With respect to the second designated portion, we are satisfied it does not constitute a conclusion of law, but on the contrary, comprises information within the personal knowledge and observation of the affiant, concerning which he was entitled to testify. We regard as highly technical the contention of appellants that the words "fully and fairly", and "knowledge, approval and consent", are opinions and conclusions of the affiant Attorney Ross. When read in conjunction with the entire paragraph in which they appear, we regard them as statements of ultimate facts. The same criticism could be directed at some of the language used in appellant Fink's affidavit wherein he avers that neither of the appellants "ever at any time *authorized* the taking of said judgment", (emphasis added), but when read in conjunction with the entire context of the affidavit the criticism lacks substance.

[5-7] Appellants' next contention is that the court erred and abused its discretion in denying the motion to vacate and set aside the judgment taken pursuant to the stipulation for the reason that the order is against law and is not supported by evidence of a substantial character. As stated by appellants, "The question revolves upon whether or not Bertram H. Ross, the then attorney for defendants, had authority to enter into the stipulation, pursuant to which judgment was entered". Appellant leans heavily upon a letter written by attorney Ross to appellant Charles L. Fink, dated February 8, 1955. In their brief appellants assert, "The date is significant. The stipulation was entered into on June 18, 1954. The opinion of the Public Utilities Commission was rendered on January 18, 1955. The letter, therefore, was written twenty-one (21) days after the opinion of the Public Utilities Commission was rendered. This letter purports to confirm a conversation between Mr. Ross and the son of defendant Fink. It is impossible, it is submitted, to read that letter and arrive at the conclusion that prior to the time it was written the stipulation had been discussed with defendant Fink, as the affidavit states it had been; or that it had been entered into with 'the knowledge, approval and consent' of Fink, as the affidavit asserts. One cannot, it is submitted, read that letter and arrive at any other conclusion than that Fink was being informed for the first time of the stipulation—nearly eight (8) months after the execution of the stipulation, and twenty-one (21) days after the Public Utilities Commission had rendered its opinion. It attempts to induce him to accept it as being for his own good and asks for his consent—immediately. '*To my mind, this is a most advantageous settlement* and I am recommending that you give it your consideration and advise me at once whether or not you want to accept it.'" (Emphasis added.) Equally significant with the date of the letter is the above italicized words. A mere reading of the letter indicates that it was written to advise appellant Fink that under the stipulation, respondents, by reason of the action of the State Public Utilities Commission,

would be entitled to judgment for $6,586.25 with interest at the rate of 7% per annum from February 1, 1954, plus costs of suit. The letter then proceeds, "I have been discussing with the attorneys for the Telephone Company, the matter of settling all of your obligations with the Telephone Company, which approximate close to $10,000. There is no question in my mind but that the Telephone Company can collect from you and you may be sure that they will levy executions against your real property and do whatever is necessary to collect the amounts that are due under your advertising agreements. In order to clean this thing up, once and for all, the Telephone Company has agreed to accept the sum of $6,500 in cash and give you a full and complete release from any and all claims and demands of every nature, kind and description." As we read the letter in its entirety we are impressed that its tenor strengthens the inference that appellants were aware that, as stated in the communication, "The present action was stayed by a stipulation to the effect that nothing would be done until the Public Utilities Commission had determined the problem and it was further stipulated that if the Public Utilities Commission gave you no relief, then the Telephone Company would be entitled to judgment against you * * *".

It is fundamental that every presumption must be indulged in favor of the trial court's ruling and the burden is upon appellants to establish that the court abused its discretion. There is a rebuttable presumption that an attorney has authority from his client to enter into a stipulation which may amount to a surrender of his client's rights, unless the adverse party as well as the court is aware that the attorney is acting in direct opposition to his client's instructions. Gagnon Company, Inc., v. Nevada Desert Inn, 45 Cal.2d 448, 460, 461, 289 P.2d 466; Church v. Church, 40 Cal.App.2d 701, 705, 105 P.2d 643. The record herein is barren of any evidence to show that respondents, their attorneys or the court, were aware of any lack of authority of appellants' attorney to enter into the stipulation for judgment. In any event, the evidence as to actual authority of appellants' former counsel to stipulate to judgment was in conflict. In reviewing the evidence on appeal under such circumstances, we are not authorized to retry the cause. All conflicts in the evidence must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the order of the trial court if possible. The long established rule in this regard is thus stated in Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184: "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (Citing cases.)" And the rule is the same whether the conflict is in affidavits or oral testimony. In Hayutin v. Rudnick, 115 Cal.App.2d 138, 140, 251 P.2d 707, 708, the court stated: "When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when there is a substantial conflict in the facts stated, the determination of the controverted facts by the trial court will not be disturbed."

[8, 9] Upon the authority of Gilmore v. American Cent. Ins. Co., 67 Cal. 366, 367, 7 P. 781, and Stone v. Bank of Commerce, 174 U.S. 412, 19 S.Ct. 747, 43 L.Ed. 1028, it would seem to be the rule that where two actions, each pending, involve the same disputed issue raised between the same adverse parties represented, respectively, by the same attorneys in each proceeding, the attorneys of record have apparent or implied authority to enter into a stipulation that disposition of the issue in one proceeding shall be determinative in the other. As stated by respondent, "In the instant action, Appellants herein asserted a counterclaim

for damages based upon the allegedly wrongful refusal of the Respondent to accept for advertising in the 'Yellow Pages' of the Classified Telephone Directory certain listings desired by Appellants. This very issue was the subject matter of the judicial administrative proceeding instituted by the Appellants herein against the Respondent before the Public Utilities Commission of the State of California.

"The parties were identically aligned and were represented, respectively, by the same counsel in both proceedings."

For the foregoing reasons, the order appealed from is affirmed.

DORAN and FOURT, JJ., concur.

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141 Cal.App.2d 309

ESTATE of William H. TALBOT, Deceased.

WELLS FARGO BANK & UNION TRUST CO., individually, and as Trustee of the trust created by the last Will and Testament of William H. Talbot, deceased, Appellant,

v.

William C. TALBOT, an Incompetent Person, by Lyle Newcomer and Florian Boyd, as guardians of the Estate of William C. Talbot, Respondent.

Civ. 16567.

District Court of Appeal, First District, Division 1, California.

May 7, 1956.

Rehearing Denied June 6, 1956.

Hearing Denied July 5, 1956.

Proceeding upon objections to accounting by trustee. The Superior Court, San Mateo County, Edmund Scott, J., surcharged the trustee and the trustee appealed. The District Court of Appeal, Peters, P. J., held that where the trustee had a broad power of sale but, instead of exercising independent judgment as to sale of common stocks, relied on one beneficiary's unfulfilled assurance that latter would secure from other beneficiaries written consents to the sale, and the trustee sold stocks which thereafter doubled in value, the trustee was liable for reduction in value of the objecting beneficiary's share of the corpus, i. e., reduction consisting of capital gains taxes and expense of stock sales and bond purchases, and for interest on amount of such reduction, but the trustee was not liable for appreciation in value of the stocks after sale or for loss of income on the stocks.

Affirmed on issue of liability but reversed on issue of damages, with directions to trial court.

1. Appeal and Error 🔑1011(1)

If there was any substantial evidence, in proceeding upon objections to trustee's account, or any reasonable inference from evidence to support trial court's finding that trustee did not exercise its independent judgment in selling common stocks, such finding was binding on District Court of Appeal, regardless of conflicts. West's Ann.Civ.Code, § 2261.

2. Trusts 🔑218(1)

Under statute embodying "prudent man rule" in setting forth duty of trustee in connection with investment of trust funds, and under general law applicable to trustees, trustee, even where given broad discretionary power of investment, must exercise its independent discretion and judgment in reference to investment of trust funds. West's Ann.Civ.Code, § 2261 (1).

3. Trusts 🔑325

In proceeding upon objections to trustee's account, evidence sustained trial court's finding that trustee did not exercise its independent judgment in selling common stocks. West's Ann.Civ.Code, § 2261 (1).

4. Trusts 🔑218(1)

Measure of damages for breach of trust was the same, whether there was one breach of trust or three, where trustee did not personally benefit from the breach, did not act fraudulently, and had broad discretionary powers of sale. West's Ann. Civ.Code, § 2261.

5. Trusts ⟹218(1)

Two statutes relating to obligation of trustee who has used or disposed of trust property in unauthorized manner are intended to impose different measure of damages against trustee who breaches trust in bad faith than against one who breaches trust in good faith. West's Ann.Civ.Code, §§ 2237, 2238.

6. Trusts ⟹218(1)

Where trustee has a broad power of sale, right of income beneficiary is simply to insist that trustee shall exercise its independent judgment, and income beneficiary has no legal right to compel retention of any stocks and is not legally hurt by reason of the trustee's failure to keep certain stocks. West's Ann.Civ.Code, §§ 2237, 2238, 2261(1).

7. Trusts ⟹218(1)

In statute imposing, upon trustee who uses or disposes of trust property in unauthorized manner but in good faith, liability only to "make good whatever is lost", words "make good whatever is lost" limit liability to loss to corpus, plus interest, without liability for loss of income and appreciation which would have resulted had disposition not been made. West's Ann. Civ.Code, § 2238.

See publication Words and Phrases, for other judicial constructions and definitions of "Make Good Whatever is Lost".

8. Trusts ⟹218(1)

Where trustee had broad power of sale but, instead of exercising independent judgment as to sale of common stocks, relied on one beneficiary's unfulfilled assurance that latter would secure from other beneficiaries written consents to the sale, and trustee sold stocks which thereafter doubled in value, trustee was liable for reduction in value of objecting beneficiary's share of corpus, i. e., reduction consisting of capital gains taxes and expense of stock sales and bond purchases, and for interest on amount of such reduction, but trustee was not liable for appreciation in value of stocks after sale or for loss of income on stocks. West's Ann.Civ.Code, §§ 2238, 2261(1).

◆

Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, Lawrence C. Baker, San Francisco, Lillick, Geary, Olson, Adams & Charles, Gilbert C. Wheat, San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland, San Francisco, for respondent.

PETERS, Presiding Justice.

The Wells Fargo Bank & Union Trust Co. is the trustee of a trust created by the will of William H. Talbot. In October of 1951 it filed its twentieth account, asking, among other things, for court approval of a transaction in which the trustee had sold many of the common stocks owned by the trust, and bought government bonds. As a result of such sales a large capital gains tax had to be paid, and the income of the trust was reduced. One of the three income beneficiaries[1] filed objections and exceptions to the account, alleging that the sale of the stocks and purchase of the bonds constituted a breach of trust. The trial court so found and ordered the trustee to pay into the trust for the benefit of respondent one-third of all actual and potential losses suffered by the trust as a result of such sales. The trustee appeals.

William H. Talbot died in 1930. By his will he created several trusts, naming appellant as trustee. One such trust bequeathed certain stocks to appellant as trustee with instructions to pay the net income to his three children, Vera Talbot, now Vera Talbot Michelson, William C. Talbot, Sr., and Frederick E. Talbot. Upon the death of any child his or her share of the income was made payable to the issue of such child, and, if none, then to the surviving children of the testator. Upon the death of the last of the three children the trust is to terminate, and the corpus is to be paid to the lawful issue of the deceased children by right of representation. One of the three children of the testator, William C. Talbot, Sr., died in 1941, leaving respondent William C. Talbot, Jr., as his only child. Respondent thus succeeded to his father's one-third share of the trust income. The other two children of the testator were still alive at the time of trial.

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[1] The other two income beneficiaries do not object to the transaction. The objecting beneficiary, William C. Talbot, has been declared incompetent and he appears through the guardians of his estate.

On February 1, 1951, the gross value of the trust estate was $3,033,782.86, of which 49.9 per cent was invested in tax exempt and taxable bonds, 48 per cent in first-rate common stocks, and the remainder in preferred stocks and cash.

Under the terms of the trust the trustee had broad powers of sale and investment. In this connection the trust empowered the trustee: "To invest and reinvest, hold, exchange or sell, convey or dispose of any or all of the property held by it as such Trustee * * * for cash or exchange or upon credit, either at public or private sale, and either with or without notice, and without any application to, order from, or the intervention of any Court, and upon such terms or conditions as said Trustee may think proper, and to collect the income arising therefrom, and generally to manage the same as it may think best, without any order from or confirmation of Court."

The challenged transaction occurred under the following circumstances: On February 1, 1951, Frederick C. Talbot, one of the income beneficiaries, telephoned to Mr. J. A. Ducournau, vice-president in charge of appellant's trust investment and securities analysis department, to talk about the trust portfolio. The substance of this conversation was reduced to a memorandum by Ducournau, and was introduced in evidence. It reads in part: "Mr. Fred Talbot telephoned me in the afternoon of February 1 saying that he had been giving careful consideration to the common stockholdings in this trust and had tabulated a group of them which showed profits and that he was sending the tabulation over to me by Mr. Dudley Heron, who was at that time in his office. Mr. Talbot stated that his memorandum would show that this group of stocks cost $423,000, now had a value of approximately $778,000, and that a profit of $355,000 was indicated at present market prices. Mr. Talbot stated with respect to this list of stocks that he had sold practically all of his personal stockholdings, that he did not like the looks of the market, and thought there was considerable speculation developing in it, and that, therefore, he wished us to sell the list of stocks referred to above. He stated that the sale and reinvestment of the proceeds in Government bonds would result in a small reduction in income to the beneficiaries, but that this small loss in income was more than compensated for by the profits taken. With respect to the proceeds, less taxes, from the sales, Mr. Talbot stated he would like to see them employed in Government bonds with the hope that by the end of one, two, or three years we could repurchase stocks on a more favorable basis."

At the time of this conversation the Dow Jones average for industrial stocks was at its highest peak in twenty years, being at 252. It is presently over 500.

Appellant's officers testified that it is their policy, as a matter of courtesy to beneficiaries, to consider the views and desires of beneficiaries on matters of policy; that on previous occasions they had consulted with Frederick C. Talbot on trust investments; that on previous occasions they had sometimes agreed and sometimes disagreed with such suggestions; that they believed Frederick C. Talbot to be a man of sound business judgment; that in the past Frederick C. Talbot had acted as spokesman for the other two income beneficiaries; that in the past the other income beneficiaries had not taken an active interest in the administration of the trust.

Ducournau, after the telephone call, discussed Frederick C. Talbot's suggestion with Rebele, first vice-president of appellant, and told him that he believed the trustee should comply with the suggestion. Because of the size of the transaction, however, they agreed to defer a decision until they had conferred with Hellman, president of appellant.

On the evening of February 1st, Ducournau again talked with Frederick C. Talbot in order to determine if he was authorized to speak on behalf of the other two income beneficiaries. Frederick replied that he had spoken for them in the past, and that appellant had, where it agreed with him, followed such suggestions.

The memorandum, prepared by Ducournau, then describes what happened on February 2, 1951:

> "On the morning of February 2, prior to Mr. I. W. Hellman's arrival [prior to 9 a. m.]; Mr. Rebele raised the question of whether or not we should ask the parties at interest for a letter confirming our action in this matter, it being assumed that Mr. Talbot was speaking for the other parties at interest and the extent to which such a letter would protect us. This question was raised because of the fact that the sale of the stocks on the list would result in a reduction in common stockholdings beyond that which we were going to in other accounts (and we, of course, had in mind the other Talbot accounts). I spoke to Mr. Grady concerning the question raised, and he made a study of the trust agreement, beneficiaries, remaindermen, etc. We then joined Mr. Rebele and discussed this matter with Mr. I. W. Hellman.
>
> "It was concluded that I would explain to Mr. Talbot that in view of the size of this transaction and the fact that it would in effect be a reduction in the common stockholdings beyond what we were doing in other accounts, we would have to have a letter from the parties at interest confirming our action; however, we would be willing to execute the orders immediately on his assurance that the parties at interest would concur in this action and we were willing to rely upon his statement that they would do so. In connection with the foregoing, we would have to have letters confirming our action from Mrs. Vera Michelson, Mr. Talbot himself, and Mr. William C. Talbot, Jr.
>
> "I left the conference, telephoned Mr. Talbot to the foregoing effect, and he stated that it was inconceivable that any of the parties at interest would object to this program and that he was so convinced of the fact that he was perfectly willing for us to execute the orders in accordance with the assumption above. However, he stated he would immediately begin contacting the parties at interest explaining what the program involved."

It is conceded that, in the absence of the assurance by Frederick C. Talbot that the other two beneficiaries would assent to the transaction, the appellant would not have sold the stocks. It is also admitted that at the times here involved the appellant's general investment policy was to keep common stock holdings to at least 40 to 50 per cent of the market value of the trusts, although the assets of some of its trusts were invested entirely, or almost entirely, in bonds.

On February 2nd and 3rd, the appellant, without having received the approval of William C. Talbot, sold, at market, common stocks for $803,264.88. These stocks had cost the trusts $417,596.97, so that a profit was realized of $385,667.91. Federal and state taxes amounted to $104,386.02 and costs of the sales were $4,839.53. Thus, the balance left after taxes and expenses was $695,606. This sum the trustee invested in tax exempt municipal bonds.

After completion of the sales, because of the taxes and expenses resulting from the sales, the value of the corpus of the trust was reduced so that bonds, both taxable and non-taxable, now amounted to 75.4 per cent, common stocks, 22.3 per cent. The balance was in cash or preferred stocks.

In 1950 the total income of the trust from both taxable and non-taxable items was $103,434.39, which meant a return of 3.4 per cent. After the sales, the income in 1951 was $79,068.01 or a 2.6 per cent return on the corpus. Had the sales not been consummated the return would have been 3.56 per cent, but it should be mentioned that after the sales a greater portion of the income was tax exempt. The gross reduction in respondent's share of the income in 1951 caused by the sale was $4,873.75, which, after taxes, amounted to $3,200.

Appellant, at the time of the sales, had general knowledge of the three income beneficiaries' tax brackets and sources of income, but not specific knowledge of their 1950 income because the transactions occurred before the 1950 tax returns had been prepared. Appellant also knew the general status of the stock market, and knew, of course, how much the stocks in this trust had cost.

There is one other matter to which reference should be made. On the afternoon of February 2nd, Frederick C. Talbot advised Ducournau that he had secured the telephonic consent of the other two income beneficiaries to the transaction. Appellant, thereafter, requested written consents. These were given by Frederick C. Talbot and Vera Talbot Michelson. Respondent, however, refused to give such written consent, contending that he had not been informed of all the factors involved. Appellant has expressly abandoned the defense that respondent's telephonic consent given to Frederick C. Talbot estops him from objecting to appellant's account, admitting that there is a conflict in the evidence on the issue.

The trial judge, the Hon. Edmund Scott, rendered a memorandum decision in which he pointed out that the duties of a trustee in such case are set forth in section 2261 of the Civil Code. He then stated:

> "The first requirement of that Section is that the Trustee exercise its judgment.
>
> "We find that the Trustee did not exercise its judgment, but instead accepted the judgment of Fred Talbot.
>
> "In our opinion, the decision to buy such an unbalanced amount of municipals, in the hope that in the future they could be sold and the proceeds of the sales, or the proceeds of redemption, could be used to buy back the common stocks sold was contrary to the requirement of permanency, as set forth in said section, and constitutes speculation which is frowned upon by said Section.
>
> "We hold that, with such a great paper profit on the common stocks, there was no prudent reason, under the circumstances then prevailing, to cause concern over the safety of the capital invested in such stocks. The record shows a real loss in income, even after adjustment for income tax savings.
>
> "We hold that the Trustee violated the prudent man rule."

Thus, the trial court was of the opinion, and subsequently found, that the trustee had breached the trust in three respects: (1) It had not exercised its independent judgment in making the sales; (2) that the transaction was speculative; and (3) that the transaction was imprudent.

The findings, conclusions and judgment spell these views out at length. They are to the effect that the trustee breached the trust in that it "did not exercise its independent judgment, and its actions were not the result of the exercise by the trustee of prudence, prudent thinking, discretion or intelligence, * * * Instead the trustee accepted and acted upon the advice and judgment of Frederick C. Talbot that the trustee should engage in said transactions.

"* * * and effected said transactions in reliance upon the expectation that all the beneficiaries would confirm its action" and would not have entered into said transaction in the absence of the expected confirmation and assurance.

The court also found that "the trustee did not exercise the judgment or care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital" and specifically found that the stocks were sold for speculative purposes without a prudent reason therefor.

The trial court declared that by reason of these breaches of trust the respondent was entitled to be placed in the same position as income beneficiary and contingent remainderman that he would have been in had the questioned sales not been had.

To accomplish this the trial court ordered:

1. That appellant restore to the trust the sum of $36,408.51, which is one-third of the capital gains taxes and expenses of the sales and purchases, and that appellant pay to respondent and his successors, so long as they remain income beneficiaries, such a portion of the net income of the trust as shall correspond to the proportion that $36,408.51 bears to the value of the trust after the challenged sales, plus the $36.408.51. This, however, is to be charged against respondent in the determination of the right to reimbursement for loss of income resulting from the transaction.

2. That appellant pay into the trust for disbursement to respondent for loss of income up to August 27, 1951 (the closing date of the account) $4,873.75, plus interest, and the court reserved the question of determining any future loss of income for later periods until the hearing of subsequent accounts.

3. That upon termination of the trust appellant pay to respondent or his successors in interest a portion of the corpus equal to the proportion that $36,408.51 bears to the value of the trust estate after the sales and purchases here involved. The court reserved the determination of any further loss to respondent as remainderman until the termination of the trust, due allowance to be made for the restoration of the $36,408.51.

The trial court then entered its decree settling the account and surcharging the trustee. The trustee appeals.

In this state the duty of a trustee in connection with the investment of trust funds is set forth in section 2261, subd. (1), of the Civil Code, which reads as follows:

> "(1) In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire for their own account."

[1, 2] This statute, enacted in 1943 to replace the old statutory list of trust investments, embodies the so-called "prudent man rule" first adopted by the Massachusetts courts, and later by many other states. There can be no doubt that, under this section, and pursuant to general law applicable to trustees, the trustee, even where given broad discretionary power of investment, must exercise its independent discretion and judgment in reference to the investment of trust funds. No serious contention is made to the contrary. The trial court has found that in making the sales and purchases here involved the trustee did not exercise its independent judgment but acted upon the advice and judgment of Frederick C. Talbot, and upon his assurance that the other income beneficiaries would consent. The question presented is whether that finding is supported by any substantial evidence or by any reasonable inference therefrom. If there is any substantial evidence, or any reasonable inference from the evidence that supports this finding, it is binding on us, regardless of conflicts.

Appellant vigorously argues that the only reasonable inference from the evidence is that it did exercise an independent judgment in these transactions. It starts its argument with the general premise, conceded by respondent, that a trustee may seek the advice of others, including the advice of beneficiaries, as long as such trustee exercises its own independent judgment and makes the final decision. It is, of course, a matter of common prudence for a trustee to seek expert advice on investments, and certainly a matter of prudence, common sense and fairness to consult with interested beneficiaries.

Appellant next argues that since it had the legal and moral right to confer with Frederick C. Talbot, and since in the past it had consulted Frederick C. Talbot who acted for all beneficiaries, and sometimes followed his suggestions and sometimes not, that the only legitimate inference is that appellant did exercise its own discretion and judgment. The contrary inference, found by the trial court, is, so it is contended, unsupported as a matter of law.

Appellant points out that the officers of appellant testified that they exercised an independent judgment. Their testimony is to the effect that they found Frederick C. Talbot's suggestions meritorious because of special circumstances applicable to this trust—the size of the trust, the amount of capital gain, the outside income of the beneficiaries, the conservative nature of the transaction, etc. They testified that they entered into this transaction not merely because Frederick C. Talbot suggested it, but because of these special circumstances, and would not have sold the common stocks had they thought it was imprudent.

From these facts it is argued that the inference that appellant did not exercise its independent judgment is unreasonable and totally unsupported. It is contended that the evidence that they would not have entered into the deal without the assurance that all the beneficiaries would consent does not support such inference, and, even if it did, such inference was rebutted as a matter of law by the evidence to which reference has been made. The only reasonable inference, so it is argued, is that the trustee consulted with Frederick C. Talbot and desired the consents simply as a matter of courtesy and in keeping with the general policy of the trustee to consult with the beneficiaries as to their desires in reference to investments. Appellant argues that the mere fact that the sales were made almost immediately after they were suggested by Frederick C. Talbot is no evidence that the trustee was following Talbot's desires and not exercising an independent judgment, because as trustee they knew the facts in reference to the assets of the trust, knew the capital gain that would be realized, and the financial circumstances of the beneficiaries.

[3] There can be no doubt that the evidence referred to by appellant would support a finding that appellant in fact did exercise an independent judgment and discretion. But the trial court has found to the contrary. The question is not whether a finding that an independent judgment was exercised would be supported, but whether the contrary finding is supported by any reasonable interpretation of the evidence. We think it is.

Mr. Ducournau testified that, as a general rule, in most of the other trusts handled by the bank, it was not reducing the common stock holdings below 50 per cent. There were exceptions, but in the absence of "special circumstances" this was the general rule. When asked "Now, the only special circumstances in this trust was that one of the beneficiaries asked you to make the sale, wasn't it?" He replied: "That is the only special circumstance."

In addition, the memorandum prepared by Mr. Ducournau shows that the transaction was proposed to appellant on February 1st by Frederick C. Talbot. The memorandum shows that, although thereafter the transaction was discussed by appellant's officers, no discussion at all was had as to the merits of the proposal. The officers were simply interested in the question of whether the trustee would be protected by a letter of consent from the three beneficiaries. Admittedly, the officers would not have approved the proposal without the assurance from Frederick Talbot that the other two income beneficiaries would consent.

It is worthy of note that the sales were made on February 2nd and 3rd. Prior to these sales no written analysis as to the effect of these transactions on the trust was made. Such an analysis was not made until February 21, 1951, some eighteen days after the sales had been consummated.

It is also significant that during this general period the trustee took no similar action in reducing the proportion of common stock holdings of any other trust under its control, and that, prior to February 1, 1951, the Talbot trust had never been treated any differently than the other trusts handled by the bank insofar as the proportionate holding of common stocks was concerned.

These various facts and circumstances offer substantial evidence from which the reasonable inference can be drawn that the trustee did not exercise an independent judgment or discretion in these transactions, but simply followed the suggestions and desires of Frederick C. Talbot upon his assurance that the other beneficiaries would consent. This was a breach of the trustee's duty. This inference was not rebutted, as a matter of law, by the testimony of the officers that they did exercise an independent judgment. The trial judge saw and heard these witnesses. He knew, of course, that these witnesses, as officers of appellant, had a vital interest in the outcome of the case. He chose not to believe this portion of their testimony. He had the power so to do. We cannot say, as a matter of law, that he was wrong. This portion of the case involves nothing more than the ordinary case where the respondent produces evidence that supports a reasonable inference. The appellant produces evidence that would support a contrary inference and produces direct evidence of interested witnesses contrary to the inference. The trial judge disbelieves the testimony of the interested witnesses and finds in accord with the adverse inference. An appellate court, under such circumstances, is without lawful power to disturb the finding.

[4] We conclude that the finding that appellant committed a breach of trust in not exercising its own judgment and discretion in making the sales is supported by the evidence. This conclusion makes it unnecessary to discuss the sufficiency of the evidence to support the findings that the sales were speculative and imprudent, and so in violation of the trustee's duty. The measure of damages for one breach of trust is not any different from the measure of damages for three breaches of trust where, as here, the trustee did not personally benefit from the breach, was not fraudulent, and had broad discretionary powers of sale.

We turn now to the really difficult issue in this case—the proper measure of damages. The trial court decreed that respondent should be "made whole," and to accomplish this ordered:

1. That the trustee restore to the trust corpus $36,408.51, which is one-third of the capital gains taxes and expenses incurred by reason of the sales, and further directed that respondent was to receive upon distribution at the termination of the trust "a proportion of the corpus then available for distribution equal to the proportion that $36,408.51 bears to $2,985,028.04."

2. That appellant pay to respondent for loss of income up to August 27, 1951, the sum of $4,873.75, plus interest. The court reserved the determination of the question of the diminution of income for any future period until the hearing of future accounts.

3. That after the $36,408.51 has been restored to the trust, until the termination of the trust respondent receive as income beneficiary a portion of the income equal to the proportion that $36,408.51 bears to $2,948,619.53, but such additional income to be charged against respondent and credited against the payments made upon future determination of loss of income as shown on future accountings.

4. That the power to determine any further loss to respondent is reserved until the determination of the trust, due allowance

to be made for the restoration of the $36,408.51. Under this allowance the court reserved the power to determine and allow as further damages the amount of any appreciation in the value of the stock sold between the date of sale and the termination of the trust. The appreciable nature of this portion of the award is indicated by the fact that when the stocks were sold the Dow Jones average for industrial stocks was 252, while presently it is over 500. The stocks were sold for over $803,000. One-third of that is over $267,666. Since the stocks to date have approximately doubled in value, if the trust were to terminate right now the trustee under the award would be required to restore over quarter of a million dollars.

The avowed purpose of this decree as set forth in the judgment was to assure that respondent "should be made whole in connection with the said transactions and as between said objector [the respondent] and trustee the said objector should and shall be placed and maintained in the same position, as beneficiary and as remainderman, severally and respectively, as if said transactions had not been entered into." Thus, the court decreed, in effect, specific reparations.

At the outset of the consideration of this substantial award it must constantly be kept in mind that appellant, as trustee, was granted by the trust, the power "To invest and reinvest, hold, exchange or sell, convey or dispose of any or all of the property held by it as such Trustee" with or without notice and without prior court approval "upon such terms or conditions as said Trustee may think proper." In other words, had the trustee exercised an independent judgment in good faith it had the power to do precisely what it did do. As already held, the finding that the trustee did not exercise an independent judgment is supported. But by the decree, unless the trustee goes out in the market and buys back one-third of the kinds of stock sold by it, its power of sale, granted by the trust, is forever nullified over this portion of the trust estate. No one contends that the trustee made the sales in bad faith or that it made a profit from the deal. The question is, what is the measure of damages under such circumstances?

[5] We turn first to the California statutory provisions. The two pertinent code sections are sections 2237 and 2238 of the Civil Code. Section 2237 sets forth the measure of damages to be assessed against a trustee who uses trust property for his own profit, while section 2238 refers to the damages to be assessed against a trustee for a breach of trust committed in good faith. The two sections provide:

Section 2237 of the Civil Code: "A trustee who uses or disposes of the trust property * * * [for his own profit], may, at the option of the beneficiary, *be required to account for all profits so made, or to pay the value of its use,* and, if he has disposed thereof, *to replace it, with its fruits,* or to account for its proceeds, with interest." (Italics added.)

Section 2238 of the Civil Code: "A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to *make good whatever is lost* to the beneficiary by his error." (Italics added.)

Obviously, the two sections intended to impose a different measure of damages against a trustee who breaches the trust in bad faith and one who breaches the trust in good faith. But just what this difference is, is rather difficult to determine from the language used. It is appellant's position that under section 2238, where the breach is in good faith, the trustee is liable as a guarantor of the *res,* the damages being computable once and for all as of the time of the improper act. According to appellant, in such a case there is no liability for any future losses of profits, appreciation in the value of the assets sold, or earnings therefrom. Respondent, on the other hand, contends that under section 2238 the trustee is liable for the loss of all future earnings and future appreciation in value as well as for the loss incurred by the corpus at the time of the sale.

The difficulty comes in interpreting the language "make good whatever is lost" appearing in section 2238. Section 2237, dealing with breaches of trust involving self-benefit, expressly provides that the beneficiary may recover at his option all lost profits or the proceeds with interest, and, if possible, specific reparation of the trust property. There is no such language used in section 2238, which provides simply that the trustee must "make good whatever is lost." The real question is, at what time should the damages be fixed that the trustee must "make good"? It is quite probable that the Legislature left section 2238 intentionally broad in scope with the intent of allowing a flexible measure of damages, so that the court in each case could fix the proper measure of damages to fit the facts. Under the language used, specific reparations could be decreed, or the court could hold that the trustee has made good the loss, if that loss is fixed as of the day of the default. On the other hand, even though the breach is one made in good faith, it may constitute a breach of loyalty owed by the trustee, or the trustee under the trust may have no power of sale. In such cases the trier of the fact should have some discretion to fix the damages in accordance with the nature and degree of the breach. Where the trust *res* is held by the trustee without power of sale, and the trustee sells, obviously, the breach, morally, is much more severe than where a broad power of sale is granted. Thus, what constitutes making "good" the loss may vary according to the circumstances.

[6] This seems to be a reasonable interpretation because, where a broad power of sale exists, the income beneficiary is not legally hurt by reason of the trustee failing to keep certain stocks. That is so because, obviously, in such a case, the income beneficiary has no legal right to compel the retention of any stocks. The right of the income beneficiary is simply to insist that the trustee shall exercise its independent judgment. That right is fundamentally different than the right, where no power of sale exists, to insist on the retention of specific stocks. The measure of damages in the two cases, logically, should be different.

The general law generally bears out these concepts. A case cited by appellant is directly in point. In Hopkins v. Loeber, 332 Ill.App. 140, 74 N.E.2d 39, two trustees wrongfully delegated to a third trustee the power to sell the trust assets, which he did at an inadequate price. The two consenting trustees did not personally benefit from the sale. As to these two trustees the court held, 74 N.E.2d at page 41: "The trust agreement, under which the defendants acted as trustees, gave the defendants broad powers of sale and disposition of the securities in the trust. Where a trustee wrongfully exercises the power conferred upon him by the trust agreement, but is not shown to have personally benefited by his breach of trust or to be guilty of fraud in connection therewith, the authorities are clear that his measure of liability, if any, for the breach of trust, would be the *loss, if any, in value of the securities at the time of the breach of trust, and not a value sought to be established some five or six years later.*" (Italics added.)

The court went on to hold that the trustee who had personally benefited by the transaction was required to respond for the value of the securities that would, had the breach not occurred, inured to the benefit of the trust, measured at the time of suit. This distinction in the rule of damages is reasonable and fair.

Both parties rely on various parts of the Restatement of Trusts. Appellant points out that Section 205, Comment "d," which refers to the measure of damages for breach of trust in selling trust assets at an inadequate price, reads as follows: "If the trustee is authorized to sell trust property, but in breach of trust he sells it for less than he should receive, he is liable for the value of the property at the time of the sale less the amount which he received. If the breach of trust consists only in selling it for too little, he is not chargeable with the amount of any subsequent increase in value of the property under the rule stated in Clause (c), as he would be if he were not authorized to sell the property (see § 208)."

Appellant argues that the breach of trust in failing to exercise an independent judgment in exercising a conferred power of sale is analogous to a trustee selling at an inadequate price, and that the measure of damages should be so limited. There would seem to be no difference, in principle, between a breach, in good faith, by selling at an inadequate price, and one where the trustee failed to exercise an independent judgment. The degree of immorality in the two situations would seem to be equal, and the same rule of damages should apply.

Respondent, in contending for the widest application of the rule of damages, relies upon the code commissioner's notes to the original code section which cites the case of O'Brien v. O'Brien (Ireland, 1828), 1 Malloy 533, under the original section 2238. There the trustee apparently advanced to a life beneficiary certain stock in the corpus of the trust as a loan. There was no fraud or self-dealing in the transaction. The court held that if there had been self-dealing, that the beneficiaries, at their option, would have been entitled "to have the produce of the stock with interest, now invested in stock at the price of the day, or to have the stock replaced." But where there was no corrupt motive the trustee "must replace the fund as it stood in stock, but there is no option given in that case." The case is, of course, an old one, and its precise holding is obscure. Whether a power of sale or transfer existed in the case, for example, does not appear. We find nothing very helpful in the O'Brien case.

The Restatement of Trusts is by no means clear on the point under discussion.

Section 205 is the section entitled "Liability in Case of Breach of Trust." It reads as follows:

> "If the trustee commits a breach of trust, he is chargeable with
>
> "(a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
>
> "(b) any profit made by him through the breach of trust; or
>
> "(c) *any profit which would have accrued to the trust estate if there had been no breach of trust.*" (Italics added.)

There are several Comments to the section worth quoting.

Comment "a" reads, in part, as follows: "* * * These three types of remedies are not always distinct and are not always all of them available. The situations under which the various remedies are available are considered in the Comments to the three clauses of this Section."

The Comment on Clause (c) entitled "h," reads as follows: "If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust. This rule is applicable where the trustee in breach of trust sells or otherwise disposes of trust property which it was his duty to retain (see § 208), and where the trustee in breach of trust fails to purchase property which it was his duty to purchase for the trust (see § 211). This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust (see § 207)."

Comment "h" apparently, by its express terms, limits the liability to account for loss of profits to situations where the trustee had a duty to retain the trust corpus or a duty to purchase specific assets. That, of course, is not this case.

Section 206 of the Restatement refers to liability where there has been a breach of the duty of loyalty. It provides that, in such a case, the trustee may be held for the diminution in value of the corpus, for any profits made by him, or for the profit that should have accrued to the trust. Section 207 merely states that interest runs from the date of breach. Section 208 is entitled: "Liability for Breach of Trust by Selling Trust Property." It reads:

> "(1) If the trustee sells trust property *which it is his duty to retain*, the beneficiary can

> "(a) charge him with its value at the time of such sale, with interest thereon; or
>
> "(b) charge him with its *value at the time of the decree, with the income which would have accrued thereon if he had not sold it, or require him to make specific reparation* if this is reasonable under the circumstances; or
>
> "(c) require him to account for the proceeds of the sale." (Italics added.)

Comment "b" under this section sets forth the limitations intended in its application. It reads: *"This Section deals only with the situation where the trustee is under a duty to retain trust property throughout and has no authority to sell* at any price, at any time, or under any conditions. *It does not include the situation where the trustee is authorized to sell, but commits a breach of trust by selling at an improper price or otherwise."* (Italics added.)

It is a fair interpretation of Comment "h" to section 205, of section 206, and of section 208, together with the quoted Comments, that the authors of the Restatement intended to limit the liability for lost profits to cases either where there was a breach of the duty of loyalty, or where there was a breach of the duty to retain or to acquire specific assets.

Respondent, in apparent recognition of this limitation in the Restatement, argues that in the instant case there was a duty to retain the stock until there was an exercise of independent judgment on the part of the trustee. Therefore, so it is contended, there was a breach of section 208. This is a play on words. The breach here was not of the duty to retain the stocks, but of the duty to exercise an independent judgment. The two duties are obviously separate and distinct.

[7] Considering the difference in language between sections 2237 and 2238 of the Civil Code, considering the Restatement provisions above quoted, and giving proper weight to the reasoning in the Illinois case of Hopkins v. Loeber, 332 Ill.App. 140, 74 N.E.2d 39, we are of the opinion that, on principle and as a matter of statutory interpretation, the words "make good whatever is lost" in section 2238 of the Civil Code should be interpreted to mean that for a breach of the type here involved liability is limited to the loss to the corpus, plus interest. Stated another way, in such a situation, there is no liability for loss of all income and appreciation that would have resulted had the sale not been made. Certainly, on principle, this is a sufficient burden to place on the trustee in such a situation. To require a trustee who acts in good faith to be a guarantor of all profits that would have been made would be to place such a trustee in the same position as the defaulting trustee who breaches the duty of loyalty. In the latter situation, where there is fraud or self-dealing, or where there is no power to sell, there is moral turpitude in a very real sense, which is not involved in the type of breach here under consideration.

[8] As applied to the present case these conclusions mean that appellant is under a duty to restore to the corpus for the benefit of respondent the sum of $36,408.51, and to pay interest thereon at the legal rate from the date of breach to the date of restoration. This is the depreciation in the value of the corpus caused by the breach. The other damages provided for in the judgment were erroneously assessed.

The judgment is affirmed on the issue of liability but reversed on the issue of damages, and the trial court is directed to modify its findings, conclusions and judgment on the issue of damages in accordance with the views herein expressed. Each side to bear his or its costs on this appeal.

BRAY, J., and FRED B. WOOD, JJ., concur.

141 Cal.App.2d 515

James P. ATCHISON and James C. Atchison, Plaintiffs and Respondents,

v.

Lulu B. Stepp McGEE, Defendant and Appellant.

Civ. 8836.

District Court of Appeal, Third District, California.

May 14, 1956.

Quiet title action wherein plaintiffs moved for summary judgment. The Superior Court, Sacramento County, Jay L. Henry, J., granted the motion, and defendant appealed. The District Court of Appeal, Schottky, J., held that if party against whom summary judgment motion is made disputes statements in affidavits of moving party, he must by counter-affidavit show that there are issues of fact to be determined in action, and he cannot rely upon pleadings already filed.

Affirmed.

1. Judgment ⚷178

Summary judgment procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in determination of issues of fact.

2. Judgment ⚷185.2(6)

Affidavits of party moving for summary judgment should be strictly construed and those of his opponent liberally construed.

3. Judgment ⚷185(4)

Affiant as one of plaintiffs in quiet title action, could testify competently that deed to plaintiffs from common grantor had been executed and delivered; and it was not necessary for original deeds, or certified copies thereof, to be attached to affidavit supporting plaintiffs' motion for summary judgment predicated upon priority of grant.

4. Deeds ⚷192

Duly recorded deed is presumed sufficient to convey title.

5. Judgment ⚷185.2(7)

All facts alleged in affidavit of parties moving for summary judgment must be considered as true unless controverted.

6. Deeds ⚷8

If deed was valid, subsequent deed to same property from same grantor would be of no effect.

7. Judgment ⚷185.2(9)

If party against whom summary judgment motion is made disputes statements in affidavits of moving party, he must by counter-affidavit show that there are issues of fact to be determined in action, and he cannot rely upon pleadings already filed. West's Ann.Code Civ.Proc. § 437c.

8. Judgment ⚷187

In granting motion for, and entering, summary judgment, it is of little importance whether or not trial court makes formal order striking answer.

◆

Douglas A. Pease, San Francisco, for appellant.

Colley & Sakuma, Sacramento, for respondents.

SCHOTTKY, Justice.

Plaintiffs commenced an action against defendant to quiet title to certain real property in Sacramento County. Defendant filed an answer denying the material allegations of plaintiffs' complaint and alleging that she was the true owner of said real property. Thereafter plaintiffs filed a motion for summary judgment based upon the affidavit of James P. Atchison, one of the plaintiffs. Defendant filed no counter-affidavit, and, following a hearing on the motion at which both plaintiffs and defendant were represented by counsel, the court made an order granting said motion, and summary judgment was entered in favor of plaintiffs.

Defendant has appealed from the judgment, and her first and principal contention is that the affidavit filed by plaintiffs in support of their motion was insufficient as a matter of law to support the order granting a summary judgment.

Defendant quotes from section 437c of the Code of Civil Procedure as follows:

> "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto."

The affidavit upon which plaintiffs' motion was based set forth that on January 17, 1950, one Sanauncie Harris was the owner of the real property in controversy; that on said date she "made, executed and delivered a Grant Deed" of said property to plaintiffs and Georgia Atchison as joint tenants and that said deed was recorded on January 18, 1950; that since said deed was recorded both Sanauncie Harris and Georgia Atchison have died and that plaintiffs are the sole owners of the said property; that on May 25, 1951, defendant caused to be recorded a document dated August 17, 1950, purporting to be a gift deed of said property from Sanauncie Harris to defendant; that plaintiffs have been in possession of said property since January 17, 1950, and that defendant never has been in possession of it nor has she paid any taxes on it; that such facts are within the "personal knowledge of affiant, and if called as a witness, affiant will testify *completely* to the same." (Italics ours.)

As hereinbefore stated, defendant filed no counter-affidavit.

In Cone v. Union Oil Co., 129 Cal.App.2d 558, at pages 562, 563, 277 P.2d 464, at page 467, the court said:

> "Since plaintiff failed to file any affidavit in opposition to the affidavit filed on behalf of the defendant, the court was entitled to accept as true the facts therein stated, which were within the personal knowledge of the affiant and to which the affiant could competently testify. Coyne v. Krempels, supra, 36 Cal.2d [257] at pages 261–262, 223 P.2d 244; see Holland v. Lansdowne-Moody Co., Tex.Civ.App., 269 S.W.2d 478, 481. Plaintiff urges, however, that the pleadings herein raise particular issues of fact which preclude the granting of a motion for summary judgment. Plaintiff has fallen into the error of relying on her complaint as a means of disputing the affidavit filed on behalf of defendant. The fallacy of this position is demonstrated in Coyne v. Krempels, supra, and Hardware Mut. Ins. Co. v. Valentine, 119 Cal.App.2d 125, 129, 259 P.2d 70, which lay down the rule that the failure to file counter-affidavits cannot be remedied by resort to the pleadings. As pointed out in the careful analysis of this question in the Coyne case, the sufficiency of the allegations of a complaint do not determine the motion for a summary judgment. Rather, it must be determined from the affidavits whether there exists a genuine issue as to any material fact. Often there is no genuine issue of fact, although such an issue is raised by the formal pleadings. Absent a genuine issue of fact as disclosed by the affidavits, a party is not entitled to proceed to trial and the court, applying the law to the uncontroverted material facts, may render a summary judgment."

Defendant contends that the affidavit filed by plaintiffs was insufficient because no copies of the documents relied upon were attached to the affidavit and that therefore, affiant could not competently testify to the facts, nor could such facts be within his personal knowledge as required by said section 437c. She disputes plaintiffs' statement that the writing of the word "completely" in the affidavit was a clerical error, it being the intention to write the word "competently" as provided in the cited code section. We think it is clear that plaintiffs intended to use the word "competently", but in any event the word "completely" would serve the same purpose because it is difficult to understand how a witness could testify "completely" without testifying "competently". We shall, therefore, discuss the sufficiency of plaintiffs' affidavit upon the assumption that the affiant has stated that he could testify competently to the facts stated in the affidavit.

[1, 2] As stated in Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, at page 556, 122 P.2d 264, at page 265, in discussing the procedure for summary judgment under section 437c:

> "The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact. See Walsh v. Walsh, supra [18 Cal.2d 439, 116 P.2d 62].
>
> "For these reasons it may further be said that the affidavits of the moving party, the plaintiff in this case, should be strictly construed and those of his opponent liberally construed. McComsey v. Leaf, supra [36 Cal. App.2d 132, 97 P.2d 242]; Fuller v. General Accident Fire & Life Assur. Corp., Ltd., of Perth, Scotland, 224 Wis. 603, 272 N.W. 839; see 13 So. Cal.Law Rev. 523."

[3-6] The affidavit filed by plaintiffs, as hereinbefore detailed, states that Sanauncie Harris was the owner of the property and on January 18, 1950, executed and delivered a grant deed thereof to plaintiffs and that on May 25, 1951, defendant caused to be recorded a deed dated August 17, 1950, purporting to be a gift deed of said property from the same grantor, Sanauncie Harris, to defendant. Affiant, as one of the plaintiffs, could certainly testify competently that the deed of January 18, 1950, was executed and delivered. It was not necessary for the original deeds or certified copies thereof to be attached to the affidavit for their mere presence would not prove execution and delivery. Whether they were delivered was a question of fact about which affiant could testify. When he testified that a deed existed in which plaintiffs were grantees and one Sanauncie Harris was grantor, and that such deed was duly recorded, the presumption of sufficiency of the deed to convey title arose which was never rebutted. All facts alleged in the affidavit must be considered as true unless they are controverted. If the deed of January 17, 1950, to plaintiffs was valid, the subsequent deed of the same property from the same grantor must be of no effect.

[7] Since defendant filed no counter-affidavit, the court was entitled to accept as true the allegations of plaintiffs' affidavit and could reach no other conclusion but that defendant either did not dispute the truth of the statements in said affidavit or could not controvert them. If defendant disputed said statements she could easily have filed a counter-affidavit either denying them or setting up other facts as a defense against the action. While the procedure under section 437c is a drastic one, it was nevertheless enacted by the Legislature for the purpose of ascertaining whether there were genuine issues as to material facts, and thus to prevent in many cases long delay in determining litigation. If a party against whom such a motion is made disputes any statements in the affidavit of the moving party, he must by counter-affidavit show that there are issues of fact to be determined in the action. He cannot rely upon pleadings already filed, or there would be nothing accomplished by the passage of said section 437c.

[8] Appellant also contends that no proper order was ever made or entered by the court to support or authorize the summary judgment. Appellant argues that the trial court should have first granted the plaintiffs' motion by ordering the defendant's answer stricken; thereafter, it could properly make and enter its judgment in favor of plaintiffs. She argues that a failure to do so leaves the judgment wholly without any support in the record and the case is still at issue as demonstrated by the allegations of the complaint and the denials of the answer.

There is no merit in this contention. Defendant's appeal is from the judgment, and in granting the motion for summary judgment and entering a summary judgment it is of little importance whether or not the court made a formal order striking the answer.

In view of the foregoing, we conclude that the trial court correctly applied the law to the uncontroverted facts before it and properly granted plaintiffs' motion for a summary judgment.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

141 Cal.App.2d 416

In the Matter of the ESTATE of Bessie P. Howard PATMORE, also known as Bessie P. Howard and Mrs. Frank Patmore, Deceased.

Frank T. PATMORE, Contestant and Appellant,

v.

Hattie H. MacKECHNIE, Petitioner and Respondent.

Civ. 21518.

District Court of Appeal, Second District, Division 3, California.

May 10, 1956.

Hearing Denied July 5, 1956.

Proceeding in the matter of the estate of decedent. The Superior Court of Los Angeles County, Otho G. Lord, J. pro tem., entered an order settling final account of executrix, a final decree of distribution, and an order denying renewal of family allowance, and contestant appealed. The District Court of Appeal, Vallée, J., held that where estate of testatrix, who was resident of California at her death, was separate property which consisted of real and personal property in California and Kansas, and domiciliary administration was begun in California and ancillary administration in Kansas, and testatrix' surviving husband filed election to take against the will in the Kansas proceeding, decree of distribution in California proceeding prior to determination of effectiveness of husband's election and closing of administration in Kansas proceeding was premature.

Order in so far as it denied renewal of family allowance affirmed, and order settling final account and final decree of distribution reversed.

1. Property 🔑6

Realty is exclusively subject to the laws of the state within which it is situated.

2. Wills 🔑778

Election with respect to realty is governed by law of state where land is located.

3. Wills 🔑783

Where testatrix was resident of California at her death, leaving surviving her husband and her sister, and her estate was separate property which consisted of real and personal property in California and Kansas, the question whether husband had right to take Kansas realty against the will was required to be determined by the law of Kansas. G.S.1949 Kan. 59–505, 59–603, 59–802, 59–2233.

4. Wills 🔑783

Under Kansas law, widower had right to elect whether he would take under deceased wife's will or take what he is entitled to by the Kansas law of intestate's succession. G.S.1949 Kan. 59–603, 59–2233.

5. Wills 🔑800

Acceptance by surviving spouse of provisions of will, or an election to take under will in state of decedent's domicile, is binding elsewhere in absence of statute to be contrary, and such spouse may not elsewhere claim rights against the will.

6. Wills 🔑800

One who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will.

7. Wills 🔑783

In California a husband has no interest in separate property of wife, and a widower is not put to an election by bequest or devise to him of the separate property of the wife unless the will is so drawn as to make an election necessary.

8. Wills 🔑717

Any person may refuse to accept a provision for him in a will so long as rights of third parties are not involved, and a widower may do so as to separate property devised to him by deceased wife.

9. Wills ⚷717

Renunciation of a foreign will in a foreign jurisdiction is given effect by comity in state where renouncing party had his domicile.

10. Executors and Administrators ⚷296

Where estate of testatrix, who was resident of California at her death, was separate property which consisted of real and personal property in California and Kansas, and domiciliary administration was begun in California and ancillary administration in Kansas, and testatrix' surviving husband filed election to take against the will in the Kansas proceeding, decree of distribution in the California proceeding prior to determination of effectiveness of husband's election and closing of administration in Kansas proceeding was premature.

11. Executors and Administrators ⚷519(1)

Generally, surplus personal assets in an ancillary administration, i. e., personal assets not required for the payment of claims and expenses of administration lawfully filed and allowed in the ancillary administration, should be remitted to the domicile for final settlement and distribution of the estate.

12. Executors and Administrators ⚷465

A domiciliary representative into whose possession in the domiciliary jurisdiction foreign assets come must account for them in the domiciliary administration.

13. Executors and Administrators ⚷296

Where estate of testatrix, who was resident of California at her death, was separate property which consisted of real and personal property in California and Kansas, and domiciliary administration was begun in California and ancillary administration in Kansas, if decree of distribution in California proceedings were permitted prior to closing of administration in Kansas proceeding, there would be no one to receive residue of surplus personal assets transmitted to the domiciliary in event the Kansas court in exercise of its discretion ordered it. G.S.1949 Kan. 59–802.

14. Property ⚷6

Generally, disposition of proceeds of real estate which retained the character of that kind of property is governed by the lex loci rei sitae.

15. Property ⚷6

Whether an interest in a tangible thing is classified as real or personal property is determined by law of state where the thing is.

16. Executors and Administrators ⚷465

Where estate of testatrix, who was resident of California at her death, was separate property which consisted of real and personal property in California and Kansas, and domiciliary administration was begun in California and ancillary administration in Kansas, and testatrix' surviving husband filed election to take against the will in the Kansas proceeding, oil royalties received from Kansas realty would not lose their character as realty by transmission from the ancillary to the domiciliary administration, and they should be accounted for in detail and half thereof held and distributed to husband on determination of effectiveness of his election in Kansas after deduction therefrom of their proportionate share of properly deductible expenses.

17. Wills ⚷792(3)

To constitute an election in pais to take under a will, the acts done must be plain and unequivocal and with full knowledge of the legal rights of the surviving spouse under both the law and the will and of the condition of estate.

18. Wills ⚷792(3)

Acceptance of a benefit under a will when made in ignorance of beneficiary's rights or under misapprehension as to condition of testator's estate or other pertinent factual considerations does not operate to constitute an election.

19. Wills ⚷788

Evidence failed to establish that surviving husband elected to take under the will by the taking of a few items of personal property bequeathed to him.

20. Executors and Administrators ⚷194(7)

Where surviving husband did not offer or produce any evidence on his petition for renewal of family allowance and he did not make any point with respect to it in his brief, he was deemed to have abandoned his appeal from order denying a renewal.

◆

Rafter & Fredricks, Hermosa Beach, for appellant.

Emil H. Koehl, Hollywood, for respondent.

VALLÉE, Justice.

Appeal from an order settling the final account of an executrix, a final decree of distribution, and an order denying a renewal of a family allowance.

Bessie Patmore died testate on February 26, 1953, a resident of California. She left surviving her husband Frank T. Patmore, appellant, and her sister Hattie H. MacKechnie, respondent and executrix of her will. Her estate was her separate property and consists of real and personal property in California, Kansas, and Oklahoma. The will bequeathed a few items of personal property and $10,000 cash to appellant; bequeathed certain stocks to respondent in trust to pay the income to appellant for life or until remarriage, with remainder to respondent; and bequeathed and devised the residue to respondent. The will was admitted to probate and domiciliary administration was begun in California. It was also admitted to probate and ancillary administration was begun in Kansas. We are not concerned with the estate in Oklahoma. During the course of administration in California the executrix received $21,659.72 from the ancillary administration in Kansas consisting of oil royalties, lease rentals, proceeds from the sale of crops and a right of way, and paid taxes on Kansas land.

Respondent filed her second and final account and petitioned for final distribution of the California estate. Appellant filed objections to the account and to the petition for final distribution and a petition for renewal of a family allowance. He averred that he had theretofore filed in the probate court of Barton County, Kansas, in which the ancillary administration was being had, an election to take as the surviving husband under the laws of that state and not under the will; "[t]hat without prejudice to his rights to take under the Will in California, in the event that for any reason he should not be entitled to distribution under the laws of Kansas, objector hereby declines to accept distribution under the Will at this time, and upon distribution to him of one half the real property in Kansas your objector will file with this Court an election not to accept benefits under said Will"; that the final account, in purporting to show estate receipts, is defective in that it was impossible to determine therefrom which of the receipts arose from rents or royalties from real property located in Kansas and that the petition failed to request permission to pay half of the receipts from Kansas real estate to appellant. The court overruled the objections, denied renewal of the family allowance, settled the account, and ordered distribution in accord with the will.

The assignment of error is that the decree of distribution is erroneous in failing to recognize the Kansas election; that it is premature in decreeing distribution prior to closing of the administration in Kansas; that its effect is to decide the title to land in Kansas which is governed by the law of Kansas; and that it is erroneous in approving the commingling of Kansas assets which are realty with California assets and ordering distribution of such Kansas assets to respondent.

[1–4] A fundamental principle of law universally recognized is that realty is exclusively subject to the *lex loci rei sitae*—to the law of the state within which it is situated. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 206, 92 P. 184; In re Estate of Lund, 26 Cal.2d 472, 477, 159 P.2d 643, 162 A.L.R. 606; 21 Am.Jur. 861, § 874. See Civ.Code, § 755. Election with respect to realty is governed by the law of the state where the land is located. 69 C.J. 1091, § 2332. This necessarily includes the proposition that the question whether appellant has the right to take Kansas realty against the will must be determined by the law of Kansas. Under the Probate Code of Kansas appellant had the right to elect whether he would take under the will or take what he is entitled to by the Kansas law of intestate succession. Gen.Stat.Kan. §§ 59–603, 59–2233. The Probate Code of Kansas expressly provides that if the terms of the will are not applicable, realty shall be distributed according to the law of that state. Gen.Stat.Kan. § 59–802. A surviving husband who elects to take against the will takes half of the realty under that law. Gen.Stat.Kan., § 59–505.

[5, 6] Acceptance by the surviving spouse of the provisions of the will, or an election to take under the will in the state of the decedent's domicile, is binding elsewhere in the absence of a statute to the contrary; and such spouse may not elsewhere claim rights against the will. One who accepts a beneficial interest under a will thereby adopts the whole will and renounces every right or claim that is inconsistent with the will. In re Estate of Moore, 62 Cal.App. 265, 270, 216 P. 981; Martin v. Battey, 87 Kan. 582, 125 P. 88, Ann.Cas. 1914A, 440.[1] He cannot accept the provisions of the will in one state and renounce them in another. In such a case one may not eat his cake and yet have it; he cannot hold a bequest or devise with one hand and shove it away with the other. In other words, should appellant accept the property distributed to him by the decree of distribution appealed from, he would be precluded from taking against the will in Kansas. It was expressly so held in Martin v. Battey, 87 Kan. 582, 125 P. 88, Ann.Cas.1914A, 440. In that case a wife domiciled in Illinois died there owning lands in that state and in Kansas. She left a will giving her husband a life estate in all of her property. The will was admitted to probate in Illinois and in Kansas. In Illinois the husband elected to take under the will. No election was made in Kansas. The question before the Supreme Court of Kansas was whether the Illinois election was binding in Kansas—whether a surviving husband can claim under the will in one jurisdiction and against it in another. After an exhaustive review of the authorities, the court held that the election to take under the will in Illinois was equally effectual in Kansas. In Brooks v. Carson, 166 Kan. 194, 200 P.2d 280, a widow was the sole beneficiary in her husband's will. He died a resident of Massachusetts, owning realty in Kansas. The law of Massachusetts required the widow to elect if she desired to take under the law rather than under the will. The law of Kansas required that she elect if she chose to take under the will rather than under the law. She made no election. Holding that the widow took under the will in Kansas, the court stated, 200 P.2d 283:

> "As a matter of fact, if she could by filing her election to take under the will in Kansas, take it here, and by not so filing in Massachusetts take under it in Massachusetts the same reasoning would allow her to take under the will in one state and under the law in another. Such inconsistent position may not be taken. See 11 Am.Jur. p. 349, where the rule is stated as follows: 'The acceptance by the party entitled to make the election of the pro-

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[1] Also see Tacoma Savings & Loan Ass'n v. Nadham, 14 Wash.2d 576, 128 P.2d 982, 991; In re Estate of Washburn, 32 Minn. 336, 20 N.W. 324; In re McAllister's Estate, 135 Minn. 357, 160 N.W. 1016, L.R.A.1917C, 504; Lindsley v. Patterson, Mo., 177 S.W. 826, L.R.A. 1915F, 680; Wood v. Conqueror Trust Co., 265 Mo. 511, 178 S.W. 201; Colvin v. Hutchison, 338 Mo. 576, 92 S.W.2d 667, 105 A.L.R. 266; Noyes v. Noyes, 233 Mass. 55, 123 N.E. 395, 396; In re Cumming's Estate, 153 Pa. 397, 25 A. 1125, 1126; In re Kees' Estate, 239 Iowa 287, 31 N.W.2d 380; Huston v. Colonial Trust Co., Tex.Civ.App., 266 S.W.2d 231, 234; Apperson v. Bolton, 29 Ark. 418; Jones v. Gerock, 59 N.C. 190; Blunt v. Gee, 5 Call, Va., 481; Lawrence's Appeal, 49 Conn. 411; Cooke v. Fidelity Trust, etc., Co., 104 Ky. 473, 47 S.W. 325; In re Owsley's Estate, 122 Minn. 190, 142 N.W. 129; In re Powell's Estate, 225 Pa. 518, 74 A. 421; Ashelford v. Chapman, 81 Kan. 312, 105 P. 534; Crawford v. Bloss Estate, 114 Mich. 204, 72 N.W. 148; 69 C.J. 1091, § 2332; 57 Am.Jur. 1037, § 1526 et seq.; 2 Wharton, Conflict of Laws, 3d ed., 1346, § 599e; 2 Beale, Conflict of Laws, 976, § 253.1; annotation, 105 A.L.R. 271.

> visions of a will or an election to take under the will in the state of the decedent's domicil is binding everywhere.' "

See, to the same effect, In re Randolph's Estate, 175 Kan. 685, 266 P.2d 315.

[7, 8] In California a husband has no interest in the separate property of the wife, and a widower is not put to an election by a bequest or devise to him of the separate property of the wife unless the will is so drawn as to make an election necessary. There is nothing in the will here which puts appellant to an election. As to separate property, he stands on the same footing as any other beneficiary. In Estate of Arms, 186 Cal. 554, 565, 199 P. 1053. Cf. Cook v. Cook, 17 Cal.2d 639, 651, 111 P.2d 322; In re Estate of Boyd, 95 Cal.App.2d 44, 45, 212 P.2d 17. But any person may refuse to accept a provision for him in a will so long as the rights of third parties are not involved, and of course a widower may do so. In re Estate of Arms, supra, 186 Cal. 565, 199 P. 1057; Estate of Kalt, 16 Cal.2d 807, 814, 108 P.2d 401, 133 A.L.R. 1424. "A legatee or devisee, under a will, is not bound to accept, but may renounce or disclaim his right under it, if he has not already accepted; and the renunciation or disclaimer relates back to the time the gift was made and no estate vests in him." In re Estate of Meyer, 107 Cal.App.2d 799, 810, 238 P.2d 597, 605.

[9] Renunciation of a foreign will in a foreign jurisdiction is given effect by comity in the state where the renouncing party has his domicile. 69 C.J. 1092, § 2332. In Whalley v. Lawrence's Estate, 93 Vt. 424, 108 A. 387, the testator, domiciled in Vermont, left property in that state and in California. The will, admitted to probate in both states, made bequests to charity in excess of the limit allowed by the California law. The California court distributed the excess to the heirs who were given specific legacies by the will and remitted the balance of the estate to the Vermont executor. The heirs received the amounts decreed by the California court and asked the Vermont court for the specific legacies. It was held that the heirs, having accepted the sums decreed to them by the California court, thereby elected to take against the will and that such election would be given effect in Vermont, the state of the domicile.

[10] Application of what we have said to the case at bar compels the conclusion that it was error to render the decree distributing to appellant and to respondent in trust the property bequeathed to appellant and for his benefit. There is no dispute about the fact that appellant elected to take against the will in Kansas. If that election is effective he is not entitled to take under the will in California. Whether his election is effective may not be determined by the Kansas court until final settlement of the estate there. At the hearing on the petition for distribution the parties appeared to agree that the Kansas estate was then ready for final settlement. No delay should ensue by reason of holding the California distribution open until the effectiveness of the election has been determined by the Kansas court. There was much confusion below with respect to appellant's rights in California. The trial judge and counsel for respondent were of the view that appellant was compelled to elect to take either under or against the will under California law. As we have seen, he has no such duty; but having elected to take against the will in Kansas, his election, if effective there, will be given effect in California. Counsel for respondent stated at the oral argument that if appellant takes what has been distributed to him in California he forfeits all rights in Kansas. The obvious purpose of respondent is to force appellant to forfeit those rights, and that may be the effect of the decree of distribution if it is permitted to stand. It would be unconscionable and a miscarriage of justice for the courts of this state to be parties to an attempt to deprive appellant of rights given him by the law of Kansas.

Appellant is entitled to know that his election is effective and that he will receive half the Kansas real estate before refusing to take under the will in California—not how much he will take in Kansas because he has made his election, but whether his election is valid. He may not renounce his election in Kansas, but it may be contested. Elections to take against the will have on occasion been held by the Kansas courts to be ineffective. See Cox v. McBroom, 155 Kan. 2, 122 P.2d 185; In re Anderson's Estate, 159 Kan. 512, 156 P.2d 860. Respondent concedes that appellant "as yet, has no Order of any kind granting him anything from the Kansas estate." It would appear that the Kansas court has until final settlement of the estate there in which to determine whether appellant has taken under the will in California. See In re Randolph's Estate, 175 Kan. 685, 266 P.2d 315; In re Rothrock's Estate, 173 Kan. 717, 252 P.2d 598, 602; In re Osborn's Estate, 167 Kan. 656, 208 P.2d 257; In re Hoover's Estate, 156 Kan. 31, 131 P.2d 917.

[11–13] There is another reason why the California administration should not be closed. It is the general rule that surplus personal assets in an ancillary administration, i. e., personal assets not required for the payment of claims and expenses of administration lawfully filed and allowed in the ancillary administration, should be remitted to the domicile for final settlement and distribution of the estate. McCully v. Cooper, 114 Cal. 258, 261, 46 P. 82, 35 L.R.A. 492. Also see In re Estate of Lathrop, 165 Cal. 243, 131 P. 752; 34 C.J.S., Executors and Administrators, § 1005, p. 1253; 21 Am.Jur. p. 855, § 863, p. 866, §§ 884, 885, 887; annotation, 90 A.L.R. 1043. A domiciliary representative into whose possession in the domiciliary jurisdiction foreign assets come must account for them in the domiciliary administration. In re Estate of Barreiro, 125 Cal.App. 752, 765–767, 14 P.2d 786; In re Ortiz's Estate, 86 Cal. 306, 24 P. 1034; In re Estate of Conkey, 35 Cal.App.2d 581, 585–586, 96 P.2d 383; 21 Cal.Jur.2d 396, § 984; 21 Am.Jur. p. 854, § 862, p. 870, § 891; annotations, 99 A.L.R. 1135, 132 A.L.R. 1369. The Probate Code of Kansas provides that if administration of an estate of a nonresident is had in that state, the residue of the personal property and the proceeds from the sale of realty shall be transmitted to the domiciliary, "or the court may direct it to be distributed according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall be distributed according to the law of the decedent's residence if personal, and according to the laws of Kansas, if real estate. The real estate not sold in the course of administration shall be assigned according to the terms of the will applicable thereto, or if the terms of the will are not applicable thereto, or if there is no will, it shall pass according to the laws of this state." Gen. Stat.Kan. § 59–802. If the Kansas court in the exercise of its discretion orders the residue of surplus personal assets transmitted to the domiciliary, there will be no one to receive it. Respondent, and apparently the trial judge, were laboring under the mistaken notion that surplus assets which retain the character of realty in the hands of the executrix should be transmitted to Kansas. As we shall see, if the Kansas election is effective they should be distributed to appellant here.

[14, 15] Appellant's claim that the order settling the account is erroneous in approving the commingling of Kansas assets which have retained their character as realty with California assets, and that the decree is erroneous in distributing such Kansas assets to respondent, is well taken on the record. The general rule is that disposition of the proceeds of real estate which retain the character of that kind of property is governed by the *lex loci rei sitae*. 34 C.J.S. Executors and Administrators § 1005, p. 1255. Whether an interest in a tangible thing is classified as real or personal property is determined by the law of the state where the thing is. Rest., Conflict of Laws, § 208. In re Randolph's Estate, 175 Kan. 685, 266 P.2d 315, was a contest of a petition for final settlement of an ancillary administration and to determine heirship. The testatrix, a resident of Tennessee, prior to her marriage executed an oil and gas lease on realty in Kansas and gas was produced in paying quantities. On her death her husband elected to take against the testatrix' will which devised royalties from a well to her niece. The question was whether roy-

alties from gas produced after the death of the testatrix were real or personal property. The Supreme Court of Kansas held that the grant of an oil and gas lease is a profit a prendre; that it does not work a disseverance of oil or gas in place from the real estate so that it might be said to be personal property; that the gas in place at the time of the death of the testatrix and the royalties therefrom were real property; and that the surviving husband, when he elected to take under the statute rather than under the will, took a half interest in the proceeds of the gas well.

[16] The Randolph case is of direct application to the case at bar. As noted, the executrix has received oil royalties from the Kansas administration derived from Kansas realty which are presumably realty. Notwithstanding appellant's objection to the final account on the ground it was impossible to determine therefrom which of the receipts were from royalties from realty in Kansas and to the petition for distribution on the ground it did not ask that half the receipts from such royalties be distributed to appellant, the court did not compel the executrix to so account and apparently distributed all of such royalties to respondent. When appellant elected to take against the will in Kansas he became entitled to a half interest in such royalties unless the Kansas court determines that his election is ineffective. Such royalties do not lose their character as realty by transmission from the ancillary to the domiciliary administration. They should be accounted for in detail and half thereof held and distributed to appellant on determination of the effectiveness of his election in Kansas, after deduction therefrom of their proportionate share of properly deductible expenses. In re Estate of Hills, 176 Cal. 232, 168 P. 20; Rest., Conflict of Laws, §§ 8, 245. If, as respondent says, the federal estate tax was paid in full by the California executrix, she was entitled to receive from the Kansas administration that estate's proportionate share. Respondent says the money received from Kansas was used for that purpose, but there is nothing in the record to support that statement. The account does not show how much of the federal estate tax should be allocated to a half interest in the Kansas realty. If all of the money received from Kansas was used in paying the Kansas estate's share of the federal estate tax, there is none of such money to be distributed to appellant. On the other hand, if any of the money received from Kansas, which retains its character as realty, remains after payment of the federal estate tax, appellant is entitled to distribution here of half thereof, less any properly deductible expenses, on determination in Kansas of the effectiveness of his election. Counsel for respondent so conceded at the hearing below. Referring to the $21,659.72 which the executrix received from the Kansas administration, he said that appellant "would only be entitled to one-half of that. * * * Out of that, of course, must necessarily come, which would be a matter of accounting later, the proportion of the expenses and so on so far as Kansas is concerned."

The will bequeathed to appellant a television set, a gas range, a Frigidaire, a bedroom set, a rug, 2 beds, a lamp, a chest, a set of dishes, all appraised at $425; an accordian appraised at $600, an accordian appraised at $50, a record player appraised at $25, and a toaster appraised at $3. Very shortly after the will was admitted to probate and respondent had been appointed executrix, appellant asked her if he might take the accordians, the record player, and the toaster and have the use of them, since he was getting them under the will. She said, "OK" and he took them. The inventory and appraisement, filed many months after appellant received these items, lists them as assets of the estate. In his objections to the petition for distribution, appellant stated he was holding the items for the executrix. At the hearing he offered to return them to the executrix at any time she named and disclaimed any interest in them. Respondent claims the taking of the accordians, record player, and toaster constituted an election to take under the will.

[17, 18] To constitute an election *in pais* to take under a will, the acts done must be

plain and unequivocal and with full knowledge of the legal rights of the surviving spouse under both the law and the will and of the condition of the estate; it must be a deliberate and intelligent choice. The acts done must clearly evidence an intent to elect, and the party must have so dealt with the property left him by the will that it would be inequitable to permit him to avoid those acts and disclaim his intent. Cook v. Cook, 17 Cal.2d 639, 651, 111 P.2d 322; In re Smith's Estate, 108 Cal. 115, 120, 40 P. 1037; In re Estate of Klingenberg, 94 Cal.App.2d 240, 245, 210 P.2d 514; In re Estate of McCarthy, 127 Cal.App. 80, 85, 15 P.2d 223; In re Garden's Estate, 158 Kan. 554, 148 P.2d 745.[2] Acceptance of a benefit under a will when made in ignorance of the beneficiary's rights or under a misapprehension as to the condition of the testator's estate or other pertinent factual considerations does not operate to constitute an election.[3]

[19] There was no evidence that appellant elected to take under the will. There was no showing that he knew that by taking the few items of personal property he thereby elected to take under the will. There was no evidence he had any knowledge of the condition of the estate in either California or Kansas. There was no proof that he knew he could elect to take against the will in Kansas and that if he did so he could not take under it in California. In short, there was no proof that he had any knowledge of his legal rights in either Kansas or California. He did not deal with the property so that it would be inequitable to permit him to avoid his acts and disclaim his intent. On the contrary, it would be inequitable to compel him to retain the few items of nominal value and forego his rights under the law of Kansas.

[20] Appellant did not offer or produce any evidence on his petition for renewal of the family allowance and he has not made any point with respect to it in his brief. He is deemed to have abandoned his appeal from the order denying a renewal.

The order denying a renewal of the family allowance is affirmed. The order settling the second and final account and the decree of distribution are reversed. Respondent shall bear appellant's costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

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[2] Also see In re Hoover's Estate, 155 Kan. 647, 127 P.2d 460; Sill v. Sill, 31 Kan. 248, 1 P. 556; James v. Dunstan, 38 Kan. 289, 16 P. 459; Payton v. Bowen, 14 R.I. 375; Millikin v. Welliver, 37 Ohio St. 460; Anderson's Appeal, 36 Pa. 476, 496; In re Woodburn's Estate, 138 Pa. 606, 21 A. 16; Garn v. Garn, 135 Ind. 687, 35 N.E. 394; O'Driscoll v. Koger, 2 Desaus., S.C., 295; English v. English's Ex'rs, 3 N.J.Eq. 504, 510; Tooke v. Hardeman, 7 Ga. 20, 30; Hill v. Hill, 88 Ga. 612, 15 S.E. 674; Clark v. Hershey, 52 Ark. 473, 12 S.W. 1077; Stone v. Vandermark, 146 Ill. 312, 34 N.E. 150; Reaves v. Garrett's Adm'r, 34 Ala. 558, 562; Yorkly v. Stinson, 97 N.C. 236, 1 S.E. 452.

[3] See Owens v. Andrews, 17 N.M. 597, 131 P. 1004, 49 L.R.A.,N.S., 1072; Waggoner v. Waggoner, 111 Va. 325, 68 S.E. 990, 30 L.R.A.,N.S., 644; Crocker v. Beal, Fed.Cas.No.3,396; United States v. Duncan, Fed.Cas.No.15,002; Canavan v. McNulty, 328 Ill. 388, 159 N.E. 782; Schaffenacker v. Beil, 320 Ill. 31, 150 N.E. 333; Hahn v. Dunn, 211 Iowa 678, 234 N.W. 247, 82 A.L.R. 1503; McCallister v. Brand's Heirs, 50 Ky. 370; Cooper v. Cooper, 56 N.J.Eq. 48, 38 A. 198; Shanley v. Shanley, 34 App.Div. 172, 54 N.Y.S. 652; In re Beck's Estate, 265 Pa. 51, 108 A. 261; In re Williams' Estate, 145 Wash. 19, 258 P. 851.

141 Cal.App.2d 328

Iona Jean BLOCK, Plaintiff and Respondent,
v.
Harold L. BLOCK, Defendant and Appellant.
Civ. 21431.

District Court of Appeal, Second District, Division 1, California.
May 7, 1956.

Divorce action. Husband moved to set aside a default judgment in favor of wife upon the ground the default judgment was taken through his mistake, inadvertence, surprise or neglect. The Superior Court, Los Angeles County, Beach Vasey, J., denied the motion and husband appealed. The District Court of Appeal, White, P. J., held evidence sustained determination of trial court that husband had notice of the action.

Order affirmed.

1. Divorce ⚷184(4)

On appeal from an order of the trial court denying a husband's motion to set aside a default divorce judgment in favor of wife, affidavits filed by wife in opposition to the motion to set aside the default judgment would be deemed to establish the facts stated therein and any other facts which might reasonably be inferred therefrom.

2. Divorce ⚷161

In a divorce action wherein husband moved to set aside default judgment in favor of wife upon the ground that default judgment was taken through his mistake, inadvertence, surprise or excusable neglect, evidence sustained determination of trial court that husband had notice of the action. West's Ann.Code Civ.Proc. § 473.

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Lucas & Rolland, Long Beach, for appellant.

Leonard A. Delk, Norwalk, for respondent.

WHITE, Presiding Justice.

Defendant appeals from an order of the Superior Court of Los Angeles County, denying a motion to set aside a default judgment of divorce under provisions of Section 473, Code of Civil Procedure, made upon the ground that the said default judgment was taken against the defendant through his mistake, inadvertence, surprise or excusable neglect. When denying the motion, the trial court stated: "From the affidavits on both sides in this case, it seems to me that it is inescapable that the defendant had notice of this action and did not appear within the time."

The record includes the affidavit of Carl Neighbors that he personally served the Summons and Complaint upon the defendant, Harold L. Block, at Paramount, California, on March 30, 1955.

The affidavits in support of defendant's motion to set aside the default are to the effect that "shortly after May 5, 1955, the defendant was informed by the plaintiff that she had obtained a divorce against the defendant * * *. Defendant was taken completely unawares by said information inasmuch as at no time had he been informed that his wife had filed papers for divorce although defendant admits that he knew she was contemplating divorce and that they in fact had both discussed the matter with an attorney. Defendant states that it was made known to him that he was supposed to have been served by one Carl Neighbors * * *." Defendant's "first knowledge of said divorce action taking place was after the interlocutory judgment had already been obtained by the plaintiff".

The supporting affidavit of Carl Neighbors is that plaintiff gave him papers to be handed by him to defendant; that he did hand those papers to defendant; that he was later told that the papers so handed to defendant included divorce papers; that he signed the affidavit of service; "and that if I knew any divorce papers were contained in said mail, I would not have delivered them to her husband".

In opposition to said motion to set aside the default judgment, the record includes the affidavit of plaintiff that she personally asked Carl Neighbors if he would serve the papers upon the defendant; that he stated that he would; that she handed them to him; that the papers were discussed by them; and together they placed them in an envelope.

Edna Flood, an employee of plaintiff, averred that on or about March 30, 1955, plaintiff asked her to serve the summons and complaint upon defendant; that she was leaving early that afternoon and could not do so; that she discussed the service with Carl Neighbors and he said he was working that evening and would be glad to serve the papers upon defendant; that later that afternoon Mr. Neighbors told her Mrs. Block had offered him $10 to serve the papers and that he had refused the money because he would be working there anyway.

Nettie Fitzgerald, housekeeper and baby sitter for plaintiff, who lived across the street from her place of business, averred that plaintiff told her on March 30, 1955, that she had given a summons and complaint to Carl Neighbors to be served upon defendant; and that plaintiff asked her to "observe to ascertain if Mr. Block was served with the Summons and Complaint"; that about 5:00 p. m. that day she went across the street and talked with Mr. Carl Neighbors and he told her he was going to serve the summons and complaint upon defendant; that he would hand him the papers in an envelope as defendant walked out the door; that she went back to the house across the street; that when defendant arrived at the factory, she turned out the light in the house and watched across the street; that about 6:00 p. m. she saw Mr. Block walk out of the building carrying an envelope; that he opened the envelope under the bright light outside the building and she saw him remove some papers from the envelope; that he stood under the bright light and appeared to be reading several pages which were fastened together across the top; that defendant stood there some time reading the papers; that he then walked back into the factory with the papers, leaned over a desk, said something to Mr. Neighbors, came outside, got into his car and left. A few minutes later she went to the factory, Mr. Neighbors told her he had given the papers to defendant; that defendant had walked outside with them in the envelope and "a short time later brought the papers back in and had put them in a waste basket by the desk"; that she looked into the waste basket and saw the Summons and Complaint with the blue cover in the waste basket; that she and Mr. Neighbors left them in the basket where defendant had put them; that the next morning she told plaintiff what had happened and plaintiff removed the papers from the waste basket. The papers are attached as exhibits to the affidavit of plaintiff.

No oral testimony was offered or taken. It further appears from the various affidavits without conflict that plaintiff and defendant separated January 5, 1955; that about January 6th defendant accompanied plaintiff to the office of her attorney and a divorce action and the terms of a settlement were discussed between them; and that about the same time defendant alone consulted another attorney in his own behalf. Nowhere in defendant's affidavit does it appear that he never received the papers delivered to him by Neighbors. Nowhere in the several affidavits does it appear that Neighbors did not deliver the summons and complaint to defendant as stated in his affidavit of service upon the original summons. Defendant's averment that "at no time did plaintiff inform affiant that she had actually filed for divorce or that the papers had been served upon him or that there was a hearing date set for the divorce", and that his "first knowledge of said divorce action taking place was after the interlocutory judgment had already been obtained by the plaintiff", falls short of a direct denial that summons and complaint were served upon him.

Appellant contends that the fact that the papers were handed to appellant in an envelope and the affidavit of the process server that "if I knew any divorce papers were contained in said mail, I would not have delivered them to her husband" makes at least a slight showing of excusable neglect, surprise or inadvertence and therefore it was an abuse of discretion by the court hearing the matter to refuse to grant the motion to set aside the default.

[1] Appellant, however, has ignored the averments that defendant was seen with the papers out of the envelope apparently reading them; and that defendant returned to the factory and placed the summons and complaint in the waste basket. On the instant appeal the affidavits filed by respondent in opposition to the motion to set aside the default establish the facts stated therein and any other facts which may be reasonably inferred therefrom. Brainard v. Brainard, 82 Cal.App.2d 478, 480, 186 P.2d 990.

[2] The trial court's determination that defendant had notice of the instant action is supported by substantial evidence. We find no abuse of discretion.

The order is affirmed.

DORAN and FOURT, JJ., concur.

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141 Cal.App.2d 391

In the Matter of the ESTATE of Bessie B. HAWKINS, also known as Bessie B. Stevens, also known as Mrs. George C. Hawkins, also known as Mrs. William Stevens, Deceased.

Walter W. BAXLEY, as executor of the last will and testament of Bessie B. Hawkins, deceased; Adeline Stevens, as guardian of the estate of Lynda Floy Stevens, a minor; George B. Fogal and Tirza E. Fogal, Appellants,

v.

George C. HAWKINS, Respondent.

Civ. 5322.

District Court of Appeal, Fourth District, California.

May 9, 1956.

Proceeding in the matter of decedent's estate, wherein the Superior Court of Kern County, W. L. Bradshaw and Gordon L. Howden, JJ., entered orders setting aside a previous order confirming executor's sale, and allowing husband's petition for probate homestead, and the executor and others appealed. The District Court of Appeal, Barnard, P. J., held that setting aside the order confirming sale, merely to permit hearing of husband's petition for probate homestead which had been filed only thirty minutes before hearing on confirmation of the sale, was error and husband had lost his right to probate homestead by his implied consent to sale.

Reversed.

1. Executors and Administrators 380(1)

Where order confirming executor's sale had been made after notice and without objections, and there was no showing of surprise or excusable neglect, mere fact that petition for setting aside of probate homestead to decedent's husband had been filed 30 minutes before hearing on the confirmation of sale, without posted notice, did not warrant setting aside the order confirming sale, especially after purchasers at sale had acted in reliance thereon. West's Ann.Code Civ.Proc. §§ 473, 663, 663a.

2. Executors and Administrators ⚷194(2)

Where notice of petition for setting aside a probate homestead had not been posted as required by law, court had not acquired jurisdiction with respect to such petition. West's Ann.Code Civ.Proc. §§ 473, 663, 663a.

3. Judgment ⚷336

Motions ⚷59(1)

A trial court may not revoke or otherwise disturb its judgments or orders except in method particularly prescribed by some statute.

4. Executors and Administrators ⚷184

The right to a probate homestead, as well as the right to a family allowance, is not absolute under all circumstances and may be waived or lost by acts of applicant. West's Ann.Code Civ.Proc. §§ 473, 663, 663a.

5. Executors and Administrators ⚷189

Where decedent's husband obtained a family allowance, by representing to court that he had vacated decedent's realty for purpose of aiding settlement of estate and sale of the realty, and subsequently waited for three months with knowledge that property was to be sold, including a month after return of sale was made, accepting money from purchasers of realty on his family allowance, husband lost his right to claim probate homestead by petition filed only a few minutes before hearing on return of sale, when proper notice was not and could not be given. West's Ann.Code Civ.Proc. §§ 473, 663, 663a.

6. Executors and Administrators ⚷380(4)

Error in setting aside order for confirmation of executor's sale, in order to hear husband's petition for probate homestead, was reversible as resulting in miscarriage of justice, where purchasers had paid money and such money had been disbursed in reliance on validity of the confirmation. Const. art. 6, § 4½.

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Baker, Palmer, Wall & Raymond; H. E. McCombie, Bakersfield, for appellants.

William R. Hulsy, Bakersfield, for respondent.

BARNARD, Presiding Justice.

Bessie B. Hawkins, formerly Bessie B. Stevens, died on October 12, 1954. She was survived by her husband George C. Hawkins, whom she married in March, 1951. Aside from $62.92 in cash, her sole estate consisted of a city lot improved with a two-story dwelling and a duplex apartment over the garage, and some household furniture. By her will she disinherited her husband and gave all of her estate to her minor granddaughter, Lynda Floy Stevens.

The will was admitted to probate on November 1, 1954, and letters testamentary were issued to Walter W. Baxley. The estate was appraised at $10,912.02, including $500 for the furniture. The only other income received from the estate was $34.10, and notice to creditors was duly published. Notice of intention to sell the real property and the household furniture, subject to confirmation by the court, was duly published and given commencing on November 5, 1954.

On December 15, 1954, George C. Hawkins filed a petition for a family allowance. In a supporting affidavit he alleged that he had aided the deceased in operating the property as a rooming house; and that in an attempt to aid in the settlement of the estate "and to aid in the attempted sale of the real property" he had vacated the premises. The executor filed objections alleging that the husband was able to support himself if he would remain sober; that no funds were available with which to pay a family allowance; that the executor had offered the property for sale; and that no bids had yet been received. After a hearing, at which the husband testified, "I am not drunk most of the time", an order was made on February 4, 1955, granting the husband an allowance of $75 a month payable when funds became available, it being further ordered that said amounts be paid to him through the office of his attorney "to be disbursed for lodging and food."

On April 1, 1955, the executor filed his return of sale and petition for order confirming sale, alleging that on March 28 he sold the real property together with the household furniture to Mr. and Mrs. Fogal for $11,000, payable $2,500 in cash and the balance in monthly installments of $90 to be secured by a note and trust deed, which were attached; that $1,500 was deposited with the bid; and that he had employed a named real estate broker who found the buyer. The petition also contained the usual allegations as to the required facts, and prayed that the sale be confirmed, that upon the receipt of the balance of the down payment and the note and trust deed the executor be directed to convey the property to the Fogals, and that he be authorized to pay this broker a commission of $550. The clerk set the matter for hearing on April 18, 1955, and filed an affidavit of posting notice thereof. The matter was continued to May 2, 1955 at 10:00 A. M. for hearing and written notice thereof was given to Hawkins and his attorney.

On May 2, 1955, at 9:31 A. M., Hawkins filed a petition for an order setting aside the real property to him as a probate homestead, alleging that he was the surviving spouse, that no homestead had been selected during the lifetime of the decedent, and that he was residing on the property at the time of her death and had voluntarily vacated the premises at the request of the executor. The return of sale and petition for confirmation was heard at 10:00 A. M. on May 2, 1955, counsel for both parties being present. A minute order was entered on that day, and an order signed by the judge was entered on May 3, finding all of the required facts, and further finding that no objections had been made or opposition filed. It was ordered that the sale be confirmed, that the executor convey the property to the Fogals, upon receipt of the down payment with a note and trust deed for the balance, and that the executor pay the real estate broker $550 as a commission for finding the buyers. It appears that the down payment was paid, a conveyance to the buyers was executed and recorded, and a note and trust deed securing the balance was received by the executor.

On May 19, 1955, Hawkins filed an affidavit alleging that he selects this real property as a homestead during his lifetime; that his petition for an order setting aside the probate homestead was filed prior to the hearing of the executor's petition for confirmation of sale; that the order confirming sale made on May 3, 1955, takes all of the real estate out of said estate and makes the granting of a probate homestead impossible; and that he has not waived his right to a probate homestead and is informed and believes that he has a statutory right thereto. The affidavit then prays for an order vacating the order confirming sale of real property entered on May 3, 1955. On the same day, the court issued an order requiring the executor to show cause on May 31 why its order confirming sale of real property should not be vacated. The executor filed an affidavit in opposition thereto alleging, among other things, that the property had been sold on March 28 in order to pay the family allowance, the funeral expenses, the expense of administration, and claims against the estate; that the sale had been confirmed; that in order to give the buyers a clear title the executor had paid from the monies received from the Fogals $522.79 for taxes and to redeem the property from a tax sale; that it was also necessary to pay $169 to release a chattel mortgage which had been signed by Hawkins; and that various claims as well as cost of administration remained to be paid.

The motion for an order vacating and setting aside the order confirming sale of the real property was finally heard on June 14, 1955, and on June 29 the court entered an order reciting merely that "the order heretofore made, confirming the sale of real property is hereby vacated." On July 1, a written order to the same effect was entered. There is no record of the oral proceedings at that hearing. However, at the hearing of Hawkins' petition for probate homestead held on July 14, 1955, counsel for both parties agreed that the only reason "why the order of confirmation of sale was vacated was to give Hawkins an opportunity to have his petition for probate homestead heard."

The petition of Hawkins that the property be set aside to him as a probate homestead was set for hearing on May 16, 1955, but was continued and heard on July 14, 1955. At that time the court had before it objections filed by the executor alleging that at all times after November 5, 1954, Hawkins and his attorney knew that the executor intended to sell this property and knew that it would be impossible to pay a family allowance unless the property was sold; that the petition for a probate homestead was not filed until the day the sale was confirmed; that a certified copy of the order confirming sale was recorded; that, thereafter, in good faith the buyers had complied with the terms of the order and the executor had conveyed the property to them; that in order to complete the sale of the property the executor had used $1,009.27 of the money received from the buyers to pay off liens against the property and the family allowance; and that the buyers had subsequently expended over $2,000 in repairing the property. It also appeared that Hawkins had received $300 on his family allowance, which came from the money paid by the buyers. No evidence was brought out at the hearing on July 14, but counsel for both parties were present. After argument, the court stated that the right to a probate homestead was an absolute one, and that the objections made did not constitute a valid ground for not granting the petition. An order was entered on July 18, 1955, ordering that this real property be set aside to Hawkins for his exclusive use and benefit for a period of six months, with permission to him to then file a petition for an extension of said probate homestead.

The executor has appealed from the order vacating the order confirming sale; and the executor, Mr. and Mrs. Fogal, and the guardian of the Estate of Lynda Floy Stevens, a minor, have appealed from the order setting apart a probate homestead.

It is first contended that the court erred in vacating the order confirming sale of the real property. It is argued that this order was based upon findings of all necessary jurisdictional facts, that it was reviewable only on appeal or in some manner authorized by statute, and that under the showing here made the court had no authority to set this order aside. In this connection, it is pointed out that the buyers of the property were not given notice of the application for an order vacating the order of confirmation.

The respondent does not attack any of the proceedings leading up to the order confirming the sale, but contends that the court erred in entering that order since a petition for probate homestead had been filed just prior to the hearing. It is argued that the court may have inadvertently concluded that no objections had been made or opposition filed, since a petition for probate homestead was pending; and that it was error to confirm the sale, since such an order removed from the estate the only property available for a probate homestead. It is further argued that the court did not err in entering the order vacating the order of sale, since the court could have based that order either on the provisions of Section 473, or on Sections 663 or 663a of the Code of Civil Procedure. Finally, it is argued that the court may well have determined that it had erred in making its order confirming the sale, which error was apparent from an examination of the judgment roll, and that it is now established that courts have authority to correct their judgments for errors "which are clerical or judicial in nature", citing In re Estate of Remick, 75 Cal.App.2d 24, 170 P.2d 96 and Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466.

[1–3] It does not appear that the buyers of this property were notified of the hearing on the motion to vacate the prior order confirming the sale, or that they were present or represented by counsel at that hearing. The order confirming sale had been made after notice and with no objections filed. There was no sufficient showing under Section 473 of the Code of Civil Procedure, since there was no showing that the order had been made because of any surprise or excusable neglect. Sections 663 and 663a of that code were not applicable as the requirements of those sections for the giving of notice, and the facts to be stated, were not complied with. The mere fact that a petition for the setting aside of a probate homestead had been filed was not enough. If, as claimed, that fact was brought to the attention of the court, the court did not consider it as controlling, and acted on the return of sale. The court had not yet acquired jurisdiction in that regard, since notice had not been posted as required by law. Stiebel v. Roberts, 42 Cal.App.2d 434, at page 438, 109 P.2d 22. There was no showing and there is nothing to indicate that the order confirming sale was not the one intended by the court at that time, and there is nothing to indicate any clerical or ministerial mistake, or that the order vacating the prior order was made for any such reason. In fact, it was conceded at the hearing on July 14 that the "only" reason that order was made was to permit the application for a homestead to be heard. A conveyance of the property had been made in accordance with the court's direction in the order confirming sale, and Section 786 of the Probate Code provides that such a conveyance conveys to the buyer all rights in the property which the decedent owned at the time of death. It also clearly appeared that the buyers of the property had paid a large sum of money pursuant to the order of confirmation and a large part of this money had already been expended in clearing the title to the property, and that the respondent had received $300 of that money to apply on his family allowance. It has been held in the cases cited by the respondent, and in many other cases, that a trial court may not revoke or otherwise disturb its judgments or orders except in the method particularly prescribed by some statute. United Railroads of San Francisco v. Superior Court, 170 Cal. 755, 151 P. 129. In Re Estate of Estrem, 16 Cal.2d 563, 107 P.2d 36, 40, the court said:

> "The jurisdiction of the court to render a judgment or order often depends upon the preliminary determination of certain jurisdictional facts. When all parties affected are actually or constructively before it with an opportunity to assert their contentions and to appeal from an adverse ruling, the finding of such facts by the court may be reviewed only by an appeal or other timely and available direct attack. This finding cannot be attacked in proceeding under paragraph 4 of section 473 to have the judgment declared void, nor can it be attacked in any collateral proceeding. In such situations the finding is as conclusive as any other finding of fact by the court in the original proceeding."

In Crane v. Superior Court, 42 Cal.App. 285, 183 P. 606, 607, it is said:

> "'No fact appeared in the record from which inadvertence of the court may be inferred. The order itself, now under review, while it states that the decree of discharge was made inadvertently and *ex parte,* does not indicate any particular in which the court had acted improvidently or inadvertently.'"

The order with which we are here concerned does not even purport to say that the prior order was entered inadvertently, or through any surprise or mistake. No reason for vacating the prior order appears anywhere in this record, other than the admitted fact that it was made for the sole purpose of giving the respondent an opportunity to have his petition for a probate homestead heard. If it be assumed, as respondent argues, that the court erred in confirming the sale, this was an error in a judicial decision actually made and not a clerical error in entering a wrong or incomplete order. Being a judicial act the court was without authority to vacate that order under the circumstances or for the reasons which here appear. Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988.

[4] The appellants further contend that where an order for family allowance has been made which cannot be paid until the property is sold, and where a sale has been properly made and the return of sale is ready for hearing, a petition for probate homestead filed at the last minute cannot cut off the right of the purchasers to a confirmation of the sale; and that by his conduct the respondent waived any right he may have had to a probate homestead. It is well settled that the right to a probate homestead, as well as the right to a family allowance, is not absolute under all circumstances and that such a right may be waived or may be lost by the acts and conduct of the applicant. The respondent knew that an attempt was being made to sell the property when his order for family allowance was made, and knew that this allowance could not be paid until and unless the property was sold. At the hearing of his application for a family allowance it appeared without conflict that the property was then vacant, that it needed repair, that there was no money in the estate to do that, and that it was not economically feasible to rent it or to hire someone to operate it as a rooming house. The court recognized this, stated that there were no funds out of which the family allowance could be paid, and asked when the property would be sold. He then made his order providing that the amounts allowed should be payable when the funds were available.

[5] In asking for a family allowance the respondent represented to the court

that, for the purpose of aiding and settling the estate and "to aid in the attempted sale of the real property", he had vacated the premises. After getting that order, and with knowledge that the property was to be sold, he waited for another three months including a full month after the return of sale was made. After rights of the bidders had thus accrued, and only a few minutes before a hearing on the return of sale was held, he filed a petition for a probate homestead proper notice of which was not and could not be given before the other hearing. He then accepted $300 on his family allowance, which came and had to come from the buyers' money. A conveyance of the property was made to the buyers pursuant to the court's order, some of the buyers' money was used in clearing the title to the property, and the buyers had expended large sums in reliance on the order. Under the circumstances shown by the record it must be held that the respondent lost his right to claim probate homestead by his acts and conduct, including his implied consent to the sale of the property. In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724; Soares v. Steidtmann, 130 Cal.App.2d 401, 278 P.2d 953.

In view of the foregoing, it is unnecessary to consider appellant's further contentions that under the wording of Section 661 of the Probate Code the respondent was not entitled to claim a probate homestead, since there were no minor children; and that he was not entitled to a probate homestead because the evidence shows that he was not dependent upon the decedent for support at the time of her death.

[6] The respondent contends that if the court erred in vacating the order confirming the sale such error is not reversible since Section 4½ of Article VI of the Constitution forbids a reversal unless a miscarriage of justice appears. It is argued that since an order setting aside a probate homestead was mandatory under the provisions of Section 661 of the Probate Code, the order vacating the order of confirmation merely cleared the way for a hearing on the petition for a homestead, and no miscarriage of justice appears. The order confirming the sale was regularly made in the absence of objection thereto; in accordance therewith a conveyance was made to the buyers who paid the required amount; and some of their money was used in paying off liens and in paying the family allowance to the respondent. The setting aside of this order necessarily worked an injustice as to the executor and the estate. Moreover, the rights of the buyers and of the real estate broker, who had no notice of that proposed action, were completely ignored. We are far from convinced that no miscarriage of justice appears.

The orders appealed from are reversed.

GRIFFIN and MUSSELL, JJ., concur.

141 Cal.App.2d 494

Morris R. McLAUGHLIN, Plaintiff and Respondent,

v.

Janet V. McLAUGHLIN, Defendant and Appellant.

Civ. 21561.

District Court of Appeal, Second District, Division 1, California.

May 14, 1956.

Rehearing Denied June 4, 1956.

Hearing Denied July 11, 1956.

Divorce action wherein the Superior Court, Los Angeles County, A. Curtis Smith and Wilbur C. Curtis, Judges, entered orders denying post-decretal motions by the defendant-wife, and she appealed. The District Court of Appeal, White, P. J., held that even though there had been evidence at trial that a property settlement agreement had been entered into, and even though court (granting husband divorce for wife's fault) had been without jurisdiction to award wife alimony, court did not err, upon conflicting evidence presented by affidavits, in denying wife's motion for an order nunc pro tunc amending decree to indicate that payments husband had been ordered to make were to be made under agreement and not as alimony.

Affirmed.

1. Judgment ⊂=745

Decision in prohibition proceeding, that divorce court had been without jurisdiction to award wife alimony (for nonpayment of which wife sought to have husband held in contempt), was conclusive against wife's subsequent motion for writ of execution.

2. Judgment ⊂=304, 306

Amendments to judgments can only be made for purpose of making record conform to truth, and not for purpose of revising and changing judgment; that is, final decrees may be amended only for clerical errors, not judicial in character.

3. Husband and Wife ⊂=278(1)

Property settlement agreements after separation must be in writing and signed by both parties. West's Ann.Civ.Code, § 159.

4. Judgment ⊂=297

Court is not empowered to amend by new modifications and enlargements judgment or decree which court originally rendered.

5. Divorce ⊂=254

Even though there had been evidence at trial that a property settlement agreement had been entered into, and even though court (granting husband divorce for wife's fault) had been without jurisdiction to award wife alimony, court did not err, upon conflicting evidence presented by affidavits, in denying wife's motion for an order nunc pro tunc amending decree to indicate that payments husband had been ordered to make were to be made under agreement and not as alimony.

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W. H. Wadsworth, E. L. Fraser, Charles E. McClung, Los Angeles, for appellant.

Caryl Warner, Morris R. McLaughlin, Los Angeles, in pro. per., for respondent.

WHITE, Presiding Justice.

In June, 1949 plaintiff secured an interlocutory decree of divorce on the grounds of cruelty. Defendant wife was awarded custody of the minor son of the parties who was then 19 years of age. The decree provided that the husband pay defendant wife $200 a month for her "support, care and maintenance", and that of the minor child until the further order of the court. A final decree was entered in June, 1950, and in October of that year the minor son attained his majority. Plaintiff husband continued to make the payments required by the aforesaid order until approximately June of 1953, at which time all payments pursuant to the order ceased. Thereafter, in April 1954, in an attempt to enforce the order, defendant wife procured the issuance of an order to show cause re contempt based upon her affidavit that plaintiff was delinquent in payments under the order amounting to some $2,500. This order was vacated by the trial court and on August 5, 1954 defendant wife procured the issuance of another order to show cause re contempt against plaintiff husband. Her efforts in this regard however, proved unavailing when Division 2 of this court issued a peremptory writ of prohibition directing the superior court to desist and refrain from further proceedings on the aforesaid order to show cause in re contempt, except to dismiss it, McLaughlin v. Superior Court, 128 Cal.App.2d 62, 274 P.2d 745, 748. The holding of the court in the case just cited was grounded on the fact that "The interlocutory decree, however, fails to disclose any fact indicating the provision for the defendant's support was based on a contract settling the property rights of the parties. On its face the provision for the wife's support is simply an alimony order, and since on the record the divorce was granted to the husband for her fault, the court was without jurisdiction to award her alimony, and such order was therefore void (citing cases)".

After the foregoing decision in the prohibition proceeding became final defendant wife made a motion in the trial court for an order *nunc pro tunc* amending the interlocutory decree of divorce by inserting therein the following: "it appearing that the parties hereto have entered into a property settlement agreement relating to disposition of the community property and support and maintenance of defendant wife and the minor child, and that the parties desire the terms of said property settlement agreement to be incorporated into this Decree", and that following the word "alimony" in the final decree there be added the phrase "or support". This motion was denied. Defendant wife then moved the court below for a writ of execution on the ground that, "the decree of divorce in the above entitled action heretofore entered and filed orders and requires monthly payments by plaintiff and cross-defendant to defendant and cross-complainant in the amount of $200, until further order of the Court". This motion was also denied. From the orders denying the foregoing two motions defendant prosecutes this appeal.

[1-5] We are satisfied that the decision in McLaughlin v. Superior Court, supra, 128 Cal.App.2d at page 65, 274 P.2d at page 748, wherein the court stated, "On its face the provision for the wife's support is simply an alimony order * * * the court was without jurisdiction to award her alimony, and such order was therefore void" is res adjudicata in so far as the validity of such order is concerned. White v. Fresno National Bank, 98 Cal. 166, 167, 32 P. 979; Geibel v. State Bar, 14 Cal.2d 144, 148, 93 P.2d 97. The question then arises whether defendant by her first motion can breathe life into the void order through the amendment thereof *nunc pro tunc*. We are persuaded she cannot. Amendments to judgments can only be made for the purpose of making the record conform to the truth, and not for the purpose of revising and changing the judgment, Felton Chemical Co. v. Superior Court, 33 Cal.App.2d 622, 627, 92 P.2d 684. In other words, final decrees may be amended only for clerical errors, not judicial in character. It is manifest that on the motion to amend the decrees *nunc pro tunc* appellant tendered the issue as to whether or not any property settlement agreement or contract was entered into between the parties. The notice of motion stated, "Said motion will be made on the ground that it was the intention of the court in signing the Interlocutory Decree of Divorce to award the defendant wife support, pursuant to a property settlement agreement previously agreed upon between the parties, and not to award the defendant wife, against whom the divorce was granted alimony". This issue was further tendered by affidavits filed in support thereof. The issue was joined by counter affidavits filed by respondent. Civil Code section 159 controls property settlement agreements after separation and such agreements must be in writing and signed by both parties, Fitch v. Tyler, 105 Cal.App. 306, 311, 288 P. 74. In the instant case, no property settlement was offered or received at the trial nor was any such document proffered at the hearing of the motion now engaging our attention. The only reference to any agreement between the parties appears in an affidavit filed by respondent, re reporter's transcript, and in which affidavit we find that at the trial the following questions were propounded to respondent, to which he gave the indicated replies:

"Q. You, through me, and your wife have agreed on the provisions of the interlocutory decree relating to the community property and support of your wife and minor child, have you?

"A. Yes.

"Q. And that is satisfactory to you?

"A. Yes, as long as the boy is a minor, it is satisfactory."

In denying appellant's motion to correct the decrees *nunc pro tunc*, the trial court may well have concluded that no property settlement was before it at the trial of the divorce action and that no judicial decision was then actually made or intended to be made with respect to the problem here under consideration. The amendment proposed by appellant would indisputably change the decrees in an important respect, and as pointed out in the Felton case, supra, 33 Cal.App.2d at page 627, 92 P.2d at page 687, the court is not empowered to amend by new modifications and enlargements the judgment or decree which the court originally rendered. Barkelew v. Barkelew, 73 Cal.App.2d 76, 79, 80, 166 P.2d 57. Furthermore, the trial court upon conflicting evidence presented by affidavits, decided the matter in respondent's favor. By its decision in the case at bar the court determined that it did not intend upon the trial of the action to approve any property settlement agreement, but that the court was to give appellant alimony and child support until the child reached his majority. Since the court was without jurisdiction to grant alimony to the appellant, McLaughlin v. Superior Court, supra, 128 Cal.App.2d at page 65, 274 P.2d at pages 747, 748, and the interlocutory decree fails to disclose any fact indicating the provision for appellant's support was based on a contract settling the property rights of the parties, and since the decree was granted to the respondent on the ground of appellant wife's extreme cruelty, the court was without jurisdiction to award the latter any alimony, and the question of apportionment in the decree, after the minor child became of age cannot arise. As pointed out in the case of McLaughlin v. Superior Court, supra, the court was without authority to grant any alimony to appellant wife, either before or after the minor son attained his majority. We have examined the cases relied upon by appellant and find them factually distinguishable from the one at bar and in none of them do we find any holding which militates against what we have herein held under the facts and circumstances present in the instant proceeding.

Appellant's contention that respondent is estopped to deny the jurisdiction of the court which made the support order cannot be sustained. We are not here confronted with a situation wherein the parties entered into a valid contract for settlement of property rights, and one of them subsequently sought to set aside and vacate that portion of the decree affecting property rights, based upon the claim that the court was without jurisdiction. The evidentiary features of this case present no such picture. In the case of Marrs v. Superior Court, 137 Cal.App. 579, 30 P.2d 1030, an award of alimony was made pursuant to a stipulation at the trial which resulted in a decree for the husband. Because at no place in the record did it appear that the parties entered into an agreement settling their property rights, the award of alimony to the wife was void and a subsequent order adjudging the husband guilty of contempt was annulled. In the case at bar it was appellant wife who sought to enforce an order which she claimed awarded her alimony and respondent contended that the award did not purport to give appellant alimony, but that if it did, it was in that respect void. We find no element of estoppel present in this case.

Coming now to a consideration of appellant's contention that the court erred in denying her motion for issuance of a writ of execution, we have concluded that the ruling was correct. The trial court was without jurisdiction to grant alimony to the appellant by reason of the fact that the divorce was not granted to her but was granted to her husband for her fault since it was not based upon a contract of property settlement. Appellant therefore was not entitled to a writ of execution Johnson v. Superior Court, 128 Cal.App. 584, 589, 590, 17 P.2d 1055; In re McKenna, 116 Cal.App. 232, 233, 234, 2 P.2d 429; Marrs v. Superior Court, supra, 137 Cal.App. at pages 581, 582, 30 P.2d at page 1031.

For the foregoing reasons, the orders appealed from are, and each is affirmed.

DORAN and FOURT, JJ., concur.

141 Cal.App.2d 446

DESERT TURF CLUB, a California Corporation, Plaintiff and Appellant,

v.

The BOARD OF SUPERVISORS OF the COUNTY OF RIVERSIDE et al., Defendants and Respondents.

Civ. 5262.

District Court of Appeal, Fourth District, California.

May 11, 1956.

Mandamus proceeding. The Superior Court of Riverside County, R. Bruce Findlay, J., denied the relief sought, and an appeal was taken. The District Court of Appeal, Conley, J. pro tem., held that the state has pre-empted the horse racing field and that a county board could not, on moral grounds, exercise "local option" with respect to horse racing; and held that, excluding opinion evidence that horse racing and its attendant betting were immoral, there was insufficient evidence to uphold board's denial of application for land use permit for establishment of race track.

Reversed with directions.

1. Constitutional Law ⚷81

When state sees fit to regulate upon a matter which is within its police power, its authority over subject is plenary.

2. Constitutional Law ⚷70(3)

In mandamus proceeding involving proper definition and delimitation of authority as between state and county in their respective control and administration of horse racing and zoning, it was not province of court to pass on moral question.

3. Counties ⚷21½

The state has taken over in its entirety the whole subject of horse racing, and county board of supervisors cannot overrule act of people of State in adopting constitutional amendment, and Legislature of state, in passing full and comprehensive plan for licensing and control of horse racing, by forbidding, on moral grounds, that which state expressly permits. West's Ann.Const. art. 4, § 25a; West's Ann. Bus. & Prof.Code, §§ 19400 to 19663, 19480.5.

4. Counties ⚷21½

Right to zone is a local matter, and county board of supervisors, acting in good faith, may by properly adopting zoning restrictions exclude on soundly-based grounds installation of horse racing track or any other type of activity from those portions of county as to which such exclusion is reasonable; but board cannot, under guise of doing one thing, accomplish a wholly disparate end, and board could not, on moral grounds, exercise "local option" with respect to horse racing by declining land use permit. West's Ann.Gov.Code, §§ 65300, 65460, 65800.

5. Counties ⚷21½

Eliminating opinion evidence that horse racing and its attendant betting were immoral, there was insufficient evidence to uphold county board's denial of land use permit for establishment of race track. West's Ann.Gov.Code, §§ 65300, 65460, 65800.

6. Administrative Law and Procedure ⚷458

Administrative bodies are not expected to observe meticulously all of rules of evidence applicable to court trial, but common sense and fair play dictate certain basic requirements for conduct of any hearing at which facts are to be determined, and among those are the following: evidence must be produced at hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, including hearsay evidence concerning some one else's opinion; cross-examination within reasonable limits must be allowed; and telephone calls to officials sitting in case, statements made in letters and arguments made in petitions should not be considered as evidence.

7. Mandamus ⚷87

Where county board of supervisors based its action in denying application for land use permit on an erroneous conclusion as to its legal rights and duties, and, upon record legitimately before it, abused its discretion, writ of mandate would issue.

8. Appeal and Error ⚷185(1)
Courts ⚷74

Sessions of superior court of given county must be held in that county; and even if judge who tried case had procured essential assignment from chairman of judicial council to sit and act in Riverside county and attorneys had consented that case might, for convenience, be actually tried in San Bernardino county courthouse, there was such impropriety involved as would be noticed by reviewing court, notwithstanding appellant's failure to raise any point as to jurisdiction or error in that respect. West's Ann.Gov.Code, §§ 68099, 69741.

Thompson & Colegate, Riverside, and John E. Glover, Los Angeles, for appellant.

Ray T. Sullivan, Jr., County Counsel, Leo A. Deegan, Deputy County Counsel, and James H. Angell, Asst. County Counsel, Riverside, for respondents.

CONLEY, Justice pro tem.

This case involves the proper definition and delimitation of authority as between the State and the County of Riverside in their respective control and administration of horse racing and zoning.

The appellant, Desert Turf Club, a corporation, after securing a permit from the California Horse Racing Board to conduct quarter-horse racing at the site hereafter described, made written application to the Riverside County Planning Commission for a land use permit to establish, operate and maintain a race track on Zone M–3 land in the Northwest Quarter and the North Half of the Southwest Quarter of Section 6, Township 5 South, Range 6 East, S. B. B. & M., comprising 240 acres, situated on the east side of Del Sol Road, between Tamarisk Road and Avenue 40. The California Horse Racing Board by a decision and order of July 19, 1954 had determined:

> "1. That the applicant, Desert Turf Club, has shown and established that the conducting of quarter-horse racing meetings of the proposed Palm Springs track would be in the public interest and would subserve the purposes of the California Horse Racing Act;
>
> "2. That the conducting of quarter-horse racing meetings at the proposed Palm Springs track will be in the public interest and will subserve the purpose of the California Horse Racing Act."

After a public hearing pursuant to proper notice, the Riverside Planning Commission made its order and decision on February 23, 1955, recommending to the Board of Supervisors that the application be granted upon certain specified terms and conditions, all of which were afterwards accepted and agreed to by the applicant. In accordance with the requirements of Article III of Ordinance 348 of Riverside County, the Planning Commission filed with the Board of Supervisors, on March 2, 1955, in connection with its recommendation that the application be granted, a summary of the testimony presented at the public hearing and all reports and exhibits which had been introduced in evidence. Thereafter, the Board of Supervisors regularly noticed and held a public hearing on the question on March 28, 1955; besides the entire files and records of the Planning Commission on its hearing, the Board received evidence from several witnesses respectively for and against the granting of the permit and also accepted as evidence various petitions and letters in opposition thereto. At the close of the hearing, the Board, by unanimous vote, denied the application for the permit.

No findings of fact of any kind were made by the Supervisors, but the record of the proceedings makes it abundantly clear that the Board members took into consideration "every type of evidence that anybody cared to bring to us" and that they assumed that it was "up to the Board to look at all angles, the moral aspects or any other point."

On April 22, 1955, Desert Turf Club filed its petition for a writ of mandate praying that the Board of Supervisors be required to cancel its order denying the permit, and to make an order granting it and further praying that Charles Bixel, as Chief Building Inspector of Riverside County be required to issue the permit. The respondents below filed a general and special demurrer; at the hearing, which according to the Reporter's Transcript was held "Before Hon. R. Bruce Findlay, Superior Court Judge (of San Bernardino County), presiding as Superior Court Judge of Riverside County but actually sitting in San Bernardino County, California, May 24 and 25, 1955", it was stipulated that the special demurrer be deemed withdrawn, and that if the general demurrer should be overruled the cause would be submitted for decision substantially on the record of the hearing before the Board of Supervisors. The court overruled the general demurrer, denied the peremptory writ of mandate and discharged the alternative writ.

The trial court determined in its conclusions of law that the order of the Board of Supervisors denying the application for a permit was sufficiently supported by competent substantial evidence, that the Board did not act arbitrarily, capriciously or unlawfully, and that petitioner was not denied a fair trial and

> "5. That, although the licensing throughout the State of California of horse racing tracks where pari-mutuel wagering is conducted is a matter of general and statewide concern, the same is, nevertheless, a municipal affair and is subject to local regulation as embodied by the provisions of Ordinance 348 of the County of Riverside, Section 3.1 of Article III thereof."

It is our opinion that the trial court erred in these views.

By the provisions of Section 65300 of the Government Code each county in the State is required to create a planning commission; each of said latter bodies is directed to adopt a comprehensive long-term master plan for the development of the county, Government Code, § 65460. Zoning regulations by boards of supervisors are specifically authorized by law, it being provided that a county may by ordinance "Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes." Government Code, § 65800. The Riverside County Zoning Ordinance No. 348, is a part of the master plan of land use in Riverside County, it having been adopted as recited in Article I thereof "in order to classify, restrict, regulate and encourage the orderly use of land in the County of Riverside and to conserve and promote public health, peace, safety, comfort, convenience, and general welfare." Article III of the Zoning Ordinance provides that:

> "All the unincorporated territory of the County which is not included under the terms of this ordinance in any other zone is hereby designated and classified as M-3 Zone.
>
> "The restrictions pertaining to other zone classifications shall not be deemed or construed to apply to land or property in Zone M-3. The restrictions applicable to land use in M-3 Zone shall be only as hereinafter in this Article specifically set forth."

Article III, Section 3.1 forbids a person to use any premises or erect any building in Zone M-3 for any of some 39 uses without first securing a permit; among these enumerated uses is "23. Race track, except for contests between human beings only."

[1-3] By the adoption of Section 25a of Article IV of the Constitution, the people of the State of California enacted the controlling principle that the legislature could provide for the regulation of horse races and horse race meetings throughout the state and wagering on the results thereof. As is said in Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 407, 189 P.2d 17, 21, 3 A.L.R.2d 90:

> "When the state sees fit to regulate upon a matter which is within its police power, its authority over the subject is plenary * * *."

Chapter 4 of Division 8, Sections 19400 to 19663, of the Business and Professions Code contains a full and comprehensive legislative treatment of legalized horse racing in this State which is a clear and complete plan for the state-wide control of the subject matter. Section 19480.5 of the Business and

Professions Code provides that the Board shall not issue any new license unless it shall determine that conducting horse racing meetings at such place will be in the public interest and will subserve the purposes of the provisions of state law relative to horse racing.

There can be no legitimate doubt that the State has taken over in its entirety the whole subject of horse racing. There is also no room for doubt that many thousands of citizens (who were in a minority at the time the constitutional amendment was adopted) are uncompromisingly opposed to race tracks and any form of betting on horses, not only on abstract moral grounds, but because of their observations as to the practical effect on the community. They oppose, so they say, any improvement in the breed of horses that debases the breed of men.

It is not our province to pass on the moral question but only on the question of power. The query to be answered is: can a Board of Supervisors overrule the act of the people of the state in adopting a constitutional amendment and the legislature of the state in passing a full and comprehensive plan for the licensing and control of horse racing by forbidding on moral grounds what the state expressly permits? There is no escape, in our opinion, from a negative answer.

In Shean v. Edmonds, 89 Cal.App.2d 315, 325, 200 P.2d 879, 886, it is said:

> "Horse racing was recognized in this state in 1933, Stats.1933, p. 2046. Section 25a of art. IV of the Constitution gave certain powers regulating horse racing to the Legislature. 'The continuance of the grant of power' as expressed in certain sections of the Business and Professions Code 'did not affect its status as previously ratified and confirmed.' Sandstrom v. California Horse Racing Board, 31 Cal.2d 401, 413, 189 P.2d 17, 24 [3 A.L.R.2d 90]."

The opinion in Cunningham v. Hart, 80 Cal.App.2d 902, 906, 183 P.2d 75, 78, thus enumerates various instances in which the adoption by the State of general laws covering the field deprives a local legislative body of any right to act relative to the subject matter involved:

> "The following cases are examples of matters which have been determined to be of state-wide concern and in which general laws have prevailed over conflicting laws in municipalities adopting the 'home rule' afforded by section 6, article XI of the Constitution: Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172, regulation of traffic on city streets. To the same effect, Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; Mann v. Scott, 180 Cal. 550, 182 P. 281; In re Murphy, 190 Cal. 286, 212 P. 30; Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515. Regulation of the character and standards of taxicab service to be preformed on city streets, In re Martinez, 56 Cal.App.2d 473, 132 P.2d 901. Appointment of a probation officer and the fixing of his salary payable out of the city and county treasury, pursuant to the Juvenile Court Law, Nicholl v. Koster, 157 Cal. 416, 108 P. 302. Sustaining the Metropolitan Water District Act which permits individual municipalities to initiate proceedings in the formation of a water district, City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630. Sustaining the City Boundary Line Act, Gadd v. McGuire, 69 Cal.App. 347, 231 P. 754. Adoption of a pension system by a municipality does not take the place of the Workmen's Compensation Law in its application to city employees, [City of] Sacramento v. Industrial Accident Comm., 74 Cal.App. 386, 240 P. 792. General laws prohibiting the licensing by a city of a house of prostitution, Farmer v. Behmer, 9 Cal.App. 773, 100 P. 901. General laws prohibiting the organization and control of a school district by a county, Scott v. County of San Mateo, 27 Cal.App. 708, 151 P. 33. A statute claiming a city street to be a secondary state highway prevails over right of municipality

to improve that street, Southern California Roads Co. v. McGuire, 2 Cal.2d 115, 39 P.2d 412. Exclusive control in the state of liquor licensing, Los Angeles Brewing Co. v. [City of] Los Angeles, 8 Cal.App.2d 391, 48 P.2d 71. Issuance and revocation of motor bus licenses within a city, People v. Willert, 37 Cal.App.2d Supp. 729, 93 P.2d 872. Drunken driving provision in Motor Vehicle Act prevails over city ordinance, Helmer v. Superior Court, 48 Cal.App. 140, 191 P. 1001. Liability of a municipality for tortious acts or omissions of its servants, Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353. Liability of a municipality for defective highways within its limits, Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759."

This rule has also been applied by this court to a city ordinance requiring an electrical contractor, licensed by the State, to procure a local business license, Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767. See: Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 243 P.2d 73. And this court has pointed out that this principle gives the State of California the sole right to regulate and license the liquor business. City of San Diego v. State Board of Equalization, 82 Cal.App.2d 453, 464, 186 P.2d 166.

[4] What does this holding do to the Zoning ordinance? Nothing at all. The right to zone is by express provision of law a local matter. A Board of Supervisors, acting of course in good faith, may by properly adopting zoning restrictions exclude on soundly-based grounds the installation of a horse racing track or any other type of activity from those portions of the county as to which such exclusion is reasonable, just as manufacturing establishments or business houses may be legitimately prohibited in residential districts. But the Board cannot under guise of doing one thing, accomplish a wholly disparate end. The Board here, on moral grounds, contrary to the legislative fiat of the people, has in effect excluded all horse racing from all parts of the county—or, to borrow an analogy from the field of liquor regulation, has exercised a *local option* with respect to horse racing. There is no such thing as local option on this question under the present law.

[5] If the opinion evidence of those persons opposed to the granting of the permit on the ground that horse racing and its attendant betting are immoral be eliminated, there is insufficient evidence in the present record to uphold the decision of the Board of Supervisors, or the findings of the trial court. The testimony adduced on behalf of petitioner was: that the plans and specifications for the construction of the track and buildings in all respects conformed with State and County building codes and regulations; that access roads for ingress and egress were adequate to handle traffic; that the use and development of the land as proposed conformed with good and established planning and zoning regulations; that there would be no flood problem or water drainage problem; that the owners of all property within a distance of 500 feet from the exterior boundaries of the premises favored the granting of the application; that the nearest subdivided area is approximately one-half mile from the site; that Government land and vineyards adjoin the proposed track; that no objections of any kind have been interposed by the Riverside County Flood Control and Water Conservation District or the Riverside County Agricultural Commissioner.

The opposing evidence of a number of citizens was that the nature of the general area as one of homes and farms would be violated by the building of a race track; that police problems, in the opinion of the witness based on hearsay, would be increased by the attraction to the course of undesirable types; that many petitioners opposed the coming of a race track believing that "gambling is a social evil". The Coachella Valley Ministerial Association filed a protest containing numerous names of citizens who opposed "the establishment of any race track where pari-mutuel betting is permitted"; attached to the signed document is a writing signed by Harvey W. Harper, Chairman, stating as further grounds of opposition "* * * it would not be within the public interest to bring such a questionable industry into this area" and asserting that it would be an economic burden, in that money would be taken away from the community by pari-mutuel betting law enforcement problems would arise, county roads would be over-taxed and fire protection problems would arise; further it was said that "* * * It has been clearly demonstrated in other cases that credit ratings drop during racing seasons"; next the document states that a race track would be a social and cultural detriment through the attraction of "undesirable elements" and finally that the moral tone of the community would be lowered.

Supervisor Varner made the following observation at the close of the hearing:

> "Out of 100 telephone calls received approximately ninety were in opposition to granting permission for the race track. I have received here and admitted in evidence some 20 letters, almost all—there were two in favor of it. There have been petitions submitted here today of between some four and five hundred names in opposition to granting this permit. In view of this fact it indicates to me that it is not in the public interest to grant this M–3 Permit to establish this quarter-horse race track. I move that the M–3 Permit be denied."

The motion having been seconded, all supervisors voted "Aye" and the permit was denied.

Some of the reasons advanced by the witnesses opposing the granting of the permit should weigh powerfully with the voters of California in determining whether race tracks and pari-mutuel betting should be allowed anywhere, but in view of the preemption by the State of the whole field of legislation and the passage of complete general laws on the subject such arguments are not available in the present situation. Counsel for respondents ably attempt a scholastic distinction between the abstract immorality of race tracks and pari-mutuel gambling which they concede is not available to respondents because the State has taken over that total legislative field, and the alleged objective social demoralization resulting from racing and gambling, which, they argue, may still be considered by the Board of Supervisors in judging whether a permit should be issued under the zoning ordinance. But, to use an old western expression, the hair goes with the hide. Those who believe strongly that gambling is immoral base their opinion largely, if not wholly, on its observed effect on people and the community. Similarly, the opposition to alcoholic drinks does not arise from any abstract hatred for alcohol as such, but from a dislike for what it does to drinkers, as individuals and social groups. The onus of the people's authorization of race tracks and pari-mutuel machines must be borne by the grouped voters of the whole state; they have, for the time being at least, decided the question, and whatever advantages or disadvantages go with the decision cannot be barred by local legislative action from the entire territory of any county, as has been done in this case.

[6] Appellants also complain concerning the nature of the evidence accepted by the Board of Supervisors at the hearing. While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight, Walker v. City of San Gabriel, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383; Englebretson v. Industrial Accident Comm., 170 Cal. 793, 797, 151 P. 421; Employers Assurance Corp. v. Industrial Accident Comm., 170 Cal. 800, 801, 151 P. 423; Dyment v. Board of Medical Examiners, 93 Cal.App. 65, 268 P. 1073; Thrasher v. Board of Medical Examiners, 44 Cal.App. 26, 185 P. 1006, and this would apply to hearsay evidence concerning some one else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the

officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.

[7] As it appears to us that the Board of Supervisors based its action on an erroneous conclusion as to its legal rights and duties, and that upon the record legitimately before it the Board acted in abuse of its discretion, a writ of mandate should issue. Tilden v. Blood, 14 Cal.App.2d 407, 413–414, 58 P.2d 381; Martin v. Board of Supervisors, 135 Cal.App. 96, 103, 26 P.2d 843; Walker v. City of San Gabriel, supra, 20 Cal.2d 879, 129 P.2d 349; Bleuel v. City of Oakland, 87 Cal.App. 594, 597–598, 262 P. 477.

But, as the Board of Supervisors has a proper field for the operation of its discretion in the enforcement of its zoning ordinance, after eliminating the moral ground of opposition to racing, this court cannot agree with the contentions of the appellant that the Board of Supervisors is wholly without jurisdiction to pass on the application, and that the permit of the State Racing Board is all that is required. Dormax Oil Company v. Bush, 42 Cal.App.2d 243, 108 P.2d 710. The same observation applies to the contention that the Board should be by-passed and a writ directed to the respondent building inspector, requiring him to issue a permit forthwith. The writ should be directed to the Board of Supervisors and its members requiring them to cancel and annul the order denying appellant's application, and to reopen the hearing with leave to hold a supplemental hearing upon due notice if they be so advised, and to reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by State law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced.

[8] Attention has already been called to the statement in the reporter's transcript that the case was tried before a superior court judge of San Bernardino County, "presiding as Superior Court Judge of Riverside County but actually sitting in San Bernardino County." The first page of the transcript begins:

> "San Bernardino, California, May 24, 1955, Afternoon Session
>
> "Mr. Deegan: Your Honor, for the purpose of this case you are sitting as Superior Court Judge of Riverside County?
>
> "The Court: Yes, I appreciate you gentlemen coming over here, otherwise we would be in the position of having to exchange judges, get started on a case here, never could seem to finish up at the same time."

We assume from the foregoing that the judge who tried the case had secured the essential assignment from the Chairman of the Judicial Council to sit and act in Riverside County, but that for convenience the case was actually tried in the San Bernardino County Courthouse, with the tacit or express consent of the attorneys. Appellant does not raise any point as to jurisdiction or error in this respect. But this court cannot let pass unnoticed the impropriety involved in this irregular procedure. The sessions of the superior court of a given county, under the law, must be held in that county, Government Code, §§ 69741, 68099; 13 Cal.Jur.2d, "Courts", § 41.

The judgment is reversed, with instructions upon the going down of the remittitur to amend the findings of fact and conclusions of law in accordance with the views expressed in this opinion, and to enter a judgment granting a peremptory writ of mandate directed to the Board of Supervisors of Riverside County and the members thereof requiring them forthwith to cancel and annul their order denying appellant's petition and to proceed without delay to carry on and complete a hearing in the manner indicated and set forth in this opinion.

BARNARD, P. J., and GRIFFIN, J., concur.

141 Cal.App.2d 457

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Max Maynard SPELLINGS, Defendant and Appellant.

Cr. 897.

District Court of Appeal, Fourth District, California.

May 11, 1956.

Defendant was convicted of armed robbery in the first degree. The Superior Court of Fresno County, Arthur C. Shepard, J., rendered judgment on the jury's verdict, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence was sufficient to sustain the verdict.

Judgment affirmed.

1. Criminal Law 🔑741(2)

In prosecution for armed robbery, sufficiency of defendant's identification as robber was fact question for jury.

2. Robbery 🔑24(1)

Evidence was sufficient to sustain conviction of armed robbery in first degree.

3. Criminal Law 🔑394

Conviction of armed robbery in first degree was not invalid as resulting from use of evidence obtained by illegal search and seizure, where testimony as to circumstances under which defendant's truck was searched by police officers and money, jacket and revolver found therein by them were admitted in evidence without objection, officers knew that crime had been committed and had reasonable grounds to believe that defendant was guilty thereof and was leaving town to avoid further investigation before making search, and there was ample evidence, aside from evidence so obtained, to support conviction.

4. Criminal Law 🔑1158(4)

In prosecution for armed robbery, conflict in evidence as to whether defendant's confessions of such crime were freely and voluntarily made was for trial judge and jury, not District Court of Appeal, to resolve.

Willis Mevis, Bakersfield, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was accused of the crime of armed robbery alleged to have been committed on February 19, 1955. He was represented by counsel appointed by the court, and pleaded not guilty. On a first trial, the jury was unable to reach a verdict. On the second trial a jury found him guilty as charged, fixing the degree as first degree robbery and finding that he was armed with a deadly weapon at the time of the robbery. His motion for a new trial and his application for probation were denied, and he was sentenced to imprisonment at San Quentin. He has appealed from the judgment and from the order denying his motion for a new trial.

At about 7:30 on the evening of February 19, 1955, the proprietor of a liquor store in Fresno was robbed of a sum of money by a man armed with a revolver, who had come in and asked for a carton of beer. When the proprietor brought the beer the man had a gun in his hand and, on his demand, the proprietor took the money from the cash register and gave it to the man, who then left the store. The victim testified that the robber wore a brown leather jacket and that he held a black revolver, which the victim said looked like a .38. From the description furnished them, the police started to look for a man about five feet eight inches tall and who had reddish blond hair.

On February 20, the police officers went to the home of the defendant, having learned that he answered the description of the man they sought. At that time he denied that he owned a revolver and denied that he had a brown leather jacket. They took the defendant to the liquor store, and the proprietor refused to positively identify the defendant as the robber. He stated then and later on the stand that the defendant looked like the man but that he was not sure. He testified on cross-examination that he did not know whether this was the right man or not, that he was excited at the time of the robbery, and that "I never see hardly anything no more after I see the gun."

On February 21, having learned that the defendant had been in the vicinity about the time the crime was committed and other facts which aroused their suspicion, and thinking he might decide to leave town, the officers decided to watch the defendant's home. In the early evening of that day an officer parked near the defendant's home and kept watch. Shortly thereafter he saw the defendant make eight or ten trips from his house to his panel truck parked at the curb, taking out various articles. A little later the defendant, with his wife and baby, entered the truck and drove away. The officer followed and radioed for help. When another police car arrived the defendant was stopped near the north edge of Fresno, as he was traveling north. The defendant and the car were searched, $21 in bills was found on his person, and a brown leather jacket with a .22 caliber revolver fully loaded with six cartridges were found in a holster in the car. There was evidence that this revolver was built on the same frame as a .38, but with a smaller bore. A later search of the panel truck revealed a $5 bill and two $1.00 bills "shoved down" in a rip in the upholstering of the driver's seat.

The defendant was taken to the police station in a patrol car and his wife and baby were taken there in a plain police car. The defendant was questioned by the officers, outside of the presence of his wife. He at first denied knowing anything about this robbery, but later told one of the officers that he had robbed this liquor store, that he had gone in with a .22 pistol, and that he had taken about $50 or $60. The officers sent for a deputy district attorney and a court reporter, who arrived about an hour later. The defendant then made a complete confession before all three, which was taken down by a shorthand reporter. This statement takes up eleven pages of the transcript and the defendant therein told all about the manner in which the robbery was committed, including a number of things of which he could have had no knowledge if he had not been present. In this statement he said he had committed the robbery because he was broke, had not been able to find a job, and had a wife and child to feed. On the stand the defendant admitted ownership of the brown leather jacket and revolver which were admitted in evidence, denied the commission of the crime, and contended that he had made this confession because of his fear that his wife would be held on the charge if he did not admit the crime.

The appellant contends that the evidence is not sufficient to support the verdict. It is argued that his identification by the victim was uncertain and not sufficient; that he was convicted through the use of evidence which was obtained by illegal search and seizure in that the revolver, the leather jacket and the currency were obtained by an unlawful search before the arrest; that the arrest was without reasonable cause; and that the court committed prejudicial error in admitting testimony as to appellant's confessions into evidence. In this latter connection it is argued that while there is a conflict in the evidence as to whether or not the statements made by the appellant to the officer, and later before the court reporter, were freely and voluntarily made it appears without contradiction that the appellant's wife and child had been taken to the police station, and that the appellant knew that they were there in an adjoining room.

[1, 2] Whether or not the identification of the appellant as the robber was sufficient was a question of fact for the jury. People v. Hightower, 40 Cal.App.2d 102, 104 P.2d 378; People v. Addington, 43 Cal.App.2d 591, 111 P.2d 356; People v. Shaheen, 120 Cal.App.2d 629, 261 P.2d 752. While the victim was unwilling to positively identify the appellant as the robber he repeatedly said that he looked like the same man. The appellant answered the description originally given to the officers and published in a newspaper on the morning of February 20, and there were other facts and circumstances, including the appellant's admission. The appellant at first denied that he owned a revolver or had a brown leather jacket and later admitted ownership of these articles which were found in his possession. There was some evidence of flight as he was found near the north edge of Fresno while traveling north, although he said he was on his way to Bakersfield to look for work. There was also evidence that on the night of February 21, after the appellant was taken to jail following his questioning by the officers he told an inmate of the jail that he had robbed a liquor store, going in with a .22 pistol and taking about $50 or $60. The evidence, including the conduct of the appellant, was sufficient to sustain the verdict.

[3] There is no merit to the contention that appellant's conviction resulted from the use of evidence obtained by an illegal search and seizure. The testimony as to the circumstances under which this search and seizure was made was all admitted without objection, and the money, the jacket and the revolver found were likewise admitted into evidence without objection. The officers knew that this crime had been committed and the information they had up to that time, including the conduct of the appellant, was sufficient to give them reasonable grounds to believe that the appellant was guilty, and that he was leaving town before any further investigation could be made. Whether or not it should be held that reasonable grounds existed for the search and seizure, the conviction of the appellant did not depend upon the admission of such evidence or upon any matters in connection therewith. There was ample evidence to support the verdict aside from anything in that connection.

[4] There was a conflict in the evidence with respect to whether or not the confessions made by the appellant were freely and voluntarily made. That matter was fully gone into before the testimony as to those statements or confessions was received in evidence. There was ample evidence that these statements were freely and voluntarily made and that nothing was said about the appellant's wife being charged with this or any other crime, or about the statements being made by the appellant because of his fear that she would be so charged. The appellant testified that he made the confessions for that reason and that he made the statements because the officer told him that "if I didn't make some kind of a statement he was going to hold my wife and baby", and that the statements he made to the officer and later to the court reporter were not true statements. Nothing more than a conflict appears in this connection, the statements were properly admitted into evidence, and the evidence on both sides, with respect thereto, was before the jury. The conflict thus appearing was one to be resolved by the trial judge and the jury, and not by this court. People v. Wade, 138 Cal.App.2d 531, 292 P.2d 303.

The judgment and order appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

141 Cal.App.2d 286

Richard N. SPARKS, Plaintiff and Respondent,

v.

H. J. RICHARDSON, Defendant and Appellant.

H. J. RICHARDSON, Cross-Complainant and Appellant,

v.

Richard N. SPARKS and F. A. Bier, Individually and doing business as Blackstone Realty Company, Cross-Defendants and Respondents.

Civ. 5332.

District Court of Appeal, Fourth District, California.

May 3, 1956.

Rehearing Denied May 29, 1956.

Hearing Denied June 27, 1956.

Action on note which defendant, licensed real estate broker, gave real estate brokerage firm, as commission on exchange of defendant's apartment building for apartment units and trust deeds owned by another. The Superior Court of Fresno County, Strother P. Walton, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Mussell, J., held that licensed real estate broker, who had acted in such capacity in exchange of defendant's apartment building for certain apartment units and trust deeds owned by another, was not precluded from recovering upon note defendant gave broker for part payment of commission by fact that he was not licensed to act as securities broker, in view of severability of this real estate brokerage agreement from any agreement broker may have had with other party to sell securities, and provision of securities statute that notes not offered to public are not subject to licensing law.

Judgment affirmed.

1. Brokers ⚿42

Licensed real estate broker, who had acted in such capacity in exchange of defendant's apartment building for certain apartment units and trust deeds owned by another, was not precluded from recovering upon note defendant gave broker for part payment of commission by fact that he was not licensed to act as securities broker, in view of severability of this real estate brokerage agreement from any agreement broker may have had with other party to sell securities, and provision of securities statute that notes not offered to public are not subject to licensing law. West's Ann.Corp.Code, §§ 25008, 25102(c), 25700.

2. Reformation of Instruments ⚿45(8)

In action on note which defendant, licensed real estate broker, gave to real estate brokerage firm, as commission on exchange of defendant's apartment building for apartment units and trust deeds owned by another, wherein defendant sought reformation of note to express true intent of parties by excluding acceleration and attorney's fee clauses, evidence that note was short, simple and easily read, that defendant appeared to read note before signing it, and that such clauses were usual in such notes, warranted finding that defendant had, in fact, read, understood and agreed to terms of note before signing it.

3. Stipulations ⚿14(10)

Where it was stipulated by parties to action on note that plaintiffs were not licensed securities brokers, failure of trial court to find on issue whether plaintiffs were unlicensed as securities brokers was not error.

4. Appeal and Error ⚿1071(6)

Where trial court made findings upon all issues which determined the case, no prejudicial error appeared in respect to claim of error in failure of court to make certain findings.

Louis S. Edelberg, Los Angeles, for appellant.

Daniel L. Jensen, Fresno, for respondents.

MUSSELL, Justice.

This is an action on a promissory note. Defendant in his answer admits that he signed the note but alleges that it was not supported by a good and valid consideration and did not reflect the true agreement of the parties. He admits having paid $2,250 on the note and, as an affirmative defense, alleges that in signing it he mistakenly believed that it contained only the provisions set forth in a memorandum which he delivered to the Blackstone Realty Company. He asks that the note be reformed by striking therefrom the acceleration clause and the agreement to pay attorney's fees. He further alleges that the services for which the note was given involved the transfer to defendant of notes and trust deeds; that said notes and trust deeds were securities; and that the note sued upon was invalid because neither plaintiff nor his assignor was licensed as a securities broker. Defendant also filed a cross-complaint in which he sought cancelation or reformation of the note and recovery of the sum of $2,250 paid to plaintiff thereon.

Plaintiff Sparks was employed as a real estate salesman by F. A. Bier, doing business in Fresno under the name of Blackstone Realty Company, and it was stipulated by the parties that neither Bier nor Sparks ever had a securities broker license.

Defendant Richardson was the owner of the Richardson Mortgage Company and was also a licensed real estate broker. On or about October 13, 1954, plaintiff Sparks received a brochure in the mail from Richardson in which he described his real property, consisting of 21 apartment units in Merced, California, which units he offered to sell on the following terms: "Price $167,500. Will consider exchange. Will take 1st or 2nd trust deeds in trade. Brokers cooperation invited." Sparks then wrote to Richardson on October 13, 1954, as follows:

> "We received a brochure of your apartment building in Merced, which you wish to sell.
>
> "We have a client who has some scattered properties and some first and second trust deeds, who wants to trade on a larger piece of property.
>
> "If you would be interested in something like this, please let me know and I will see if we can work out a deal."

Thereafter certain real properties owned by one Nixon were shown to Richardson by Sparks, who then, on October 27, 1954, procured an exchange agreement signed by Richardson in which Richardson agreed to transfer his 21 Merced apartment units to Nixon in exchange for certain real property owned by him in Hanford and Carmel, together with two notes secured by liens on property in Santa Cruz and Riverdale. In this agreement Richardson promised to pay to the Blackstone Realty Company the sum of $8,375 commission for services rendered by the company as broker. The sum of $2,094 was paid out of escrow on this commission and the balance of $6,281 was represented by the promissory note here involved. On October 28, 1954, escrow instructions, prepared by Security Title Insurance Company, were signed by the parties and the note for the balance of the commission was typed out by the escrow officer in the presence of Sparks and Richardson. The escrow officer testified that after he had typed out the note in question, he handed it to Richardson, who appeared to read it and then signed it. The escrow officer further testified that he got the information to make the note from the original escrow instructions; that these instructions were signed by Richardson before the note was executed and contained the following provisions: "Pay Blackstone Realty a commission in the total amount of $8375.00 payable as follows $2094.00 cash; $6281.00 by personal note payable $125.00 or more monthly including interest at 6% per annum; first payment due 30 days after close of escrow and the entire note due and payable 2 years from close of escrow."; that the note contained the customary acceleration clause and provision for attorney's fees in the event of default in installments; that all note forms used at the Security Title Company contain such acceleration and attorney's fees provisions; that it was the usual thing for a real estate broker to receive his commission in the form of a promissory note; that he had made out such notes on many previous occasions; and that he had never made out such a note without such provisions in it.

Defendant testified that he executed the note and read it at the time "but not completely"; that he read the first part of it which set forth the amount and the monthly payments but did not read the balance, which he later found incorporated the acceleration clause and the provision for attorney's fees.

The note involved was assigned by Bier to plaintiff Sparks and no payments were made on it until after suit was filed, when Richardson paid $1,858.70 on principal, $141.30 interest, and $250 attorney's fees. No commission was claimed by Sparks for handling the Nixon notes and trust deeds and Sparks testified that the note sued upon did not involve any commission on the Nixon notes or trust deeds; that the note here involved was for the commission on the sale of real property for Richardson.

The trial court entered findings of fact and conclusions of law and judgment in favor of plaintiff and against the defendant and cross-complainant. It was found and concluded, generally, that the allegations of the complaint were true; that the amount due and owing on the note at the date of trial was the sum of $4,465.35, including principal and interest, and that plaintiff was further entitled to the sum of $750 as attorney's fees, less a credit of $250. The court further found against the allegations in the cross-complaint as to defendant's mistaken belief in the terms of said note and the circumstances under which it was executed. Judgment was entered in accordance with these findings and defendant appeals therefrom. He argues that a securities broker's license is required to deal in securities; that a promissory note secured by a trust deed is a security; and that respondents contracted to and did perform an illegal act for appellant.

[1] While section 25700 of the Corporations Code provides that no person or company shall act as an agent or broker without a license, and a note is defined in section 25008 of said code as a security, section 25102(c) provides that promissory notes, whether secured or unsecured, when the notes are not offered to the public, are not subject to the law. In the instant case the testimony of Sparks was that the consideration for the note on which this action was brought was a commission for services as licensed real estate broker and salesman in effecting a sale or transfer of appellant's real property. There was no evidence that respondents or either of them were hired by appellant to act as securities agents or brokers in his behalf. While there was evidence that an oral listing of the Nixon notes was taken, the testimony of both Bier and Sparks was that they never attempted to deal with anyone concerning these notes. Under such circumstances, respondents, who were licensed real estate brokers, were not required to obtain a license to sell securities in order to be entitled to recover a commission from appellant for the sale of his real estate. If this were an action to recover on a note for a commission for the sale of securities owned by Nixon, a different problem would be presented. However, the note here relied upon arises out of a contract wherein appellant agreed to pay a commission for the sale of his real estate and if, in fact, plaintiff Sparks attempted to sell securities for Nixon, such action is clearly severable from the contract with appellant. Joy Mfg. Co. v. Julian Petroleum Corp., 208 Cal. 168, 171, 280 P. 952. In Wilson v. Stearns, 123 Cal.App.2d 472, 480, 267 P.2d 59, 65, the court said: "* * * in determining whether a real estate broker may be deprived of the value of his services, already admittedly earned, his contract will not be declared invalid upon the basis of anything not embraced within the terms of the applicable statute." In Aaker v. Smith, 87 Cal.App.2d 36, 196 P.2d 150, 157, it is said:

> "The true rule applicable to this situation was stated in Wayman Inv. Co. v. Wessinger & Wagner, 13 Cal.App. 108, 110, 108 P. 1022, 1023, as follows: 'Although there may be some illegal features indirectly connected with a transaction involved in a suit, yet the plaintiff may recover if his cause of action is otherwise legitimate, and he can make out his case without calling to his aid the illegal agreement. The

> test of whether the demand can be enforced at law is whether the plaintiff requires the aid of the illegal contract to establish his case.' See, also, McAllister v. Drapeau, 14 Cal.2d 102, 112, 92 P.2d 911, 125 A.L.R. 800; Warner v. Marchetti, 52 Cal.App.2d 172, 177, 125 P.2d 838; Wagner v. Worrell, 76 Cal.App.2d 172, 179, 172 P.2d 751."

The aid of any contract between plaintiff and Nixon was not necessary to the establishment of plaintiff's case herein.

[2] Appellant argues that the note should be reformed to express the true intent of the parties. The trial court found against this contention and we cannot say as a matter of law that its finding in this connection is not supported by substantial evidence. The note was typed out by the escrow officer and handed to appellant, who read and signed it. He admitted that he read it "but not completely." The note was short, simple and easily read. Appellant was a licensed real estate broker dealing primarily in notes and trust deeds and had previously transacted business with the title company. All note forms used by the company contained clauses for acceleration and attorney's fees. Appellant spent several hours in studying the documents used in the transaction and the court could and apparently did reasonably infer that appellant did in fact read, understand and agree to the terms of the note before signing it. As was said by this court in California Trust Co. v. Cohn, 9 Cal.App.2d 33, 41, 48 P.2d 744, 749:

> "While it is true that, as was said in Los Angeles & R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 P. 1029, the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent reformation of the instrument, this means no more than that a satisfactory explanation of the failure to read will justify a trial court in holding that the explanation relieves the party from a charge of negligence which, if unexcused, might properly warrant denial of the remedy of reformation. In the instant case the trial court was not bound to accept the naive explanation offered by appellants as an excuse for their failure to read the written contract. It is apparent from an examination of the record that the court took the view either that the failure to read comprehendingly was not sufficiently explained or that in fact the instrument was read comprehendingly and that appellants were merely attempting to escape the consequences. It is immaterial which of these two views the court adopted."

[3, 4] Finally, appellant claims that there are no findings on material issues. In this connection it is claimed that the court failed to find on the issue of whether respondents were unlicensed as securities brokers. However, it was stipulated that the respondents were not so licensed and a finding as to such fact was unnecessary. Wilson v. Mattei, 84 Cal.App. 567, 572, 258 P. 453. The court found on the issues raised in the cross-complaint as to the intent and agreement of the parties and where, as here, findings were made upon all the issues which determined the case, no prejudicial error in that respect appears. Chester R. Pyle Co. v. Fossler, 200 Cal. 204, 209, 252 P. 599.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Leola WASHINGTON, a/k/a L. W. Holmes, Plaintiff and Respondent,
v.
George WASHINGTON, Defendant and Appellant.*
Civ. 16636.

District Court of Appeal, First District, Division 2, California.
May 3, 1956.
Rehearing Denied June 1, 1956.
Hearing Granted June 27, 1956.

Divorced wife brought action against divorced husband for partition and for declaratory judgment that divorced wife had an interest in personal injury judgment obtained by divorced husband. The Superior Court of the City and County of San Francisco, George W. Schonfeld, J., entered judgment adverse to divorced husband, and he appealed. The District Court of Appeal held that where wife filed divorce suit, and thereafter husband was injured and filed action for such injuries, and wife was subsequently granted an interlocutory divorce decree, and husband then obtained a judgment in personal injury action, and divorce decree made no disposition concerning husband's cause of action for injuries or proceeds of judgment for injuries, the judgment for injuries was community property even though husband and wife were living separate and apart, and even though earnings and accumulations of wife under such circumstances were her separate property.

Judgment affirmed.

1. Divorce 🔑249(1)

The parties to a divorce action may seek a determination of their property rights, but such an issue is not essential to the action.

2. Divorce 🔑255

If it does not appear from divorce decree that property rights were determined by the decree, they are not deemed to have been adjudicated and may be the subject of an independent action.

3. Divorce 🔑255

A judgment of divorce will not prevent plaintiff from claiming an interest in community property acquired by defendant after the beginning of the action and before final judgment, if there was no issue tendered in that action concerning such property.

4. Divorce 🔑104, 171

Generally, a party to a divorce action cannot put in issue rights acquired pendente lite unless a supplemental pleading is filed, and, if such a pleading is not filed, he is not foreclosed from asserting such rights in a subsequent action.

5. Husband and Wife 🔑260

Ordinarily, a cause of action for personal injuries to one spouse during marriage is community property.

6. Husband and Wife 🔑272(1)

Where wife filed divorce suit, and thereafter husband was injured and filed action for such injuries, and wife was subsequently granted an interlocutory divorce decree, and husband then obtained a judgment in personal injury action, and divorce decree made no disposition concerning husband's cause of action for injuries or proceeds of judgment for injuries, the judgment for injuries was community property even though husband and wife were living separate and apart, and even though earnings and accumulations of wife under such circumstances were her separate property. West's Ann.Civ.Code, §§ 169, 169.1, 175.

7. Husband and Wife 🔑247

Changes made in the community property law could not affect wife's community interest acquired prior to such changes. West's Ann.Civ.Code, §§ 169, 169.1, 175.

8. Declaratory Judgment 🔑318

In action by divorced wife against divorced husband for a declaration that she had an interest in personal injury judgment obtained by him, complaint alleging that divorced wife claimed an interest as tenant in common in husband's judgment for personal injuries whereas divorced husband claimed such judgment as his separate personal property, stated a cause of action for declaratory relief.

9. Limitation of Actions 🔑182(5)

Failure to plead statute of limitations was a waiver of the defense of limitations.

On Petition for Rehearing.

10. Appeal and Error 🔑712

A pleading not included in record on appeal is not properly before District Court of Appeal.

11. Limitation of Actions 🔑39(12)

An action by tenant in common for his share of common property is not subject to the four year statute of limitations. West's Ann.Code Civ.Proc. § 343.

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* Opinion vacated 302 P.2d 569.

Edward D. Mabson, San Francisco, for appellant.

Carl B. Metoyer, Terry A. Francois, Murville C. Abels, San Francisco, for respondent.

DOOLING, Justice.

Defendant, George Washington, appeals from a judgment of the superior court that a certain cause of action growing out of personal injuries suffered by him on September 18, 1948, was at the time it arose, the community property of plaintiff, Leola Washington, and appellant; that upon the rendition of the Final Decree of Divorce between respondent and appellant the parties became the owners of that cause of action for personal injuries and the resulting judgment as tenants in common and that respondent and appellant are each the owners of a one-half interest in the judgment entered in the personal injury action above referred to subject to the payment of certain attorneys' fees and costs in that action. Appellant also requests a review of an order denying his motion for a new trial. (In his opening brief appellant states that he is also appealing from an order denying a nonsuit. Since such order is non-appealable, the attempted appeal from it will be disregarded.)

Appellant and respondent married on October 10, 1944, and separated August 10, 1946. Respondent wife filed a divorce action against appellant on October 9, 1946. Appellant husband suffered personal injuries in an accident on September 18, 1948. He filed an action on November 4, 1948, against the City and County of San Francisco and one Melvin E. Garner to recover for these injuries. On March 20, 1950, respondent was granted an interlocutory decree of divorce. A personal injury judgment in favor of appellant became final April 19, 1954. Respondent filed the present action for partition and declaratory relief asserting an interest in the personal injury judgment on June 21, 1954.

It is alleged in the complaint in this action that "the pleadings in said divorce action contained no allegation and tendered no issue concerning the said cause of action for personal injuries and the said Interlocutory Decree of Divorce made no disposition of the said cause of action or proceeds from the same * * * that said Final Judgment of Divorce made no disposition of said cause of action for personal injuries or the proceeds from same." These allegations were expressly admitted in appellant's Answer.

[1, 2] These admitted facts would bring into play the settled rule, restated with a full consideration of the case law on the subject, in Estate of Williams, 36 Cal.2d 289, 292–293, 223 P.2d 248, 251, 22 A.L.R.2d 716: "The parties to a divorce action may seek a determination of their property rights, but such an issue is not essential to the action. If it does not appear from the decree that property rights were determined by it, they are not deemed to have been adjudicated and may be the subject of an independent action."

[3, 4] These property rights originated in the injury to appellant on September 18, 1948, long after the filing of the complaint in this action. The rule announced in Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168, 1171, thus becomes applicable, that "the judgment of divorce will not prevent plaintiff from claiming an interest in community property acquired after the beginning of the action and before the final judgment, if there was no issue tendered in that action concerning such property." This is but a particular application of the general rule stated in Yager v. Yager, 7 Cal.2d 213, 217, 60 P.2d 422, 425, 106 A.L.R. 664: "It is a general rule that a party cannot put in issue rights acquired *pendente lite* unless a supplemental pleading is filed, and, if such a pleading is not filed, he is not foreclosed from asserting such rights in a subsequent action."

[5–7] Appellant, however, claims that since his cause of action for personal injuries arose after the separation of the parties it did not become community property. It is clear that ordinarily a cause of action for personal injuries to one spouse arising during marriage is community property. Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257. At the time that this property right accrued to appellant, i. e. the date of his injury, property acquired by a husband was community property of the spouses even though they were living separate and apart, although the earnings and accumulations of the wife under such circumstances were her separate property. 10 Cal.Jur.2d, Community Property, § 26, p. 693; Civ.Code, § 169. Certain changes since made in the law, Civ.Code § 169.1 in 1951 and § 175 in 1955, cannot affect the wife's community interest acquired in 1950. The exact contention now asserted by appellant was disposed of by this court in Randolph v. Randolph, 118 Cal.App.2d 584, 585, 258 P.2d 547, 548, where we paraphrased De Funiak on Community Property: "the later American cases * * * give the wife an interest in all such property acquired by either party as is community property according to statute until the marital community is terminated by death or judicial decree." (Hearing denied by Supreme Court.)

The language in some of the decisions concerning the right to recover damages for personal injuries that "a cause of action for injuries to either the husband or the wife arising during the marriage and *while they are living together* is community property". Emphasis ours; Flores v. Brown, 39 Cal.2d 622, 630, 248 P.2d 922, 926; Kesler v. Pabst, supra, 43 Cal.2d 254, 256, 273 P.2d 257, is explainable in view of Civil Code section 169 making the earnings and accumulations of the wife her separate property while she is living separate and apart from her husband. This language is not to be taken as indicating that the earnings and accumulations of the husband, where the spouses are living separate and apart, are not community property in view of the statutory law and the decisions above referred to.

[8] Appellant's claim that the complaint did not state a cause of action for declaratory relief is not tenable. The complaint alleged that respondent claimed an interest as tenant in common in the judgment for appellant's personal injuries, whereas appellant claimed such judgment as his separate personal property. 15 Cal.Jur. 2d, Declaratory Relief, § 76, p. 238.

[9] Appellant argues that the court lacked jurisdiction because too long a time elapsed between the accrual of his cause of action for personal injuries and the commencement of this action. The statute of limitations was not pleaded and this amounts to a waiver of that defense. 16 Cal.Jur., Limitation of Actions, § 199, p. 603.

Appellant's contention that the court erred in failing to find the date of the separation of the parties is immaterial in view of our conclusion that at the time when plaintiff received his injuries his cause of action became community property despite the separation of the spouses.

Judgment affirmed.

NOURSE, P. J., and KAUFMAN, J., concur.

On Petition for Rehearing.

PER CURIAM.

[10, 11] In his petition for rehearing appellant includes a photostatic copy of an amendment to his answer alleging that the action is barred under Code of Civil Procedure section 343. This pleading is not included in the record on appeal and for that reason is not properly before us; but even if it could be considered it would not aid appellant, since an action by a tenant in common for his share of the common property is not subject to the limitation of that section. Adams v. Hopkins, 144 Cal. 19, 27, 77 P. 712.

The petition for rehearing is denied.

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141 Cal.App.2d 340

Milo BARRY, Plaintiff and Appellant,

v.

Willard K. RODGERS et al., Defendants,
Sam Portelli and Lillian Portelli,
Respondents.

Civ. 21556.

District Court of Appeal, Second District,
Division 2, California.

May 7, 1956.

Action to recover damages for alleged false arrest, false imprisonment and malicious prosecution growing out of a prosecution charging the plaintiff with perjury. From a judgment of the Superior Court of Los Angeles County and from an order dismissing the complaint, Bayard Rhone, J., the plaintiff appealed. The District Court of Appeal, Fox, J., held that summary judgment for the defendants was properly granted where their affidavits showed that neither of them had anything to do with the criminal prosecution against the plaintiff and that attempted appeal from an order dismissing the complaint as to the defendants must be dismissed.

Judgment affirmed; appeal from order dismissed.

1. Judgment ⚷178

The purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials, and while it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists or whether the defense interposed is sham.

2. Judgment ⚷185.2(8)

If it appears from an examination of the affidavits that no triable issue of fact exists and that the affidavits in support of the motion state facts which if proved would support a judgment in favor of the movant, then summary judgment is proper.

3. Judgment ⚷185.2(8)

Propriety of granting or denying a motion for summary judgment depends upon the sufficiency of the affidavits that had been filed.

4. Judgment ⚷185.2(1)

In granting summary judgment the plaintiff may not rely on the allegations of his complaint as a means of disputing the affidavits filed by the defendants.

5. Judgment ⚷185.2(8)

Absent a genuine issue of fact as disclosed by the affidavits a party is not entitled to proceed to trial and the court applying the law to the uncontroverted material facts may render summary judgment.

6. Judgment ⚷185.3(21)

In action for false arrest, false imprisonment and malicious prosecution growing out of a prosecution charging the plaintiff with perjury where the affidavits of defendant showed that neither of them had anything to do with the issuance of the criminal complaint against the plaintiff his subsequent arrest or later incarceration and the plaintiff's affidavit did not controvert such matters there was no genuine issue of fact and the defendants were entitled to summary judgment.

7. Judgment ⚷185.2(1)

In a summary judgment proceeding whether there is a triable issue of fact is determined from the affidavits and the pleadings may not be resorted to for that purpose.

8. Appeal and Error ⚷780(1)

Attempted appeal from an order striking the complaint was dismissed where no such order was made.

9. Appeal and Error ⚷103

Attempted appeal from an order granting the motion of defendants to dismiss the complaint as to them must be dismissed since there is no appeal from such an order.

◆

Milo Barry, in pro. per.

Raymond R. Roberts, Van Nuys, for respondents.

FOX, Justice.

Plaintiff appeals from a summary judgment in favor of defendants Sam Portelli and Lillian Portelli.

By his amended complaint plaintiff seeks to recover damages from Willard K. Rodgers, Sam Portelli, Lillian Portelli and others, for false arrest, false imprisonment and malicious prosecution. His asserted causes of action grow out of the fact that in December, 1953, defendant Rodgers swore to a criminal complaint charging plaintiff with perjury. Plaintiff was thereupon arrested, arraigned, and, upon a preliminary hearing, was held to answer in the superior court. The charges against him, however, were later dismissed. Plaintiff alleges that the Portellis had a part in this unhappy experience. The Portellis filed an amended answer denying plaintiff's allegations insofar as they related to them.

Thereafter the Portellis filed a notice of motion for summary judgment, supporting the same with their respective affidavits, which are identical except in one particular which will be later noted. These affidavits disclose that in 1951 Mr. and Mrs. Portelli rented a restaurant from Rocky Ybarra; that Milo Barry, plaintiff herein, prepared the lease; that in 1952 a civil action was instituted by Barry against defendant Rodgers and his wife, Rachael; that the matter before the court related to payment under a lease covering the identical restaurant premises. Mrs. Portelli's affidavit states that she was served with a subpoena requiring her to testify at the trial of said action; that she was called as a witness and testified as to the date that she and her husband took possession of the restaurant and as to the rent they paid. It does not appear from Mr. Portelli's affidavit that he was subpoenaed as a witness or testified.

Thereafter it appears from the affidavits of both Mr. and Mrs. Portelli that they were subpoenaed by the Los Angeles Police Department as witnesses on behalf of the People in a criminal proceeding entitled The People v. Milo Barry; that at said criminal trial they each testified as to the date they took possession of the restaurant and as to the rent they paid. Each of them denied ever having accused Barry of committing perjury; each denied having had any part whatsoever in causing a criminal complaint to be filed against him, or in causing his arrest and imprisonment.

Plaintiff filed an affidavit in opposition. It only stated conclusions and generalities, however. It failed to raise an issue as to any material fact. It was on this state of the record that the court granted the motion of the Portellis for summary judgment.

[1–5] The purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials. While it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the court to pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists or whether the defense interposed is sham or feigned. Cone v. Union Oil Co., 129 Cal.App.2d 558, 562, 277 P.2d 464; Kelly v. Liddicoat, 35 Cal.App.2d 559, 561, 96 P.2d 186. If it appears from an examination of the affidavits that no triable issue of fact exists, and that the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving party, then summary judgment is proper. Coyne v. Krempels, 36 Cal.2d 257, 261, 223 P.2d 244. It is thus apparent that the propriety of granting or denying the motion depends upon the sufficiency of the affidavits that have been filed. Kimber v. Jones, 122 Cal.App.2d 914, 918, 265 P.2d 922; Low v. Woodward Oil Co., 133 Cal.App.2d 116, 121, 283 P.2d 720; McComsey v. Leaf, 36 Cal.App.2d 132, 133, 97 P.2d 242. The plaintiff may not rely on the allegations of his complaint as a means of disputing the affidavits filed by the defendants. Cone v. Union Oil Co., supra; Maltby v. Shook, 131 Cal.App.2d 349, 355, 280 P.2d 541. Often there is no genuine issue of fact although such an issue is raised by the formal pleadings. Absent a genuine issue of fact, as disclosed by the affidavits, a party is not entitled to proceed to trial and the court, applying the law to the uncontroverted material facts, may render summary judgment. Murphy v. Kelly, 137 Cal.App.2d 21, 23, 29, 289 P.2d 565. The sole question then is, are the Portelli defendants entitled to a summary judgment on the basis of the undisputed material facts in the affidavits they filed in support of their motion? This question must be answered in the affirmative.

[6] Since the affidavits of Mr and Mrs. Portelli show that neither of them had anything to do with either the issuance of the criminal complaint against the plaintiff, his subsequent arrest, or later incarceration, and since plaintiff's affidavit does not controvert any of these matters, there is no issue of fact to be tried. The Portellis have made out a complete defense of nonliability. They are accordingly entitled to a summary judgment to that effect. Coyne v. Krempels, supra; Murphy v. Kelly, supra.

[7] Plaintiff apparently believes that since his amended complaint alleges a cause of action against the Portellis they are not entitled to a summary judgment. This theory is erroneous. In a summary judgment proceeding whether there is a triable issue of fact is determined from the affidavits. The pleadings may not be resorted

to for that purpose. Cone v. Union Oil Co., supra; Maltby v. Shook, supra.

[8, 9] Plaintiff purports to appeal from an order striking the complaint. No such order was made. The purported appeal therefrom is dismissed. Plaintiff attempts to appeal from the order granting the motion of the Portellis to dismiss the complaint as to them. There is no appeal from such an order. Bank of America National Trust & Savings Ass'n v. Oil Well Supply Co., 12 Cal.App.2d 265, 271, 55 P.2d 885. This attempted appealed is also dismissed.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

William Branch RILEY, also known as William Brand Riley, Plaintiff and Respondent,

v.

Hallie Ford TURPIN, Defendant and Appellant.*

No. 16662.

District Court of Appeal, First District, Division 1, California.

May 9, 1956.

As Corrected May 14, 1956.

Rehearing Denied June 8, 1956.

Hearing Granted July 5, 1956.

Action was brought for partition of realty and for recovery of taxes paid by plaintiff. The Superior Court, County of Marin, B. C. Hawkins, J., entered an interlocutory judgment and ordered the realty sold, and the defendant appealed. The District Court of Appeal, Agee, J. pro tem., held that where man, who owned home, and woman entered into written agreement whereby the home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, the property should vest in the nephew in fee simple, and that if nephew should die before the man and woman, then the survivor should take the property in fee simple, and the man died, and the woman lived on the property, but did not pay real estate taxes, and property was sold to the State, and near end of five year redemption period nephew made formal demand on woman to pay taxes, but she paid nothing, and nephew paid enough on the taxes to prevent a final forfeiture, nephew had right to maintain action in partition as to woman's life estate, and that it was proper to order a sale of the property as a whole, but that there was fundamental error in judgment because Superior Court, in determining respective shares of parties, did not take into value the life estate of the woman.

Judgment reversed with instructions.

1. Appeal and Error 🔑1008(3)

Where interpretation of written agreement depends solely on language of agreement itself, District Court of Appeal on appeal is not bound by trial court's construction of the agreement.

2. Joint Tenancy 🔑1

A joint tenancy may exist in all kinds of property.

3. Joint Tenancy 🔑3

Where man, who owned home, and woman entered into written agreement whereby the home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, the property should vest in the nephew in fee simple, and that if nephew should die before the man and woman, then the survivor should take the property in fee simple, provision in favor of the nephew was valid and was not irreconcilable and repugnant to a joint tenancy estate.

4. Remainders 🔑4

Though the law may favor vested future interests over contingent remainders, contingent remainders are clearly recognized by the law of California. West's Ann.Civ.Code, §§ 769, 773.

5. Taxation 🔑531(2)

Where man, who owned home, and woman entered into written agreement whereby home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, property should vest in nephew in fee simple, and that if nephew should die before man and woman, then survivor should take property in fee simple, and after death of man, woman did not pay taxes as required of her as life tenant, nephew in paying taxes was not a volunteer, and his payment of taxes gave him a lien to that extent on woman's life estate. West's Ann.Code Civ. Proc., § 752; West's Ann.Civ.Code, § 840.

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* Opinion vacated 301 P.2d 834.

6. Partition ⚷12(5), 16, 100

Where man, who owned home, and woman entered into written agreement whereby home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, property should vest in nephew in fee simple, and that if nephew should die before man and woman, then survivor should take property in fee simple, and man died, and woman lived on property, but did not pay real estate taxes, and property was sold to the State, and near end of five year redemption period nephew made formal demand on woman to pay taxes, but she paid nothing, and nephew paid enough on taxes to prevent a final forfeiture, nephew had right to maintain action in partition as to woman's life estate, and it was proper to order a sale of the property as a whole. West's Ann.Rev. & Tax.Code, §§ 3436, 3613; West's Ann.Code Civ.Proc., §§ 752, 763; West's Ann.Civ.Code, §§ 769, 773, 840.

7. Partition ⚷87

Where man, who owned home, and woman entered into written agreement whereby home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, property should vest in nephew in fee simple, and that if nephew should die before man and woman, then survivor should take property in fee simple, and man died, and woman lived on property, but did not pay real estate taxes, and property was sold to the State, and nephew paid taxes to prevent final forfeiture, and brought suit against woman for partition and recovery of taxes paid by him, nephew was not entitled to money judgment for taxes paid, but only a lien against woman's interest in the property to be paid out of her share of the proceeds of sale. West's Ann.Code Civ. Proc. §§ 752, 763; West's Ann.Civ.Code, §§ 769, 773, 840.

8. Partition ⚷114(6)

In partition action, paragraph of interlocutory decree allowing plaintiff attorney fees in the sum of $250 and his costs of partition, was properly stricken on motion for new trial.

9. Partition ⚷112

Where man, who owned home, and woman entered into written agreement whereby home was to be held by them in joint tenancy, subject to condition that if man's nephew survived both of them, property should vest in nephew in fee simple, and that if nephew should die before man and woman, then survivor should take property in fee simple, and man died, and the woman lived on property, but did not pay real estate taxes, and nephew paid taxes to prevent final forfeiture, and brought suit against woman for partition and recovery of taxes paid by him, judgment, which did not, in determining respective shares of parties in proceeds of sale of property, take into account value of life estate of woman was fundamentally erroneous. West's Ann.Code Civ.Proc. §§ 778, 779.

10. Evidence ⚷364

In ascertaining value of life estate in partition action, or a remainder contingent on survivorship, use of standard mortality tables is proper. West's Ann.Code Civ. Proc. §§ 778, 779.

11. Partition ⚷112, 114(6)

At time of confirmation of sale of realty in partition action, final judgment should first determine and allow fee and expenses of referee, then any attorney fees and costs of partition should be fixed and ordered paid, and balance then remaining from proceeds of sales should be apportioned between parties. West's Ann.Code Civ.Proc. §§ 768, 796.

Russell T. Ainsworth, San Francisco, for appellant.

Hilary H. Crawford, Hilary H. Crawford, Jr., San Francisco, for respondent.

AGEE, Justice pro tem.

On February 24, 1941, Arthur Brand and Hallie Turpin entered into a written agreement whereby the home owned by Brand would thereafter be held by them in joint tenancy, subject to the condition that if William Riley (Brand's nephew) survived both of them the property "shall vest in William Branch Riley, in fee simple, but in the event of the death of William Branch Riley, dying before both of the parties to this Agreement, then the survivor of the Party of the First Part [Brand] and the Party of the Second Part [Mrs. Turpin] shall take all the property in fee simple absolute."

Brand died on May 6, 1947, and Mrs. Turpin has lived on the property ever since. She did not pay the real property taxes and on June 25, 1948, the property was sold to the state. Rev. & Tax.Code, § 3436. Near the end of the five year redemption period Riley made formal demand upon Mrs. Turpin to pay the taxes but she paid nothing. On May 20, 1953, Riley paid enough on the taxes to prevent a final forfeiture. Rev. & Tax Code, § 3613.

On July 17, 1953, Riley filed suit against Mrs. Turpin for partition and recovery of the taxes paid by him. The lower court granted an interlocutory judgment and ordered the property sold.

Defendant's motion for a new trial was denied and she appeals from the whole of the interlocutory judgment.

[1] Preliminarily, it should be noted that this court is not bound by the trial court's construction of the written agreement when, as here, its interpretation depends solely upon the language of the instrument itself. Stevenson v. County of San Diego, 26 Cal.2d 842, 844, 161 P.2d 553.

Appellant contends that, under the agreement, respondent did not acquire any interest whatsoever in the property because the parties thereto agreed to hold it as joint tenants with the right of survivorship in themselves, and any exception in the agreement to this is irreconcilable and repugnant to a joint tenancy estate and therefore void. This being so, appellant continues, respondent was a mere volunteer in paying the taxes and, furthermore, has no right to bring this or any other action with regard to the property. Appellant cites McDonald v. Morley, 15 Cal.2d 409, 101 P.2d 690, 129 A.L.R. 810, and California Trust Co. v. Anderson, 91 Cal.App.2d 832, 205 P.2d 1127.

The McDonald case [15 Cal.2d 409, 101 P.2d 691], involves an agreement between husband and wife that if one should die, then his or her interest in certain real property held by them in joint tenancy "shall become the property of their daughter." The Supreme Court held that this was entirely inconsistent with the survivorship characteristic of an estate in joint tenancy and that the agreement made the husband and wife tenants in common with separate descendible interests. In the California Trust case, the property (mainly stocks) was held in joint tenancy by a mother, son and daughter. The son and daughter agreed in writing between themselves that if their mother should predecease both of them, the property in question would be divided equally between them. Thereafter, the mother died, and, two months later, the daughter died. In the ensuing litigation, the brother claimed all of the property as the surviving joint tenant. It was held that after the mother's death the property was held by the son and daughter in equal shares, as tenants in common, and that their agreement had terminated the joint tenancy between them because it had destroyed the right of survivorship.

[2] Both of these two cases involve joint tenancy in the entire interest in the property. In the instant case the joint tenancy involves only a life estate, the life being that of the survivor of the two parties, Brand and Mrs. Turpin. A joint tenancy may, of course, exist in all kinds of property, 13 Cal.Jur.2d p. 299; O'Neill v. O'Malley, 75 Cal.App.2d 821, 824, 171 P.2d 907, and it has been held from an early date that joint tenancies may be created in less than fee estates (2 Blackstone's Commentaries, 181). In the instant case the two

parties intended and so provided that the survivor should have the property until his or her death, and that the remainder would go to and be the property of the survivor as between themselves and Riley. In other words, Brand and Mrs. Turpin had a life estate in joint tenancy and Brand, Mrs. Turpin and Riley each had a contingent remainder, dependent upon surviving the other two. Although not involving the instant situation, the following comment in Zeigler v. Bonnell, 52 Cal.App. 2d 217, 220, 126 P.2d 118, 119, is of interest: "While both joint tenants are alive each has a specialized form of life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives."

[3] In short, neither Brand nor Mrs. Turpin agreed to anything repugnant to their joint tenancy in the life estate created by them nor did either of them transfer any interest therein to Riley or anyone else. As to effect of such a transfer by one joint tenant, see Green v. Skinner, 185 Cal. 435, 438, 197 P. 60.

[4] Appellant cites McGarrigle v. Roman Catholic Orphan Asylum, 145 Cal. 694, 79 P. 447, 1 L.R.A.,N.S., 315; and Litten v. Warren, 11 Cal.App.2d 635, 54 P.2d 39. In the first case, the grantor deeded a life estate to McGarrigle and stated in the deed that it was her "purpose" that the asylum should have the property after McGarrigle's death. But, as the court pointed out, the deed contained "no operative words of grant" and was therefore a mere statement of intention to do something in the future with the reversion and this was never done. In the Litten case, the court said 11 Cal.App.2d at page 637, 54 P.2d at page 40: "Where there is an asserted modifying or limiting clause in a deed, if such clause be of *doubtful import,* the fee contemplated by the granting clause of the deed will not be cut down." (Emphasis added.) Thus a mere statement of "purpose" or "intent," particularly where it is expressed in doubtful language, will not create any estate. From what has already been said regarding the agreement in the instant case, these two decisions are not in point because Riley's contingent remainder was clearly provided for and was not just a statement of intent or purpose by the grantors. While the law may favor vested future interests over contingent remainders, Williams v. Williams, 73 Cal. 99, 14 P. 394, contingent remainders are clearly recognized by the law of this state. (See Civ.Code §§ 769 and 773.)

Formerly, a cotenant had to be in possession in order to bring a partition action. However, in 1919, section 752 of the Code of Civil Procedure was amended so as to eliminate this requirement. The effect of this amendment was discussed in Geary v. De Espinosa, 1921, 51 Cal.App. 52, 196 P. 90, where plaintiff and fifteen others owned the remainder in real property as tenants in common. Plaintiff's right to bring the partition suit against the other remaindermen was upheld even though the life tenant was in possession and they were not. The question did not arise as to whether a remainderman could bring such a suit against the life tenant because the life tenant, who was joined as a defendant, consented to the partition in her answer. However, the case does stand for the proposition that respondent herein, as a remainderman, can maintain this action against Mrs. Turpin, at least in her capacity as the other remainderman.

Once the right to bring the action is established, as it is here, the question as to what the court is entitled to do is covered by section 763 of the Code of Civil Procedure, which provides: "If it appears by the evidence, whether alleged in the complaint or not, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, *or* where property is subject to a life estate and the remainder is a *contingent remainder,* the court may and in the latter case *must* order the sale thereof; * *." (Emphasis added.) Here, the lower court made an express finding from the evidence that the property could not be partitioned without great prejudice to the owners. It also found respondent to be the owner of a contingent remainder in the property; so that, under the first finding just mentioned, a court *may* order a sale, and under the second it *must* order such sale.

However, the question still remains as to what is included in the "property" to be sold. Is it the entire fee or just the remainder which is subject to sale?

After Brand's death, the property was, in effect, divided into a life estate in Mrs. Turpin and the remainder in her and Riley, as joint tenants. While we have seen that Riley can maintain this action against his fellow joint tenant as to the remainder, there is no case in California allowing such action by a remainderman against a life tenant.

[5, 6] Section 752 of the Code of Civil Procedure provides for those who are entitled to bring actions for partition of real property. In 1943, the following provision was added to this section: "* * * or where real property is subject to a lien on a parity with that on which the owner's title is based, by the owner or by the *holder of such lien*," etc. (Emphasis added.) Riley had a lien on the life estate of Mrs. Turpin for the amount of taxes paid by him. The obligation to pay such taxes was upon her as the life tenant. Civ.Code § 840. As we have heretofore stated, Riley was not a volunteer; he had an interest in the property, and his payment of taxes which had become delinquent gave him a lien to this extent upon Mrs. Turpin's life estate. Willmon v. Koyer, 168 Cal. 369, 143 P. 694, L.R.A.1915B, 961. Under the 1943 amendment Riley therefore had a right to maintain an action in partition as to Mrs. Turpin's life estate. We conclude that it was proper to order the sale of the property as a whole.

Appellant's motion for a new trial on the ground of newly discovered evidence was supported by her attorney's affidavit that after the trial he had discovered a recorded deed by which Brand had conveyed his interest in the property to Riley's father and that the latter was therefore a necessary party in the partition action. Riley's father executed a counter-affidavit in which he denied any delivery of the deed, alleged that he had recorded it without realizing that there had been no legal delivery of it to him, and that, although Brand in his will left everything to him, and named him executor, he did not include any interest in the property in the assets of the estate. Riley's father further disclaimed any interest in the property. A quitclaim deed was executed by him and recorded before the new trial was ruled upon. The trial judge evidently concluded that the father had never acquired any interest in the property and therefore denied a new trial.

The interlocutory judgment contains nine paragraphs, each of which is herewith summarized.

[7] Paragraph 1 orders a money judgment totaling $1,213.44 in favor of respondent and against appellant, this being for taxes, plus interest, paid by him to prevent a final forfeiture. All that respondent is entitled to in this respect is a *lien* against the appellant's interest in the property, to be paid out of the appellant's share of the proceeds of sale. Willmon v. Koyer, supra.

Paragraph 2 declares respondent to be a contingent remainderman and, in the event of appellant's death before his, the owner in fee simple.

Paragraph 3 declares that appellant has a life estate in the property and a contingent remainder in the fee, the contingency being her survival of respondent.

[8] Paragraph 4 allows appellant his attorney fees in the sum of $250 and his costs of partition. This was properly stricken on motion for a new trial. Broome v. Broome, 179 Cal. 638, 645, 178 P. 525. Harrington v. Goldsmith, 136 Cal. 168, 170, 68 P. 594.

Paragraph 5 declares that partition is necessary; that a physical partition cannot be had without great prejudice to the parties; that, therefore, it is necessary that said property be sold at partition sale.

Paragraph 6 names the referee, the parties having consented to one referee instead of three, Code Civ.Proc. § 763, and directs the referee to sell according to law. Code Civ.Proc. § 775.

Paragraph 7 then orders the referee, after the sale, to report to the court for confirmation.

Paragraph 8 provides that the referee's fee, disbursements and expenses shall be determined by the court at the time of such confirmation.

Paragraph 9 provides for the distribution of the proceeds of sale. First, provision is made for payment of the referee's fee and expenses; second, for payment of respondent's attorney fees and costs of partition; third, for apportionment of the balance between appellant and respondent on the basis of their life expectancies, which were correctly found to be 5.7 years and 24.43 years, respectively, but which, incidentally, were incorrectly calculated as to the resulting percentages; then the judgment provides that appellant's share be surcharged with the sum of $556.68 still owing under the five-year plan plus any penalties and interest thereon, and any additional taxes which fall due between the interlocutory judgment and the sale; fourth, that the $1,213.44 (heretofore referred to) plus interest from the date of the interlocutory judgment be paid to respondent out of appellant's share; fifth, that the balance, if any, remaining out of appellant's share be paid to her.

[9] The fundamental error in paragraph 9 of the judgment is that the trial court did not, in determining the respective shares of the parties, take into account the value of the life estate of appellant. The apportionment was made on the basis of each owning a contingent remainder, the contingency being survival of the other. But appellant had more than a contingent remainder. She had a life estate in herself alone.

Section 778 of the Code of Civil Procedure provides: "The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the Clerk of the Court." Section 779 of the Code of Civil Procedure provides that if such consent (to a reasonable amount) be not given, "the Court must *ascertain and determine* what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate * * *." (Emphasis added.)

[10] In ascertaining the value of a life estate, or a remainder contingent upon survivorship, the use of standard mortality tables is proper. 68 C.J.S., Partition, § 219, p. 354.

From what has been said, it is clear that this action must be returned to the trial court for an evaluation by it of the interest of each of the parties in proportion to that of the other, taking into account that appellant has a life estate as well as a contingent remainder and also using the mortality tables for whatever assistance may be afforded.

[11] At the time of confirmation of sale, the final judgment should first determine and allow the fee and expenses of the referee in accordance with section 768 of the Code of Civil Procedure. Then, any attorney fees and costs of partition, as provided by section 796 of the Code of Civil Procedure, should be fixed and ordered paid in accordance with said section. The balance then remaining from the proceeds of sale should then be apportioned between the parties as determined by the trial court in accordance with this decision, subject to the following charges, which are to be paid out of appellant's share: the respondent's lien of $1,213.44 plus interest at 7 per cent from July 9, 1954; the sum of $556.68 still owing under the five-year plan plus any penalties and interest thereon; any additional taxes, penalties or interest thereon which respondent has paid in order to prevent a final forfeiture; and any additional taxes, interest and penalties thereon, which fall due and are payable up to the time of sale.

The interlocutory judgment heretofore rendered is reversed, with instructions to the trial court to proceed to take the necessary steps to render and cause to be entered an interlocutory judgment in accordance with this decision. The parties are to bear their own respective costs upon this appeal.

PETERS, P. J., and BRAY, J., concur.

141 Cal.App.2d 350

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph MOYLE, Defendant and Appellant.

Cr. 3202.

District Court of Appeal, First District, Division 1, California.

May 8, 1956.

Hearing Denied June 6, 1956.

The Superior Court, County of Alameda, Charles Wade Snook, J., denied defendant's petition for relief from default in presentation of record upon his appeal from judgment and order denying his motion for new trial. The District Court of Appeal, Fred B. Wood, J., held that failure to file with clerk and present application to trial court, stating in general terms grounds of appeal and points upon which appellant relied deprived reviewing court of any and all jurisdiction except to dismiss appeal, and trial court was without jurisdiction to grant relief from default in presentation of record upon appeal.

Affirmed.

Criminal Law ⚷1071

Failure to file with clerk and present application to trial court, stating in general terms grounds of appeal and points upon which appellant relied deprived reviewing court of any and all jurisdiction except to dismiss appeal, and trial court was without jurisdiction to grant relief from default in presentation of record upon appeal. West's Ann.Pen.Code, § 1239; Rules for Supreme Court and District Courts of Appeal, rule II, § 7; West's Ann.Pen. Code, § 1247k.

Joseph Moyle, in pro. per.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Emmet J. Seawell, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

October 6, 1955, the superior court denied defendant's petition (dated September 21, 1955) for relief from default in the presentation of the record upon his appeal from a judgment and from an order denying his motion for new trial. The judgment was rendered and the order was made on or about May 27, 1939. Defendant gave timely oral notice of appeal therefrom[1] but he did not then, or at any time, "file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies" required by section 7 of Rule II of the Rules for Supreme Court and District Courts of Appeal then in effect concerning appeals in criminal cases.[2]

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[1] At that time the applicable statute provided: "An appeal from a judgment may be taken by the defendant by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from the same or by filing a written notice of appeal within two days after the rendition of judgment with the clerk of the court wherein judgment was rendered; and from any order made after judgment, by announcing in open court at the time the same is made that he appeals from the same. * * *" Pen.Code, § 1239, as amended by Stats.1935, ch. 679, p. 1867, at 1868.

[2] Section 7 of Rule II of those rules at that time significantly provided: "Upon an appeal by the defendant from a judgment of conviction or from an order denying his motion for a new trial, * * * the appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent. * * *" 213 Cal. xxxix-xl.

The rule in question apparently first appeared in 204 Cal. xliii-xliv; declared effective September 1, 1928, in 204 Cal. lxviii.

When making the order which is the subject of this appeal, the judge then presiding said he found that under date of January 22, 1951, the District Court of Appeal dismissed the appeal because of the appellant's failure to file his opening brief and that, therefore, it did not appear possible to give any relief. That was an incorrect premise. Our records show that the dismissal of January 22, 1951, was of a later appeal, an appeal from a superior court order made September 15, 1950, denying a petition of September 1, 1950, to modify the judgment by accelerating the starting date of the sentence imposed.

Defendant, in support of the present appeal, claims that the trial judge, in assigning a prior dismissal of the main appeal as the reason for denying the requested relief, in effect failed to consider the request because of a mistaken belief that he lacked jurisdiction to do so.

This presents the question whether, for a reason other than that assigned, the trial court may have lacked jurisdiction to grant the request.

It seems abundantly clear that defendant's failure to file the application required by section 7 of Rule II deprived the court of any and all jurisdiction except to dismiss the appeal, in view of the mandate of the rule that if the application be not filed in time "the appeal shall be dismissed." It was so held in People v. Davis, 103 Cal. App. 318, 284 P. 516, and in People v. Riga, 104 Cal.App. 477, 285 P. 1069. This rule was substantially the same as an antecedent statute, Penal Code, § 1247 which was similarly interpreted. People v. Pietri, 90 Cal.App. 69, 265 P. 508; People v. Pierce, 89 Cal.App. 290, 264 P. 519, hearing by Supreme Court denied; People v. McClellan, 88 Cal.App. 415, 263 P. 841, hearing by Supreme Court denied; People v. Shaw, 81 Cal.App. 312, 253 P. 747, reviewing five similar cases which had been decided during the period 1911–1926. See also confirmatory statement in People v. Malone, 213 Cal. 406, 407–408, 2 P.2d 332.

Defendant relies heavily upon People v. Bryant, 207 Cal. 450, 278 P. 1025. However, in that case the defendant, in addition to giving notice of appeal, filed with the clerk of the court a notice and request which specified in considerable detail the transcripts, exhibits, minute entries, and other records of the proceedings in the trial court. The Supreme Court found that to be a substantial compliance with the requirements of section 1247. In addition, the court made the observation that the 1927 repeal of section 1247, Stats.1927, ch. 620, p. 1047, § 4, at p. 1048, was misleading because the same chapter, by its amendment of section 1246, declared that until promulgation of judicial council rules relative to the making up and filing of the record on appeal "the time and manner provided by statutes in force on January first, 1927, shall govern." Same, § 1, pp. 1047–1048. See discussion of the Bryant case in People v. Davis, supra, 103 Cal. App. 318, 320, 284 P. 516; People v. Riga, supra, 104 Cal.App. 477, 478, 285 P. 1069, and People v. Appellate Dept. of Superior Ct., 8 Cal.2d 56, 59–60, 63 P.2d 812.

In the instant case there was no compliance with the rule, no written application of any kind filed, a very considerable contrast to the situation which obtained in the Bryant case. It is manifest that the trial court was without jurisdiction to grant defendant's request. In view of this conclusion, it is unnecessary to consider whether or not defendant's many long years of delay would furnish an additional ground for affirmance.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

It next appears in 213 Cal. xxxix-xl; apparently without change insofar as it bears upon the present inquiry.

It was still in effect in 1941, according to 18 Cal.2d 5–6; and superseded July 1, 1943, when the new Rules on Appeal were adopted (see 22 Cal.2d 1, 22–27, 27–34) in response to the legislative request therefor expressed in section 1247k of the Penal Code, Stats.1941, ch. 562, p. 1945, amended by Stats.1943, ch. 4, p. 111.

141 Cal.App.2d 344

TOWN COUNCIL OF THE TOWN OF LOS GATOS, and Hal Belyew, Harry F. Boone, Charles Gamble, Alberto E. Merrill, and James F. Thompson, as members of the Town Council of the Town of Los Gatos, Plaintiffs and Appellants,

v.

The STATE BOARD OF EQUALIZATION, and George R. Reilly, James H. Quinn, Paul B. Leake, William G. Bonelli, and Robert C. Kirkwood, as members of the State Board of Equalization, Defendants and Respondents.

Civ. 16910.

District Court of Appeal, First District,
Division 1, California.

May 8, 1956.

Hearing Denied July 5, 1956.

Proceeding on petition for a writ of mandate to compel Board to sustain protest and deny application to license sale of distilled liquor. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., denied the petition, and the petitioner appealed. The District Court of Appeal, Agee, J. pro tem., held that statute, prohibiting issuance of liquor license, for premises located in territory where exercise of rights and privileges conferred by license would be contrary to valid zoning ordinance, unless such premises has been used in exercise of such rights and privileges at time prior to effective date of zoning ordinance, exempts only nonconforming uses existing at time of effective date of zoning ordinance, and held that use which had ceased more than four years before effective date of ordinance and more than eleven years before application was made to renew it was not within exception.

Reversed with directions.

1. Municipal Corporations 🔑625, 626

Zoning ordinance cannot single out and prohibit sale of liquor as such, and it would probably be unreasonable and arbitrary to exclude sale of liquor in district in which other retail businesses were allowed to be conducted. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23790.

2. Intoxicating Liquors 🔑59(1)

Statute, prohibiting issuance of retail license for any premises located in territory where exercise of rights and privileges conferred by license would be contrary to valid zoning ordinance, confers upon counties and cities right to determine districts in which various types of liquor business can be carried on, and such legislation is constitutional, even though excluding of liquor business of any type in certain zone has effect of denying in advance all applications for liquor licenses for premises within that zone. West's Ann.Bus. & Prof.Code, § 23790.

3. Intoxicating Liquors 🔑59(1)

Liquor license could not be issued for premises located in district zoned for residences where any fair reading of zoning ordinance made it manifest that sale of alcoholic beverages in such a district was not a permitted use, even though there was no express or specific prohibition in zoning ordinance against sale of liquor in such zone. West's Ann.Bus. & Prof.Code, § 23790.

4. Intoxicating Liquors 🔑59(1)

Statute, prohibiting issuance of liquor license for premises located in territory where exercise of rights and privileges conferred by license would be contrary to valid zoning ordinance, unless such premises has been used in exercise of such rights and privileges at time prior to effective date of zoning ordinance, exempts only non-conforming uses existing at time of effective date of zoning ordinance; and use which ceased more than four years before effective date of ordinance and more than eleven years before application was made to renew it was not within exception. West's Ann. Bus. & Prof.Code, § 23790.

5. Evidence 🔑20(1)

Court would take judicial notice of fact that restaurant with full liquor permit is different sort of enterprise from restaurant which sells only wine and beer.

6. Municipal Corporations 🔑601(25)

Sale of distilled spirits would constitute an extension and enlargement, of nonconforming use involving sale of wine and beer, within prohibition of zoning ordinance. West's Ann.Bus. & Prof.Code, § 23790.

* * *

J. Rainey Hancock, San Jose, for appellants.

Edmund G. Brown, Atty. Gen., Carl W. Wynkoop, Deputy Atty. Gen., San Francisco, for respondents.

AGEE, Justice pro tem.

On October 16, 1953, Guilio A. Bocci (applicant) filed with the State Board of Equalization (respondent) an application for the transfer of a general on-sale liquor license to his restaurant which is located at 42 Central Avenue, Los Gatos, California. From 1937 to 1942 this restaurant had had an on-sale distilled spirits license and an on-sale beer and wine license. In 1942, both licenses were transferred to a location near Saratoga, California. Thereafter the restaurant had no liquor license of any type until May 24, 1946, when an on-sale beer and wine license was issued to it.

On December 2, 1946, the Town of Los Gatos adopted a comprehensive zoning ordinance (No. 276) effective January 1, 1947. The area in which the restaurant was located was zoned as a single family residential district, "R–1." However, the ordinance provided: "The lawful use of a building existing at the time of the adoption of this ordinance may be continued, although such use does not conform to the regulations specified for the district in which such building is located; * * *" Therefore, the restaurant was allowed to continue its existing operation.

When Bocci made his application to license the sale of distilled liquor on the premises, the Town of Los Gatos filed a written protest with the board. The board nevertheless granted the application. The town then filed a petition in the superior court for a writ of mandate against the board to compel it to sustain the protest and deny the application. The petition was denied and the Town of Los Gatos, hereinafter referred to as appellant, has appealed from the resulting judgment.

The only question on this appeal is whether the board had a right to grant Bocci's application in view of the existing zoning restrictions in the district in which the premises are located.

Appellant's position is that, while section 22 of Article XX of the Constitution of the State of California, adopted November 6, 1934, provides that "The State Board of Equalization shall have the exclusive power to license the * * * sale of intoxicating liquors in this State," the same section further provides that, "Until the Legislature shall otherwise provide, the privilege of keeping, buying, selling, serving, and otherwise disposing of intoxicating liquors in bona fide hotels, restaurants, cafes, cafeterias, railroad dining or club cars, passenger ships, and other public eating places, * * * shall be licensed and *regulated* under the applicable provisions of the so-called State Liquor Control Act, California Statutes 1933, Chapter 658, insofar as the same are not inconsistent with the provisions hereof." (Emphasis added.) It seems clear that this constitutional amendment of 1934 authorizes the Legislature to limit the power of the board to license and regulate the sale of intoxicating liquor. Such a limitation is contained in the Statutes of 1935, at page 1130, wherein the Legislature amended section 15 of the Alcoholic Beverage Control Act, the first paragraph of which then provided as follows: "No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county, city and county or municipality unless such premises had been used in the exercise of such rights and privileges at a time prior to the effective date of any such valid zoning ordinance." This provision is now contained in section 23790 of the Business and Professions Code, added in 1953. Appellant concludes by quoting from volume 5 of Opinions of Attorney General, at page 21: "The California Legislature, acting under the authority conferred by Section 22, Article XX, did enact the Alcoholic Beverage Control Act referred to above. It vested in the State

Board of Equalization the authority to issue various forms of licenses relating to the manufacture and sale of alcoholic beverages including on-sale beer licenses, on-sale beer and wine licenses, and on-sale distilled spirits licenses. But it limited, by the provisions of Section 15 of the Alcoholic Beverage Control Act, the right of the Board to issue retail licenses for premises located in any territory where the exercise of the rights and privileges conferred would be contrary to the provisions of a valid zoning ordinance of any county, city and county or municipality. * * * The language of the section [15] evidences a legislative intent to exercise its power to control and *regulate* the sale of intoxicating liquors by depriving the Board of authority to issue licenses in certain premises within a particular zoned area."

[1] Respondent argues that the adoption of section 22 of Article XX terminated "local option" and precludes counties and cities from exercising any control over the issuance or granting of liquor licenses. There is no doubt that local option has been terminated. Zoning ordinances cannot single out and prohibit the sale of liquor as such. There must be a reasonable classification of districts and in any zoning district in which, for example, other retail businesses are allowed to be conducted, it might well be and probably would be unreasonable and arbitrary to exclude the sale of liquor. In such a situation, it would be for the Board of Equalization (now Department of Alcoholic Beverage Control) to determine the propriety of granting liquor licenses to locations within such a district.

[2] However, respondent's contention that the constitutional provision precludes counties and cities from exercising any control over the granting of liquor licenses overlooks the provisions of section 15 (now section 23790, Bus. & Prof.Code) quoted above. It is clear that the Legislature did confer upon counties and cities the right to control the districts in which various types of liquor business could be carried on by the enactment of valid zoning ordinances. In this instance, respondent expressly concedes that the zoning ordinance in question is valid. In other words, there is no question of improper or arbitrary zoning. It is true, of course, that the excluding of liquor business of any type in a certain zone does have the effect of denying (in advance) all applications for liquor licenses in that zone but, as stated before, this result is expressly authorized by said section 15, which in turn is legislation authorized by the 1934 constitutional amendment.

[3] Respondent points out that there is no express or specific prohibition in the zoning ordinance against the sale of liquor in R–1 residential areas. This is true. But section 23790 only requires that there be (1) a valid zoning ordinance, and (2) that the exercise of the rights and privileges of the license sought to be issued would be *contrary* to its provisions. The section does not require a specific limitation against the sale of alcoholic beverages in a designated area. Section 1.1 of the zoning ordinance reads: "There is hereby adopted a Zoning or Districting Plan as a part of the Master Plan of the Town of Los Gatos, California. Said Plan is adopted to promote and protect the public health, safety, peace, morals, comfort and general welfare. It consists of the establishment of various districts, including therein all the territory within the boundaries of said Town within various of which districts it shall be lawful, and *within various of which it shall be unlawful* to erect, construct, alter or maintain certain buildings or *to carry on certain trades or occupations or to make certain uses of land.*" (Emphasis added.) Section 2.1 establishes districts, among which are single family residential districts designated as "R–1." Section 2.4(a) provides that no building shall be used "for *any purpose* or in any manner, * * * *except as permitted* by and in conformity to the regulations specified herein for the district in which such building * * * is located." (Emphasis added.) Section 5.1 provides: "The following regulations shall apply in all R–1 Districts * * *: (a) *Uses Permitted:* 1. One family dwellings, public parks and playgrounds, crops and tree farming and truck gardening; Home occupations provided that no name plate or sign exceeding

2 square feet in area shall be displayed in connection therewith; and provided further that such sign or name plate shall be attached to the main building and shall not project into any yard area." (Emphasis added.) Any fair reading of this zoning ordinance will reveal that the sale of alcoholic beverages in R–1 Districts is not a permitted use.

[4] Respondent next calls attention to the exception contained in section 23790, which provides: "No retail license shall be issued * * * contrary to a valid zoning ordinance * * * *unless* the premises had been used in the exercise of such rights and privileges *at a time prior to the effective date of the zoning ordinance.*" (Emphasis added.) The zoning ordinance expressly authorizes the continuance of "the lawful use of a building *existing at the time* of the adoption of this ordinance," December 2, 1946. (Emphasis added.) However, the last time the premises had been used for the sale of distilled spirits was in the year 1942, so the saving clause in the ordinance does not apply. Therefore, the question is, if at *any time* in the past a particular type of liquor license had been issued to a certain location, is such location by reason thereof excepted from the application of a valid zoning ordinance? Or, in other words, is such a location permanently eligible for the issuance of such a license no matter how long ago the use in question had ceased? To answer in the affirmative does violence to the intent and purpose of such an exception or "saving clause" as that contained in section 23790. As was said in Edmonds v. Los Angeles County, 40 Cal.2d 642, 651, 255 P.2d 772, 777: "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected." It would seem clear that a reasonable interpretation of the language used in section 23790 to exempt a nonconforming use is that such use must exist at the time of the effective date of the zoning ordinance. Certainly, the Legislature did not intend that a use such as this, which had ceased for over four years before such effective date and for over eleven years before the application was made to renew it, should be included in the exception granted by the last clause of section 23790.

[5, 6] Respondent next argues that its grant of the transfer of a general on-sale license is not an expansion or extension of a nonconforming use because the restaurant already had the right to sell wine and beer and the addition of the right to sell distilled spirits did not change the general use of the premises. However, there can be little doubt that the character of a business serving beer and wine may well change to a substantial degree when it adds the sale of hard liquor to its other commodities. To avoid being provincial, we quote from Salerni v. Scheuy, 140 Conn. 566, 102 A.2d 528: "As a matter of common knowledge it is also true that ordinarily a restaurant with a full liquor permit is quite a different sort of enterprise from a restaurant which sells only beer. It is a more ambitious establishment, partaking to at least some degree of the characteristics of a night club, rather than a quiet family eating place. The difference between the two types of restaurant is so great that the trial court was correct in its conclusion that to carry into effect the plaintiffs' proposal to change their restaurant into one in which all kinds of liquor should be sold would be an extension and enlargement of their existing nonconforming use of the property and would create a use of the property prohibited by the zoning ordinance." 140 Conn. at pages 571–572, 102 A.2d at page 530. We agree with this language and conclude that the granting of a general on-sale license was an unwarranted enlargement of a nonconforming use. As was said in San Diego County v. McClurken, 37 Cal.2d 683, 234 P.2d 972: "Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement." 37 Cal.2d at page 687, 234 P.2d at page 975.

The judgment is reversed with instructions to issue the writ of mandate as prayed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

141 Cal.App.2d 399

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Frank SMITH, Defendant and Appellant.
Cr. 5579.

District Court of Appeal, Second District, Division 2, California.
May 10, 1956.

Hearing Denied June 6, 1956.

Defendant was convicted of possession of heroin, in violation of Health and Safety Code, with prior conviction of same code section. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that where defendant admitted to arresting officer that he had been user of narcotics, and officer testified that defendant's voluntarily rolled sleeve showed about eight fresh needle marks, officer had reasonable cause to arrest defendant upon belief that he was guilty of recent felony, and search incident to arrest, disclosing heroin, was lawful.

Judgment affirmed.

1. Arrest 🔑68

Where police officer, who had followed automobile seen violating traffic regulation, questioned passenger as to name and address, such procedure did not, to that extent, violate any right of passenger, subsequently arrested, searched, tried and convicted of possession of heroin, since interviewing prospective witness was normal procedure for officer. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen. Code, § 836, subds. 1, 3, 5.

2. Criminal Law 🔑1158(2)

Question whether defendant has consented to search is one of fact to be answered by trial judge. West's Ann.Pen. Code, § 836, subds. 1, 3, 5.

3. Criminal Law 🔑1158(2)

Finding by trial judge, upon question whether defendant has consented to search, when supported by substantial evidence, is binding on appellate court. West's Ann. Pen.Code, § 836, subds. 1, 3, 5.

4. Criminal Law 🔑553

In prosecution for possession of heroin, where police officer testified that, prior to arrest, defendant voluntarily rolled up sleeve to show fresh needle marks, though officer's previous testimony, at preliminary hearing, contained passages calculated to impeach his trial testimony in this respect, and defendant claimed that he had not voluntarily rolled up sleeve, trial judge could properly believe officer in determining whether defendant had consented to search. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836, subds. 1, 3, 5.

5. Arrest 🔑71

When acting without warrant, search of a defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, or officer had reasonable cause to believe that he had committed a felony. West's Ann.Pen.Code, § 836, subds. 1, 3, 5.

6. Arrest 🔑63(4), 71

Where defendant admitted to arresting officer that he had been user of narcotics, and officer testified that defendant's voluntarily rolled up sleeve showed about eight fresh needle marks, officer had reasonable cause to arrest defendant upon belief that he was guilty of recent felony, and search incident to arrest, disclosing heroin, was lawful. West's Ann.Health & Safety Code, §§ 11500, 11712; West's Ann. Pen.Code, § 836, subds. 1, 3, 5.

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Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James L. Mamakos, Dep. Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted of possession of heroin in violation of § 11500 Health & Safety Code, defendant appeals from the judgment and an order denying motion for new trial. It was charged and proved that he had been convicted previously of violating the same code section and he was sentenced to

State prison for the term prescribed by law. Health & Safety Code, § 11712.

In support of the appeal counsel for appellant urges but one point, unlawful search and seizure.

[1] On the morning of April 15, 1955, defendant was riding with one Earnest Derry who was driving his own automobile. At the intersection of Naomi and Adams Streets, in Los Angeles, the driver violated the vehicle code by failing to yield the right of way to another car; this was witnessed by police officers Hanks and DiSalvo; they followed the Derry car until it stopped in front of defendant's home near Washington and Naomi Streets. Officer Hanks testified that he did not know either of the men in the car before that morning. When the Derry car stopped, officer Hanks went to the driver's side of the car to talk with him about the traffic violation. DiSalvo went to defendant, asked his name and where he lived. Receiving this information he wrote it on a card. So far there was no violation of any right of defendant. Interviewing a prospective witness was a normal procedure for the officer. See People v. Michael, 45 Cal.2d 751, 754, 290 P.2d 852. When Hanks started to talk to Derry he noticed some old hypodermic marks on his arms, "old needle punctures." He identified them as such on the basis of long experience and was told by Derry that "he was a user, but was not using at the present time;" the officer believed this. Reasoning that "if we had one person who was a user, I wanted to find out whether Mr. Smith was or was not a user," he approached defendant, who was on the sidewalk, and asked him if he was using narcotics. Defendant said that he was. Hanks asked him to roll up his sleeve and show his marks; this he did voluntarily, thereby revealing about eight fresh needle marks. The officer decided that defendant was using narcotics and placed him under arrest, searched him and found in the watch pocket of his trousers a paper containing heroin. The officer had no warrant of any kind and the heroin thus found is the crux of this appeal.

[2–4] There is but one point of serious conflict in the evidence. Hanks said that defendant voluntarily rolled up his sleeve and exposed the fresh needle marks. Defendant testified that he did not do so; that he had on a long sleeved shirt and Hanks rolled up the sleeve without his permission and searched him without his consent. The officer's previous testimony, given at the preliminary hearing, contained passages calculated to impeach his trial testimony in this respect, but the trial judge chose to believe that defendant voluntarily rolled up his sleeve for the officer. Thereby he merely resolved a conflict in the evidence. It was his function to assay the testimony, accept the true and reject the false. The question of whether a defendant has consented to a search is one of fact to be answered by the trial judge. People v. Gorg, 45 Cal.2d 776, 782–783, 291 P.2d 469. His finding, when supported by substantial evidence, as here, is binding on the appellate court.

[5] So far as concerns the search of defendant's person, as distinguished from rolling his sleeve up, there was sufficient ground for such action in this instance regardless of any consent of defendant. It is true that, when acting without a warrant, "the search of defendant's person may be justified only if he was committing or attempting to commit an offense in the officer's presence, Penal Code, § 836, subd. 1, or the officer had reasonable cause to believe he had committed a felony. Penal Code, § 836, subd. 5." People v. Simon, 45 Cal.2d 645, 648, 290 P.2d 531, 533. "Section 836, subd. 3, provides that an officer may make an arrest without a warrant 'When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.' Defendant contends that to justify a search incident to an arrest under this subdivision there must be evidence, other than any turned up in the search, that a felony has in fact been committed. Such evidence is present in any case in which the officer has reasonable cause to believe defendant guilty of a felony. When his belief of defendant's guilt is based on

reasonable cause and a felony has in fact been committed, not only are the requirements of subdivision 3 satisfied, but a search incident to an arrest thereunder is reasonable." People v. Boyles, 45 Cal.2d 652, 655, 290 P.2d 535, 537. Reasonable or "'[p]robable cause is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122, 133. In People v. Novell, 54 Cal.App.2d 621, 623, 129 P.2d 453, 454, the concept is thus defined: "The term, reasonable or probable cause, has been defined: 'By "reasonable or probable cause" is meant such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.' In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568.

"The term, 'probable,' has been defined as meaning 'having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt.' Ex parte Heacock, 8 Cal. App. 420, 421, 97 P. 77."

Officer Hanks testified that defendant told him he "was using them," "was using narcotics." This statement, coupled with the fresh needle marks, afforded sufficient ground for belief that defendant had been in possession of narcotics recently and thus had committed a felony, cf. People v. Rios, 46 Cal.2d 297, 294 P.2d 39; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6, and the officer had good ground for an immediate arrest. The search was closely related to the cause and fact of arrest and it is immaterial whether the arrest or the search occurred first. People v. Simon, supra, 45 Cal.2d 645, 648, 290 P.2d 531.

[6] Defendant's own testimony was that the officer "asked me was I a user and I told him I was. I had been, and had just gotten out of jail but wasn't using at the present time." The fresh puncture marks then seen on his arm belied this claim that defendant's use of narcotics was in the past, and well might emphasize the officer's belief that defendant had committed a recent felony. The basis for arrest being present a search for narcotics was a normal incident thereto.

The trial judge impliedly found that the officer had reasonable cause for arrest and hence had good cause for search of the person. This is not a case in which an appellate court may properly interfere with the ruling.

Judgment and order affirmed.

MOORE, P. J., and FOX, J., concur.

141 Cal.App.2d 370

Fred WAGNER and Norma Wagner, his Wife, Plaintiffs and Respondents,
v.
Troy McCONNELL and Bessie McConnell, his Wife, Defendants and Appellants.

Troy McCONNELL and Bessie McConnell, his Wife, Cross-Complainants and Appellants,
v.
Fred WAGNER, Norma Wagner, his Wife, and Carl A. Williams, Cross-Defendants and Respondents.
Civ. 8793.
Sac. 6580.

District Court of Appeal, Third District, California.
May 8, 1956.

Rehearing Denied June 4, 1956.
Hearing Denied July 5, 1956.

Action to specifically enforce an agreement to purchase real property wherein defendants filed a cross-complaint. Judgment for plaintiff in the Superior Court, Shasta County, Albert F. Ross, J., and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence clarified the description of the property, that the vendors were unable to convey the title contracted for, and that vendors were not in a position to consider the purchasers in default in matter of progress of payments when they gave notice of rescission, and that the purchasers under the principles of unjust enrichment should be charged with the value of the use of the premises during the occupancy.

Judgment reversed with instruction and to take further proceedings on the cross-complaint.

1. Vendor and Purchaser ⚷22

Where contract for sale of property as evidenced by deposit receipt lacked clarity in so far as description of the property was concerned in that from the face of the contract it could not be located on the ground but it appeared that the vendors owned no other land in the vicinity than the property attempted to be described, the evidence clarified the description and satisfactorily fixed with sufficient certainty the subject matter of the deposit receipt.

2. Specific Performance ⚷95

Where sale contract provided that evidence of title should consist of title insurance issued by responsible company and the vendor tendered to the purchasers a deed with the title insured which included a part of an area that a third party had quitclaimed to the vendor, vendors were unable to perform their contract and were not entitled to specific performance thereof.

3. Vendor and Purchaser ⚷118

Purchasers were not in default under a contract to purchase realty so as to be barred from rescinding the contract for failure of title where the vendors not only were acquiescing in the construction of the contract as calling for an exchange of note and deed of trust for deed after the purchase price had been paid down to $5000 but were themselves in default in that they were unable to convey the title agreed upon.

4. Vendor and Purchaser ⚷341(5)

Where vendors were unable to convey the title agreed upon so that purchasers were entitled to recover the payments they had made on the purchase price, under the principles of unjust enrichment, they would be charged with the value of the use of the premises during their occupancy thereof.

Stokes & Rader, Arcata, for appellants.

L. C. Smith, Redding, L. W. Pitman, Redding, of counsel, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiffs in an action brought to specifically enforce appellants' agreement to purchase real property.

On January 10, 1952 the parties executed a California Real Estate Association Standard Form of "Deposit Receipt" by which respondents acknowledged receipt of $500 from appellants as:

> "* * * [D]eposit account purchase of the property, situated in the County of Shasta, State of California, described as follows, to-wit: Two bedroom home in Buckeye, belonging to Mrs. Fred Wagner, Listing #H-691 at the purchase price of Six Thousand, Five Hundred And No/100 ($6,500.00) Dollars. The balance of said purchase price is to be paid at the rate of $60.00 per month or more including 6% interest. Total down payment $1500.00.
>
> * * * * * *
>
> "That the evidence of the title shall be (a) Title Insurance issued by a responsible title company to be furnished and paid for by the (b) 50-50 Buyer and Seller. Should the title to said property prove defective or unmerchantable and should the seller be unable to perfect same within a reasonable time from the date hereof all amounts paid hereon shall be returned to the purchaser unless the purchaser elects to accept the title in said condition."

[1] It is at once apparent that the contract as evidenced by the deposit receipt wanted something of clarity in so far as a description of the subject property be concerned, for from the face of the contract the property could not be located on the ground. However, it appeared without dispute that the sellers, hereinafter called respondents, had owned a parcel of property in Shasta County, in Buckeye, from which they had conveyed a portion to one Knakel;

that they retained the balance which constituted a lot having an eastern boundary of 66.15 feet, a northern boundary of about 200 feet, a western boundary of 64.77 feet, and a southern boundary of approximately 200 feet; that on this remainder there was situated a two bedroom home; that they owned no other land in that vicinity. There was nothing from which it might be inferred that they were retaining any land between themselves and Knakel. This evidence clarified the description and satisfactorily fixed with sufficient certainty the subject matter of the deposit receipt. Carr v. Howell, 154 Cal. 372, 97 P. 885; Joyce v. Tomasini, 168 Cal. 234, 142 P. 67.

It further appeared without dispute that after the northerly portion of the whole property had been conveyed to Knakel and prior to the execution of the deposit receipt, Knakel had conveyed to one Dean the property he received from respondents, but in describing the same had overlapped on to respondents' property. The overlap consisted of a gore or triangle which had a base on the westerly line of respondents' property measuring 17 feet in length with sides unequal, but each approximately 100 feet long. This arose because Knakel, describing his southerly line, which was the northerly line of respondents, assumed that it went straight from the northeasterly corner of respondents' retained property to their westerly boundary. He ignored the fact that the line extended from the northwest corner 93 feet to a point and then took a different course northerly of the straight line assumed by him.

The deposit receipt provided that evidence of title should consist of title insurance issued by a responsible title company and in due course respondents ordered such insurance from the Shasta Title Insurance Company. This company, however, considered that the overlap of the Knakel deed clouded respondents' title to the extent of the overlap and hence declined to insure the title to that part of respondents' property. (Respondents' own witness, the manager of the title company, testified the title was non-insurable unless Dean's claim was relinquished.) Thereafter appellants served notice of rescission and demanded the return of moneys paid by them, which by that time amounted to $1,620. The noticed rescission was based upon the claim that the respondents had been given a reasonable time to perfect title to the property being purchased, that the appellants had been informed by the title company that merchantable title could not be shown, and that respondents were, therefore, unable to convey by the sort of title contracted for. Respondents endeavored to clear their title from the cloud created by the overlap in the Knakel deed and finally succeeded in securing from Dean a quitclaim deed to a part of the disputed area, leaving under dispute, however, the remainder with a base line of 9.72 feet and thence continuing as a narrow triangle with sides approximately the same in length as the original gore. They then tendered to appellants a deed with the title insured, which included that part of the original gore that Dean had quitclaimed to respondents, but which excluded the rest of the disputed area. The tender was rejected and thereafter the respondents began this action by a complaint which alleged that the contract of purchase coincided with the deed they had tendered. The trial court found this allegation to be true and the first attack which appellants make upon the judgment that followed is that this finding is wholly unsupported by the evidence.

[2] We think it apparent from the statement we have made that appellants' contention with respect to the lack of support in the record for the court's finding that the deed tendered by respondents coincided with the description in the deposit receipt must be sustained. It is quite apparent from the record that the amount of land which Dean had been persuaded to quitclaim to respondents in the effort to perfect their title respresented a compromise between respondents and Dean and simply resulted in a relinquishment by Dean of a portion of the disputed area. With this compromise appellants had nothing to do; and the court erred in declaring that the area Dean quitclaimed constituted the limit of the description in the deposit receipt. There is no evidence whatever from which that result can be arrived at. The quit-

claim deed from Dean was acquired after the title company had refused to insure the title and after the appellants had rescinded upon the ground that title insurance could not be obtained within a reasonable time. To tender the title contracted for respondents' deed must have included the whole area as to which they were in dispute with Dean, and which in fact they owned. That was what appellants had agreed to buy. That was what respondents had agreed to sell. Respondents have never offered to convey to appellants that which they agreed to sell, and a fair résumé of the record is that they recognized they could not get an insurable title to offer. Therefore the judgment appealed from must be reversed.

In addition to the findings which we have hereinbefore declared to be without support in the evidence the court made various other findings of which complaint is made by the appellants. Some of these contentions are answered by what has heretofore been said and no specific mention need be made of them.

[3] The court found that appellants were in default in the matter of progress payments when they gave notice of rescission and of their election to refuse any but the title for which they had contracted. This finding is not supported. The contract itself did not expressly fix the time when progress payments should be made. Neither did it expressly provide for possession. The buyers' instructions given to the title company apparently contained provisions which did not appear in the deposit receipt. They were to the effect that a further payment of $1,000 would be made and that for the balance of the purchase price a deed of trust providing for payments of $60 per month should be executed by the appellants, the money paid in and the note and deed of trust to be delivered when the title contracted for had been received. The respondents as sellers acquiesced in this arrangement, as is shown by the fact that when they made their tender they prepared and tendered a note and deed of trust in accordance with the buyers' escrow instructions. The buyers had deposited the extra $1,000, making a total deposit of $1,500, plus the sum of $36.50 as their share of escrow and title costs and had gone into possession of the property. Thereafter they paid in two further sums of $60 each, but made no further payments. Under the foregoing circumstances the sellers were not in position to consider the buyers in default, for not only were they acquiescing in the construction of the contract as calling for an exchange of note and deed of trust for a deed after the purchase price had been paid down to $5,000, which it had been, but they were then themselves in default in that they were not able to convey the title agreed upon. King v. Stanley, 32 Cal.2d 584, 590, 197 P.2d 321; Brant v. Bigler, 92 Cal.App.2d 730, 733, 208 P.2d 47; Katemis v. Westerlind, 120 Cal.App.2d 537, 546, 261 P.2d 553.

[4] It is apparent that respondents cannot now specifically enforce the contract contained within the deposit receipt as construed in the light of the circumstances. They had made and completed their efforts to perform and their offer of performance did not measure up to their obligations. The contract provided if they could not convey the title contracted for and unless appellants elected to take the title available then respondents were obligated to repay the money they had received. The record is clear that appellants have refused to accept the partial performance tendered and that they, therefore, pursuant to their notice of rescission and to the explicit terms of the agreement are entitled to recover the payments they have made on the purchase price. However, under principles of unjust enrichment they may be charged with value of the use of the premises, a matter which is to be decided upon further proceedings on the cross-complaint.

The judgment appealed from is reversed with instructions to the trial court to enter judgment against the respondents upon their complaint and to take such further proceedings on the cross-complaint of appellants as are consistent herewith and with such evidence as may be given in such proceedings.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.

141 Cal.App.2d 292

Matter of the Adoption of Stephen Alan NELSON, a Minor.

Ralph Emerson PFOST, Petitioner and Appellant,

v.

Howard John NELSON, Respondent.

Civ. 5333.

District Court of Appeal, Fourth District, California.

May 3, 1956.

Proceeding upon stepfather's petition for adoption of stepchild. Child's father filed affidavit in opposition. The Superior Court, Fresno County, Edward L. Kellas, J., entered order denying petition for adoption and denied stepfather's motion for new trial, and stepfather filed notice of appeal. The District Court of Appeal, Mussell, J., held that notice of appeal, which was filed more than thirty days after entry of order denying the motion was not timely filed.

Appeal dismissed.

Appeal and Error 🔑428(2)

Notice of appeal, which was filed more than thirty days after entry of order denying motion for new trial, was not timely filed, and, therefore, appeal would be dismissed. West's Ann.Rules on Appeal, rules 2(a), 3(a).

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Ralph Robinson, Fresno, for appellant.

Daniel E. O'Connell, Turlock, for respondent.

MUSSELL, Justice.

On January 26, 1955, Ralph Emerson Pfost filed a petition in the Superior Court of Fresno county for adoption of his stepchild, Stephen Alan Nelson. Carlene Frances Pfost, the mother of said child, gave her consent in writing to the adoption and joined in the petition. Howard John Nelson, the boy's father, filed an affidavit in opposition to the petition and a hearing was had thereon on March 29, 1955. On April 15, 1955, the trial court entered its order denying the petition for adoption and petitioner then, on May 11, 1955, filed a notice of intention to move for a new trial. This motion was heard by the court and was denied on June 23, 1955. On August 10, 1955, petitioner filed his notice of appeal from the order denying the petition for adoption.

Rule 2(a) of the Rules on Appeal, 36 Cal.2d 1, provides that except as otherwise specifically provided by law, notice of appeal shall be filed within 60 days from the date of entry of the judgment, unless the time is extended as provided in Rule 3. Rule 3(a) provides that when a motion for a new trial is denied, the time for appeal from the judgment shall be extended until 30 days after the entry of the order denying the motion. Since the order denying the motion for a new trial herein was made on June 23, 1955, and the notice of appeal was not filed until August 10, 1955, it was filed too late and the appeal must, therefore, be dismissed. Gillies v. Brent, 73 Cal.App.2d 585, 587, 166 P.2d 877.

The appeal is dismissed.

BARNARD, P. J., and CONLEY, J. pro tem., concur.

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141 Cal.App.2d 367

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Laura SHEPHERD and Delores Brown, Defendants.

Laura Shepherd, Appellant.

Cr. 5544.

District Court of Appeal, Second District, Division 3, California.

May 8, 1956.

Defendants were convicted of grand theft of money. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment, and one defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

Larceny ⟹65

Evidence was sufficient to sustain conviction for grand theft of money. West's Ann.Pen.Code, § 484.

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Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Laura Shepherd and Delores Brown were convicted in a non-jury trial of grand theft of money from Nina Tolle and also from Charles G. Hall. It was alleged that Mrs. Brown had suffered a former conviction of felony, which was found to be true. There was evidence of the following facts: Nina Tolle, 78 years of age, was accosted by Mrs. Shepherd in a Woolworth store on Crenshaw Boulevard in Los Angeles. Mrs. Shepherd is a Caucasian and was unknown to Mrs. Tolle at the time. Mrs. Shepherd represented that a colored woman, Mrs. Brown, had found a package containing a large sum of money and also some parimutuel race tickets, and was uncertain as to what she should do with the money. Mrs. Brown appeared, confirmed the statements of Mrs. Shepherd, represented that she had discussed the matter with her employer. Her employer told her that it was "bookie money" and the man who lost it would be afraid to advertise for it; she said she would divide the money and give $1,000 to Mrs. Shepherd and $1,000 to Mrs. Tolle but that they must place in the hands of her employer enough money to make good to any one who might claim the money within three months. Mrs. Shepherd gave to Mrs. Brown what appeared to be a roll of bills. Mrs. Tolle was convinced that it was a reasonable proposition; on the following morning she withdrew $3,000 from the bank, met Mrs. Shepherd and Mrs. Brown, gave Mrs. Brown the money, which the latter said she would take to her employer. She left, saying she would bring back and divide the money she had found, which she had left with her employer; she gave Mrs. Tolle the office address of the supposed employer, telling her that he wished to see her. Mrs. Tolle left, endeavored to located the street number and found there was no such number. When she returned to report to her new friends they had disappeared. She positively identified them at the trial as the women who took her money. Mr. Fodor, a vice-president of the institution where Mrs. Tolle maintained a savings account testified that she drew $3,000 from the account on the date of her meeting with the defendants.

Mr. Hall had an experience with the defendants several days before Mrs. Tolle made their acquaintance. He was then seated in a chair in front of a Penny store in Culver City. Mrs. Shepherd approached him, being attracted to him, she said, because he looked so much like her father. Mr. Hall was evidently well along in years, and he became interested in talking with Mrs. Shepherd because he was a retired farmer from Arkansas and Mrs. Shepherd's husband, so she said, had been engaged in the dairy business and the propagation of fowls. Mrs. Brown appeared on the scene and after conversing with her Mrs. Shepherd confided to Mr. Hall that Mrs. Brown had found a large amount of money and did not know what to do with it. Mr. Hall, whose son used to be a policeman, advised that the police be notified but Mrs. Shepherd said that Mrs. Brown wished to divide the money between herself, Mrs. Shepherd and Hall and would give the latter two $1,000 each. Hall said "* * * if it was good money I wouldn't mind having it, but that if it wasn't, I didn't want it." Mrs. Brown said she would go and see her boss and she left and returned saying her boss was going to keep the money for the protection of the person who had lost it. She said her boss wanted to talk to Mrs. Shepherd and Hall; Mrs. Shepherd left but soon returned and said it was all right. Mrs. Shepherd gave Mrs. Brown a sum of money. Apparently Mrs. Brown left again to talk to her employer and when she returned she said to Mrs. Shepherd "Here is your money" and

"Here is your thousand dollars." In the meantime Mr. Hall had drawn $365 from a bank and had given it to Mrs. Shepherd to give to Mrs. Brown to carry to her employer. Mrs. Brown told Hall to talk to her employer and told him where to go to get back his $365 plus $1,000; that he would know the place because as he walked in he would see her picture hanging on the wall. He went to the address given him "but it wasn't there." When he returned to report the mistake in the address he discovered that the defendants had not waited for him. He identified them both at the trial as the women who had taken his money. Police Officer Morrissey had conversations with Mrs. Shepherd in a police car in front of her residence and at the police station, in which Mrs. Shepherd said the money they had taken from a man in Culver City was split but that she would not tell with whom it was divided. He testified that in another conversation Mrs. Brown said the $3,000 they got "out of the Crenshaw job" was divided with a person named Laura. Mr. Howard, another police officer, testified he had a conversation with defendant Brown in the city jail and that Mrs. Brown said she had split the $3,000 with Mrs. Shepherd, which Mrs. Shepherd, being present, did not deny. The defendants did not testify or offer any evidence in their behalf. Defendant Shepherd applied for probation, which was denied, and she was sentenced to the California Institution for Women, the sentences to run concurrently. She appeals from the judgment.

It is stated in the briefs of appellant that in order to sustain a charge of theft it is necessary to prove that the personal property of another was stolen, or misappropriated in violation of a trust, or obtained by a false representation or pretense. (See Pen.Code § 484.) It is argued that the evidence was insufficient to prove larceny, it was insufficient to prove embezzlement and it was insufficient to prove obtaining money by false representation or pretense or by trick and device. It is stated that there was no evidence that the money had not been found in the two instances as represented to the complaining witnesses and that, after all, the defendants could be guilty of nothing more than a failure to keep their promise to return to Mrs. Tolle and Mr. Hall the sums they had parted with, plus $1,000; therefore the defendants were not shown to have committed any crime.

There was conclusive evidence that defendants were guilty of shameful thefts of the savings of two old and innocent people. If the facts did not fit one form of grand theft they fitted another. Since defendants had no avenue of escape it is immaterial which route they took to prison. People v. Broes, 138 Cal.App.2d 843, 292 P.2d 556.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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141 Cal.App.2d 438

Jason MANN, Plaintiff and Appellant,

v.

N. S. STANLEY, N. R. Stanley and N & S Ranch, Defendants and Respondents.

Civ. 8804.

District Court of Appeal, Third District, California.

May 11, 1956.

Hearing Denied July 5, 1956.

Action by farmer for injuries sustained when gored by bull which he had borrowed for breeding purposes, against owners of bull. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that evidence supported trial court's findings that the defendants had not been negligent but that plaintiff had been contributorily negligent.

Judgment affirmed.

1. Animals 🔑74(5)

Where one injured by bull brought action against owners of bull by proceeding on theory that bull was vicious and that owners knew such, he assumed burden of proving by preponderance of evidence both that bull was vicious and that owners had knowledge thereof.

2. Animals ⚷70

The owner of an animal which is not naturally vicious is not liable for injury done by it unless it was in fact vicious and owner knew it.

3. Animals ⚷67

Where an animal of peaceful disposition while in charge of master or servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible, if, at time, he was in exercise of due care.

4. Animals ⚷70

The owner of an animal, knowing its vicious propensities, is liable for injury inflicted by it upon property or person of one free from fault.

5. Animals ⚷74(3)

For one to recover from owners of animal which is not naturally vicious for injuries inflicted by animal, he must establish that until injury occurred, he was himself ignorant of any vicious trait on part of animal.

6. Negligence ⚷3

What constitutes due care depends upon circumstances of case.

7. Animals ⚷74(5)

In farmer's action for injuries sustained when gored by defendants' bull which farmer had borrowed for breeding purposes, evidence on issues of whether bull had previously exhibited any vicious propensities and whether such had been known to defendants supported findings that they were not negligent.

8. Animals ⚷74(5)

In farmer's action for injuries sustained when gored by defendants' bull which farmer had borrowed for breeding purposes, evidence supported finding that farmer was contributorily negligent.

9. Appeal and Error ⚷1010(1)

Issues of fact must be determined by trial court, and before appellate court can reverse judgment upon ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence, together with every inference favorable to prevailing party that may be reasonably drawn therefrom, and excluding all evidence in conflict therewith, law precludes such party from recovering judgment.

10. New Trial ⚷151

In farmer's action for injuries sustained when gored by bull which he had borrowed for breeding purposes, against owners of bull, wherein trial court had found that bull owners were not negligent and that farmer was contributorily negligent, it committed no abuse of discretion in denying new trial sought on basis of affidavit of one who claimed that bull owners knew it to be dangerous and detailing some of bull's actions, where owners filed counter affidavit admitting some of bull's actions but denying that they showed vicious tendencies.

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Lovett K. Fraser and Bruce B. Bruchler, Lakeport, for appellant.

Phil N. Crawford, Lakeport, for respondents.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendants to recover damages for injuries resulting from his being gored and trampled by a bull belonging to defendants. He alleged that the bull was a vicious and dangerous animal and that these propensities were known to defendants but that they failed to properly control the bull. The defendants denied the material allegations of the complaint and also pleaded as a separate defense that the injuries to plaintiff were the result of his own carelessness and negligence. The case was tried by the court without a jury and the court rendered judgment in favor of defendants. Plaintiff's motion for a new trial was denied and plaintiff has appealed from the judgment.

Plaintiff makes a number of contentions, the principal of which is that the judgment is contrary to the evidence and the law.

Before discussing these contentions we shall summarize briefly the factual situation as it appears from the record.

Plaintiff was the owner of a farm near Upper Lake on the 11th of July, 1952, the date on which he was attacked and injured, and had thereon some milk cows besides other livestock. His experience in handling livestock, including bulls, dated back over many years. The defendants were neighbors who owned a Shorthorn Red Durham pedigreed bull four years of age which was used for breeding purposes. On the date in question, in response to a telephone call from plaintiff, the defendant N. S. Stanley, now deceased, delivered the bull to the premises of plaintiff in a specially built trailer attached to a pick-up truck. Coincident with his arrival the nephew of plaintiff's wife, Barry Patton, under the direction of plaintiff, opened the gate of the corral of the stock barn and turned one of the cows out into the open pasture land near the vegetable garden on the premises. The tail gate of the trailer was lowered, the bull released from the stanchion by which he was held, and backed out onto the ground near the cow. After the lapse of a period of time, Barry Patton, under plaintiff's direction, turned another cow out of the corral. The two cows remained in the area east of the garden which consisted of an enclosure approximately 165 feet square. The bull in the meantime had wandered to the west side of the garden. After the second cow was turned out N. S. Stanley and Barry Patton moved around toward where the cows were grazing on the east side of the garden. Plaintiff went in the opposite direction toward the bull and started driving him around the north side of the garden toward the cows. When the bull reached the stock barn directly across a driveway from the garden on the north side he suddenly stopped and began pawing the earth, and without warning wheeled and charged plaintiff, goring him in the right arm, knocking him down and trampling him. The injuries sustained were severe. Other evidence will be referred to hereinafter.

Appellant first contends that a bull is a dangerous animal and that it was negligence on the part of defendants not to have proper means of control over him at all times when hired out for services. He contends also that it is the duty of the owner of such bull to use the utmost care to control the bull so he will not injure any one. We believe that these contentions are adequately and correctly answered as to the facts and the law by the memorandum opinion filed by the trial court. We quote from said opinion as follows:

[1-5] "By proceeding upon the theory that the bull was vicious and that the defendants knew that he was vicious and dangerous, plaintiff has assumed the burden of proving not one, but both, of these facts by a preponderance of the evidence. As is said in Baker v. Borello, 136 Cal. 160, 163 [68 P. 591, 592], 'The law governing such actions is quite fully stated in the opinion of Mr. Justice Henshaw in Clowdis v. Fresno Flume, etc., Co., 118 Cal. 315, 50 P. 373 * * *.' Where in the latter case at page 320 [of 315 Cal. at page 374 of 50 P.] it is said that: 'It is well settled in cases such as this (the case involved a bull) that the owner of an animal not naturally vicious is not liable for an injury done by it, unless two propositions are established: (1) That the animal in fact was vicious, and (2) that the owner knew it. Finney v. Curtis, 78 Cal. 498, 21 P. 120. Thus, if an animal theretofore of peaceable disposition, while in charge of the master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible if at the time he was in the exercise of due care. But, conversely, the owner of such an animal, knowing its vicious propensities, is liable for injury inflicted by it upon property or upon the person of one who is free from fault.' And as is said in Barrett v. Metropolitan Contracting Co., 172 Cal. 116, 119 [155 P. 645, 647], 'It is unquestionably true, as declared in Haneman v. Western Meat Co., 8 Cal.App. 698, 97 P. 695, that it is of the essence of the plaintiff's case that he is ignorant of the viciousness of the animal until the injury has occurred.' In order to recover, the plaintiff must himself be ignorant of any vicious trait on the part of the animal.

"If, as is argued by counsel for plaintiff, all bulls are inherently vicious and dangerous and that these characteristics are, or should be, known to all persons handling them, then plaintiff must be charged with this knowledge. He testified to having been engaged in the farming business practically all of his life with considerable experience in handling cattle including bulls. If the theory contended for were to be applied, the plaintiff and the defendants would stand equal in respect to knowledge of the vicious characteristics and as if the plaintiff had been warned by the defendants, and when he voluntarily left his position of safety at the truck and trailer to drive the bull around the garden to the cows, it must be held that he assumed the risk charged with full knowledge of the claimed danger. So in this class of cases the Courts have adopted the rule expressed in Clowdis v. Fresno Flume, etc., Co., supra, [118 Cal. at] page 320 [50 P. at page 374], that, '* * * if an animal theretofore of peaceable disposition, while in charge of the master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible if at the time he was in the exercise of due care.'

[6] "What constitutes due care depends upon the circumstances of the case. Here the bull and the two cows were free in an open place selected by the plaintiff, such selection presumably being based on his experience in handling livestock. All parties were at a position of safety near the trailer. The cattle were to themselves. Plaintiff elected to leave the trailer and to start the bull around the garden. With a peaceable animal there was nothing out of the ordinary in this procedure nor anything which would require remonstrance on the part of the owner or any warning by him.

"On the other hand if the bull was vicious, and the owner knew it, a duty rested upon him to warn the plaintiff and forbid his action. But as it was, all persons present accepted the bull as peaceable, and impliedly, if not expressly, accepted all measures taken as adequate under the circumstances. The plaintiff prepared and offered the breeding ground and the owner of the bull accepted it as adequate.

"We are thus brought to a consideration of the characteristics of the bull, and a knowledge by the owners, of his vicious propensities, if any. The facts admit of no dispute as to his domestic character, and conclude any argument that he was a wild or range bull. He was purchased as a calf and for six months remained with a neighbor's herd of milk cows. When about a year and a half old he was broken to enter and ride in the trailer. This training was accomplished without the exercise of any undue force or persuasion on the part of his owners. After having been taught to enter the trailer and up to the time of the incident in question he had been taken around the community some 580 times for breeding purposes with no exhibition of viciousness. On at least three previous occasions he was on the premises of the plaintiff where presumably the same procedure was followed as was done in the present case. On none of the 580 occasions did the bull exhibit any vicious traits or dangerous propensities.

"Further proof of the domestic character of the animal is found in the fact that he was handled by all members of the family including Mrs. Stanley. On two different occasions she loaded him on to the trailer and transported him to different farms and returned him after his use. Children and boys of high school age also herded and fed him. The fact that he was transported on some 580 different occasions by different individuals to different premises with no untoward incident ever occurring speaks strongly for his peaceable character.

"It is true that Mr. Compton and Mr. Lindeblad both witnessed the bull pawing the ground on the Stanley premises on two different occasions. But in each instance he made no offer to attack either of them and went on about his own business when driven away. This evidence supports his tractable character. Nor does the fact that he rubbed his head on the fence when Mr. Lindeblad was in a neighboring field establish a vicious characteristic. But whatever may be the import of these facts the record does not disclose that any of them came within the knowledge of the owners.

"Where one person is to be held as an insurer of the safety of another all of the elements necessary to make out a case should be established by clear and convincing proof. The evidence produced by the plaintiff of viciousness on the part of the bull is doubtful, and *there is no evidence* that the defendants ever knew of the bull's demonstrations before the witnesses Compton and Lindeblad. Proof of knowledge on their part of these demonstrations is absolutely lacking. As Jack Stanley testified the bull sometimes acted like a bull but nothing more. His mother handled him with facility as did children about the place.

"In the case of Looney v. Bingham Dairy [70 Utah 398], 260 P. 855, [858], where a child was kicked by a loose horse, the Supreme Court of Utah said: 'We are of the opinion that before plaintiff is entitled to recover a judgment against the defendants, under the facts and circumstances of this case, it is necessary for the jury to find, among other facts, that the horse in question was of a vicious or dangerous disposition, and that the defendants, or one of them, knew of such fact or had seen or heard of facts sufficient to convince a person of ordinary prudence of the animal's vicious disposition, before the injury occurred.' It cannot be questioned that this is also the rule in California for the Supreme Court of this State has cited Looney v. Bingham Dairy in holding that a person injured by a horse acting up in a parade cannot recover unless the horse was known to be vicious, the Court saying in Barnett v. La Mesa Post No. 282, 15 Cal.2d 191, 194 [99 P.2d 650, 651], that, '* * * there is no evidence whatever to show that the horse was known to be vicious at any time prior to the parade, and therefore the respondents cannot be held liable for its acts as an animal which should not have been allowed in the parade because of habits which made it dangerous.' And in Haneman v. Western Meat Co., 8 Cal.App. 698 [97 P. 695], in which a hearing was denied by the Supreme Court it is stated in the main opinion by Cooper [8 Cal.App. at], page 702 [97 P. at page 696]: 'In this case it is not shown that the horse was possessed of any characteristic vice, or that the defendant knew of any such vice.' Justices Hall and Kerrigan concurring said: 'We concur, upon the ground that the evidence does not show knowledge on the part of the defendant of the vicious character of the horse.' And in Finney v. Curtis, 78 Cal. 498, 502 [21 P. 120, 121], it is said that, 'The mere fact that the horse became unmanageable on the occasion of the injury does not show that he was vicious or generally unsafe, * * *.'

"These cases are analogous to the case at bar in that they are all based upon an alleged vicious propensity of an animal known to the owner or keeper. The authorities cited by the plaintiff deal with warranties that the animal hired was safe for the purpose for which it was hired. No issue is made here as to the safety of the bull for breeding purposes and hence no warranties are involved. Furthermore, he was not given into the custody or control of the plaintiff. The facts here bear such a great similarity to those in Looney v. Bingham Dairy where a child was injured by a horse which was loose, as was the bull in this case, that the rule there stated and as announced in Clowdis v. Fresno Flume, etc., Co., supra, must be applied and which is that '* * * if an animal theretofore of peaceable disposition, while in charge of the master or of a servant, suddenly and unexpectedly, either through fear or rage, inflicts injury, neither is responsible if at the time he was in the exercise of due care.' As the Court in denying relief aptly stated in Finney v. Curtis [78 Cal. at] page 502 [21 P. at page 121], 'It does not appear that the injury resulted from the negligence of either the plaintiff or the defendant.' "

[7-9] Plaintiff attacks various findings of the trial court, but his argument is merely one as to the weight of conflicting evidence. There is ample evidence to sup-

port the finding that defendants were not negligent and there is likewise ample evidence to support a finding that plaintiff was contributorily negligent. Issues of fact must be determined by the trial court and an appellate tribunal is bound by the familiar rule that before it can be justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence, together with every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment. If the judgment had been in favor of appellant his argument would be very helpful in pointing out evidence supporting such a judgment, but in view of the adverse judgment the testimony pointed out and relied upon by appellant merely accentuates the conflict in the testimony, which conflict it was the function of the trial court to resolve. The trial court, first in its findings and judgment, and again in denying appellant's motion for a new trial, resolved this conflict against appellant, and these findings, based as they are upon conflicting evidence, are binding upon us.

[10] Plaintiff contends also that the court erred in denying his motion for a new trial. In support of his motion, plaintiff filed an affidavit of Evelyn Wattenburger to the effect that she had known the bull to be dangerous and indicating that defendants knew it, and detailing some of the bull's actions. A counter-affidavit by defendants admitted some of the bull's actions, but denied that it showed any vicious tendencies.

The determination of a motion for a new trial is a matter largely within the discretion of the trial court. It was for the trial court to decide whether or not the affidavit filed by plaintiff entitled plaintiff to a new trial. We cannot say upon the record here that the court abused its discretion in denying the motion.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.